P.E.R.C. NO. 2000-36

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and- Docket No. CO-H-98-471

COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the State of New Jersey. The Complaint was based on an unfair practice charge filed by the Communications Workers of America, AFL-CIO. The charge alleges that the State violated the New Jersey Employer-Employee Relations Act when the State Health Benefits Commission ("SHBC") announced increases, effective July 1, 1998, in certain co-payments for employees participating in Dental Plan Organizations. The Commission concludes that, under the circumstances of this case, the SHBC's actions did not repudiate the parties' contracts or trigger a statutory negotiations obligation and that any challenge to the validity of the SHBC's actions must be made in another forum. The Commission does not consider whether CWA could legally seek an arbitral determination that the employer had contractually agreed to maintain co-payment levels.

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.

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In the Matter of

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-and- Docket No. CO-H-98-471

COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, John J. Farmer, Jr., Attorney General
(Mary Cupo-Cruz, Senior Deputy Attorney General)

For the Charging Party, Weissman & Mintz, attorneys
(Steven P. Weissman, of counsel)

DECISION

On June 23, 1998, the Communications Workers of America, AFL-CIO, filed an unfair practice charge against the State of New Jersey. The charge alleges that the State violated the New Jersey Employer-Employee Relations Act, specifically 5.4a(1) and (5),[1/] when the State Health Benefits Commission ("SHBC") announced increases, effective July 1, 1998, in certain co-payments for employees participating in Dental Plan Organizations ("DPO"). 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. (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...."

charge further alleges that the previous co-payment schedule had existed for 14 years and was an established employment condition; and that when CWA objected that the scheduled increases would violate the parties' contracts, the State responded that the increases were not negotiable.2/

On July 9, 1998, a Complaint and Notice of Hearing issued. The State's Answer admits that the SHBC increased certain DPO co-payments, but it asserts that the SHBC is a separate regulatory agency and its actions preempt negotiations. It also asserts that the parties' contracts do not address DPO co-payment levels or prohibit increases; the Commission does not have jurisdiction to review SHBC actions; and there was no timely demand to negotiate.

CWA requested interim relief, but withdrew that request and instead moved for summary judgment. The State cross-moved. Both parties filed certifications, exhibits, and briefs.

On July 21, 1998, the Chair of the Commission referred the motion and cross-motion to Senior Hearing Examiner Arnold H.

2/ The charge refers to an exchange of letters between CWA's New Jersey Director and the State's Deputy Director of the Office of Employee Relations. CWA's letter asserted that the parties' contracts prohibited increasing the co-payments, but added that CWA would be willing to have the issue discussed by the Health Care Cost Containment Committee, a joint labor/management committee including several unions representing State employees. The State responded that the SHBC's co-payment increases were not negotiable, but it would also be willing to have the issue discussed by the cost containment committee.

Zudick. The parties filed further submissions, the last of which was received on February 19, 1999.

On March 10, 1999, the Senior Hearing Examiner issued his report. H.E. No. 99-19, 25 NJPER 281 (¶30119 1999). He denied CWA's motion, granted the State's cross-motion, and recommended dismissing the Complaint. He found that the SHBC had increased co-payments to shore up the DPO program against abandonments by carriers and that the increases were based on a consultant's report and not influenced by any employer representatives. Relying on N.J.S.A. 52:14-17.29(B) and State of New Jersey (OER), P.E.R.C. No. 99-40, 24 NJPER 522 (¶29243 1998), he concluded that the SHBC's actions preempted negotiations and were appealable only in court.

On May 27, 1999, having received an extension of time, CWA filed exceptions. Asserting that P.E.R.C. No. 99-40 was wrongly decided, it argues that we have jurisdiction to hold that the SHBC exceeded its power since its actions allegedly are not authorized by N.J.S.A. 52:14-17.29(B) and contravene N.J.S.A. 52:14-17.29(F). In the alternative, it asks for a hearing if we believe there are factual issues concerning the influence of employer representatives on SHBC actions.[3/]

On July 6, 1999, the State, having received an extension of time, filed its response. It urges that the Complaint be

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3/ CWA also asks for oral argument. We deny that request. Both parties have briefed this matter thoroughly.

dismissed based on the Senior Hearing Examiner's preemption analysis and P.E.R.C. No. 99-40.

We have reviewed the record. The Senior Hearing Examiner's findings of fact (H.E. at 4-11) are accurate. We adopt and incorporate them. We decline CWA's request to reopen the record now, after both parties asked for summary judgment based on the record they compiled and the Senior Hearing Examiner issued his report based on that record.

The question presented is whether a negotiations duty was violated when the SHBC approved a DPO contract renewal package increasing certain co-payments. We must analyze the nature and limits of our jurisdiction and the SHBC's authority. Under the circumstances, we conclude that the SHBC's actions did not repudiate the parties' contracts or trigger a statutory negotiations obligation and that any challenge to the validity of the SHBC's actions must be made in another forum.

A. Our Unfair Practice Jurisdiction

N.J.S.A. 34:13A-5.3 specifies the negotiations obligations of public employers and their employees' representatives. The majority representative and the public employer must "meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment." When the parties reach an agreement, they must write it down and sign it. The agreement must contain grievance procedures for resolving contractual

disputes. In addition, an employer must negotiate with a majority representative over "[p]roposed new rules or modifications of existing rules governing working conditions." This requirement applies at all times, not just during negotiations for a new or successor contract. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48-49 n.9 (1978).

N.J.S.A. 34:13A-5.4 prohibits specified unfair practices by public employers and employee organizations. Section 5.4a(5) prohibits a public employer from refusing to negotiate in good faith as required by section 5.3. Violating 5.4a(5) also violates 5.4a(1) since the Act guarantees employees the right to have a majority representative negotiate on their behalf. We have exclusive power to prevent unfair practices. N.J.S.A. 34:13A-5.4(c).

We have addressed three types of cases involving allegations that an employer changed an employment condition: (1) cases where the majority representative claims a contractual right to prevent a change; (2) cases where a working condition is changed and neither party claims a contractual right to prevent or impose that change; and (3) cases where the employer alleges that the majority representative has waived any right to negotiate over a working condition change. Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997), aff'd 25 NJPER 357 (¶30151 App. Div. 1999), pet. for certif. pending; Barnegat Tp. Bd. of Ed., P.E.R.C. No. 91-18, 16 NJPER 484 (¶21210 1990), aff'd NJPER Supp.2d 268 (¶221 App. Div. 1992).

In the first type of case, the representative alleges that the employer agreed to provide a benefit. If such a commitment exists, the employer must adhere to the contract until it expires -- there is nothing to negotiate. However, we usually defer contractual disputes to the negotiated grievance procedures required by section 5.3. State v. Council of New Jersey State College Locals, 153 N.J. Super. 91 (App. Div. 1977), certif. den. 78 N.J. 328 (1978); Brookdale Community College, P.E.R.C. No. 83-131, 9 NJPER 266 (¶14122 1983). We are not grievance arbitrators and cannot find an unfair practice based on a mere breach of contract. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Unfair practice liability requires more than a simple contract violation: for example, a showing that an employer has acted in bad faith by repudiating a clearcut contractual obligation. Id.; see also Bridgewater Tp., P.E.R.C. No. 95-28, 20 NJPER 399 (¶25202 1994), aff'd 21 NJPER 401 (¶26245 App. Div. 1995)(employer repudiated express agreement to pay the full cost of HMO coverage).

In part, this case presents the first type of claim. In the letter referenced in its unfair practice charge and in its briefs, CWA has asserted that the co-pay increases violated a contractual requirement that fringe benefits be maintained; the State disputes this assertion. We will not resolve that dispute because it involves at most a breach of contract rather than a repudiation. It appears that after the parties negotiated for a

DPO program, the SHBC unilaterally set the initial DPO co-pays; the parties' contracts do not expressly address DPO co-pays or the SHBC's power to set them; and the parties have never directly negotiated over DPO co-pays as opposed to prescription drug co-pays. CWA may (or may not) have a contractual claim, but it is not clear enough to demonstrate a bad faith repudiation within our unfair practice jurisdiction.4/

In the second type of case, a working condition is changed and the majority representative does not claim a contractual right to prevent that change while the employer does not claim, or cannot prove, a contractual right to impose that change without negotiations. Such a change triggers section 5.3's duty to negotiate. Middletown; Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983). To prove a violation, absent a defense, the representative must show only that the employer changed an employment condition without first negotiating. No violation will be found, however, if the changed condition was not negotiable.

This is the second type of case also. For 14 years, DPO co-pays remained unchanged. In 1998, the SHBC entered into a contract renewal package with DPO carriers increasing several co-pays while decreasing others. As litigated by the parties in

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4/ The issue has not been presented so we do not consider whether CWA could legally seek an arbitral determination that the employer had contractually agreed to maintain co-payment levels.

their briefs, the heart of this dispute is over whether negotiations were required before co-pays were increased.5/

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets forth the tests for determining whether a subject is mandatorily negotiable. Negotiations are required if an employment condition intimately and directly affects employees, does not significantly interfere with governmental policymaking, and is not preempted. Id. at 404-405.

Applying Local 195's tests, we have held that health benefits generally and co-payments specifically are mandatorily negotiable unless preempted. See, e.g., Stratford Tp. Bd. of Ed., P.E.R.C. No. 94-65, 20 NJPER 55 (¶25019 1993); Newark Bd. of Ed., P.E.R.C. No. 94-52, 19 NJPER 588 (¶24282 1993); Tenafly Bd. of Ed., P.E.R.C. No. 93-83, 19 NJPER 210 (¶24100 1993); West Orange Bd. of Ed., P.E.R.C. No. 92-114, 18 NJPER 272 (¶23117 1992), aff'd NJPER Supp.2d 291 (¶232 App. Div. 1993); Middlesex Cty., P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979), aff'd in relevant part, 6 NJPER 338 (¶11169 App. Div. 1980). While State v. State Troopers Fraternal Ass'n, 91 N.J. 464, 470 (1982), stated that co-pay levels implicate governmental policy, that opinion implicitly recognized the negotiability of co-pay levels in that case and

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5/ The third type of case centers on waiver issues. Given our analysis of our jurisdiction and the SHBC's actions, we do not reach the waiver issue in this case. We note, however, that CWA did not demand negotiations and instead invoked an asserted right to block co-pay increases altogether unless it agreed in discussions to permit them.

simply vacated an arbitration award because a contractual violation had not been proved.

We now turn to Local 195's preemption prong. Ordinarily, a statute or regulation will not preempt negotiations unless it speaks in the imperative and fixes an employment condition specifically, expressly, and comprehensively. See, e.g., Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); Local 195 at 403-404; State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978); State of New Jersey (State Colleges), P.E.R.C. No. 2000-12, 25 NJPER 402 (¶30174 1999). No statute or regulation specifies DPO co-payment levels.

However, negotiations may also be preempted if the Legislature vests an agency or committee with the power to take certain action and such action is taken. See P.E.R.C. No. 99-40; State of New Jersey (Dept. of Human Services), P.E.R.C. No. 97-136, 23 NJPER 343 (¶28157 1997), rev'd on other grounds, 24 NJPER 432 (¶29200 App. Div. 1998); State of New Jersey (DEP), P.E.R.C. No. 95-115, 21 NJPER 267 (¶26172 1995), aff'd 285 N.J. Super. 541 (App. Div. 1995), certif. den. 143 N.J. 519 (1996); State of New Jersey (State Troopers), P.E.R.C. No. 86-139, 12 NJPER 484, 486-487 (¶17185 (1986); State of New Jersey (State Troopers), P.E.R.C. No. 86-16, 11 NJPER 497 (¶16177 1985); State of New Jersey (DOT), P.E.R.C. No. 84-77, 10 NJPER 42 (¶15024 1983), aff'd 11 NJPER 333 (¶16119 App. Div. 1985); State of New Jersey (DHS), P.E.R.C. No. 82-83, 8 NJPER 209, 214-215 (¶13088

1982); cf. In re Boyan, 127 N.J. 266, 268 (1992)(Legislature delegated authority to Salary Adjustment Committee to fix salaries for workers' compensation judges). In this line of cases, the action in effect becomes part of the statute for preemption purposes fixing the disputed employment condition, thus eliminating any negotiations duty.

B. The SHBC's Authority and Actions

We now review the statutes creating the SHBC and authorizing it to act. We will then determine whether the Act's negotiations duty was triggered under the circumstances.

Section 27 of the New Jersey State Health Benefits Act, N.J.S.A. 52:14-17.25 et seq., creates the SHBC and specifies its membership: the State Treasurer, the Commissioner of Insurance, and the Commissioner of Personnel. The SHBC is charged with establishing a health benefits program for State employees and with adopting reasonable and necessary rules and regulations for administering the act.

Section 28 entrusts the SHBC with negotiating and purchasing contracts providing hospital, surgical, obstetrical, medical and major medical expense benefits for State employees and their dependents. The SHBC has power to enter contracts with insurance carriers "on such terms as it deems to be in the best interests of the State and its employees" and to execute all contracts "for and on behalf and in the name of the State."

Section 28a, added in 1989, prohibits the SHBC from entering into a contract providing lower benefits than those

provided by the contract in effect on October 1, 1988 unless those benefits are modified by a collective bargaining agreement made on the State's behalf. This section permitted the State, for the first time, to negotiate for reductions in statutorily-prescribed health benefits.

Section 28b, added in 1996, permits health insurance premiums and periodic charges to be determined by a collective negotiations agreement. Before 1996, the State had to pay all premiums and charges. The State and CWA agreed upon cost-saving arrangements in their 1995 negotiations and then received legislative authorization to implement them.

Section 29 specifies the required coverage in contracts purchased by the SHBC. Subsection (B), however, states:

> (B) Benefits under the contract or contracts purchased as authorized by this act may be subject to such limitations, exclusions, or waiting periods as the commission finds to be necessary or desirable to avoid inequity, unnecessary utilization, duplication of services or benefits otherwise available,... or for other reasons....

Finally, subsection (F) permits employee representatives to negotiate for forms of health insurance coverage supplementing the statutorily-prescribed coverage. This subsection states:

> (F) The commission may purchase a contract or contracts to provide drug prescription and other health care benefits or authorize the purchase of a contract or contracts to provide drug prescription and other health care benefits as may be required to implement a duly executed collective negotiations agreement or as may be required to implement a determination by a public employer to provide such a benefit

> or benefits to employees not included in collective negotiations units.

These provisions must be read harmoniously. Doing so, we reject interpretations that would always require or prohibit negotiations over DPO co-pay increases.

CWA argues that N.J.S.A. 52:14-17.29(F) mandates that the SHBC purchase insurance contracts required to implement a collective negotiations agreement granting supplemental forms of insurance and specifies that the SHBC acts as the employer's agent in that capacity. Cf. New Jersey School Bd. Ass'n v. SHBC, 183 N.J. Super. 215 (App. Div. 1987)(SHBC increased health benefits pursuant to negotiated agreement). We will assume these propositions are true and that the State and CWA could enter into negotiated agreements specifying DPO co-payments just as their agreements set prescription drug co-payments. But the factual foundation of this argument is missing: absent a repudiation, we have not found and do not have jurisdiction to find that the parties' contracts guarantee the same DPO co-payments as in 1984.

The State argues that section 28 and subsection 29(B) always authorize the SHBC to change co-payments even if the parties' contracts expressly mandate specific co-payment levels. We have reservations about that approach since it would arguably nullify subsection 29(F) and permit repudiation of negotiated agreements. However, we need not resolve that question now since this case does not evidence a repudiation. If a collective negotiations agreement does not guarantee co-payment levels,

subsection (F) does not apply to that issue and the SHBC presumably may exercise whatever authority and discretion it has been granted by section 28 and subsection (B) to enter into contracts on the terms it believes best.

In P.E.R.C. No. 99-40, we restrained arbitration over a challenge to the SHBC's authority to equalize HMO co-pays for office visits. We noted, but did not discuss, a contention that section 28 and subsection 29(F) authorized negotiations and arbitration over that issue. We concluded instead that section 27 and subsection 29(B) vested authority in the SHBC to equalize co-pays and precluded arbitral challenges to SHBC contracts. We added that any appeal from an SHBC action must be made to the SHBC or in court.

Unlike P.E.R.C. No. 99-40, this case involves a form of supplemental coverage authorized by subsection 29(F). We repeat that this unfair practice case might be different if the parties' collective negotiations agreements unmistakably dictated co-payment levels and the SHBC was then arguably required by subsection 29(F) to purchase a contract implementing those dictates. We need not explore the outer boundaries of the SHBC's authority under the other statutory provisions or parse subsection 29(B) to determine if it authorizes the instant co-pay changes. The SHBC reasonably believed it had the authority to increase co-pays to stabilize provider participation and, under P.E.R.C. No. 99-40, the Appellate Division is the proper forum for determining the limits of the SHBC's authority.

We note finally that a regulation specifying an employment condition loses any preemptive force it would otherwise have if the adopting agency is a dual regulator/employer and that agency acted in bad faith to avoid negotiations. Council of New Jersey State College Locals, NJSFT v. State Bd. of Higher Ed., 91 N.J. 18, 27-29 (1982). Even if we assume that the SHBC is a dual regulator/employer, nothing in the record suggests that its actions were influenced by a desire to avoid a contractual commitment or negotiations duty.

Accordingly, we hold that under the circumstances of this case, negotiations were not required before the SHBC approved the DPO contract renewal package. We repeat that any challenge to the SHBC's actions or authority in approving that package must be made elsewhere.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners McGlynn, Muscato and Ricci voted in favor of this decision. Commissioners Buchanan and Madonna voted against this decision.

DATED: November 15, 1999
Trenton, New Jersey
ISSUED: November 16, 1999

H.E. NO. 99-19

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

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and- Docket No. CO-H-98-471

CWA, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission denied the CWA's motion for summary judgment but granted the State's cross-motion for summary judgment and recommended the complaint be dismissed. The Hearing Examiner concluded that changes to a dental copayment schedule were preempted based upon statutory terminology and the facts of this case.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which 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.

H.E. NO. 99-19

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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In the Matter of

STATE OF NEW JERSEY,

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CWA, AFL-CIO,

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Appearances:

For the Respondent, Peter Verniero, Attorney General
(Mary L. Cupo-Cruz, Senior Deputy Attorney General)

For the Charging Party, Weissman & Mintz, attorneys
(Steven P. Weissman, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION
ON MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

On June 23, 1998, the Communications Workers of America, AFL-CIO (CWA), filed an unfair practice charge with the Public Employment Relations Commission against the State of New Jersey. The charge alleges that the State violated 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/] when, on February 27, 1998, it unilaterally announced an

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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. (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."

increase in certain copayments for employees participating in Dental Plan Organizations effective July 1, 1998. The CWA further alleged that the copayment schedule has been an established term and condition of employment, and that the dollar amount of the copayments paid by employees/dependents is a mandatory subject of negotiations. Finally, the CWA alleged that the State refused its demand to negotiate over the increased copayments.

The charge was accompanied by a letter brief and a certification with attachments requesting interim relief, or in the alternative, requesting summary judgment. Through its interim relief request the CWA was seeking an order restraining the increase of copayments on July 1, 1998. Shortly after it was docketed, this charge was assigned to me as Commission Designee to consider the request for interim relief. Prior to scheduling a return date, however, the CWA, in early July 1998, expressed its preference to treat this matter as a motion for summary judgment rather than a request for interim relief.

In order to consider the motion, a Complaint and Notice of Hearing was issued on July 9, 1998. On July 20, 1998, the State filed a brief and a certification in response to the CWA's motion, and in support of its own cross-motion for summary judgment filed at the same time.

The State made four claims to support its case. First, it explained that the State Health Benefits Commission (SHBC) increased certain DPO copayments, that the SHBC is a distinct

administrative and regulatory agency, and that its decisions are only reviewable by the Appellate Division. Therefore, it argued that the Commission did not have jurisdiction to review SHBC actions.

Second, it argued that negotiations over the copayments for the DPO's was preempted because the SHBC had the statutory authority to make the changes. Third, it claimed that negotiations over dental copayments were non negotiable because it would interfere with the determination of governmental policy. Fourth, it argued that the CWA waived any right it may have had to negotiate copayments by allegedly failing to make a timely demand to negotiate in accordance with its collective agreement.

The State filed its Answer to the Complaint on July 21, 1998. It admitted several facts but denied violating the Act, and it asserted several affirmative defenses including that the CWA allegedly waived its right to negotiate over the copayment changes; that the Commission lacked jurisdiction to consider the matter; and, that negotiations over the copayments was preempted.

By letter of July 21, 1998, the Commission's Chair referred the motion and cross-motion for summary judgment to me for consideration. N.J.A.C. 19:14-4.8. On December 4, 1998, the CWA submitted a brief with attachments to me in response to the State's cross-motion for summary judgment. The State filed a reply brief on February 19, 1999.

Based upon the pleadings filed to date, I make the following undisputed:

Findings of Fact

1. The CWA represents certain State employees in four different State-wide negotiations units. Since at least 1981, the first collective agreement(s) between the State and the CWA provided for dental insurance. The initial dental insurance program which still exists is known as the "Dental Expense Plan", a traditional indemnity plan that reimburses 80% of reasonable and customary charges after participants satisfy a $25.00 deductible. That plan is administered by the Prudential Insurance Company pursuant to an agreement with the State Health Benefits Commission (SHBC).

2. The SHBC was established pursuant to N.J.S.A. 52:14-17.27 and includes the State Treasurer, the Commissioner of Insurance, and the Commissioner of Personnel. The SHBC is required to:

> establish a health benefits program for the employees of the State.... The commission shall establish rules and regulations as may be deemed reasonable and necessary for the administration of this act. [N.J.S.A. 52:14-17.27]

3. During negotiations between the State and CWA leading to their 1983-86 collective agreement(s) the parties agreed to make another dental plan available to eligible employees. That plan, known as the Dental Plan Organization (DPO) was implemented in 1984. The DPO operates like a health maintenance organization. Employees select a particular DPO and receive dental services from dentists participating in that organization.

Participation in either the Dental Expense Plan or the DPO is voluntary, and the employee pays 50% of the premium.

4. Similar to the Dental Expense Plan, the SHBC approves contracts with insurance carriers which operate the DPO's. In the DPO's, participating dentists provide specified dental procedures at no cost, or with a copayment paid by the patient/employee. The copayment is a charge for a specific procedure and paid by the patient/employee to the dentist, it is not the same as the premium for the dental insurance. When the DPO option was created in 1984 the SHBC approved contracts which included a list of covered services and copayments.

5. By renewing the dental insurance contracts each year the SHBC has unilaterally increased the annual premiums for the Dental Expense Plan and the DPO's which has automatically resulted in an increase in costs to employees who pay 50% of the insurance premium. From 1984 through June 30, 1998, however, the copayments for dental services provided through the DPO's remained the same.

6. As part of their 1995-99 collective agreement, the State and CWA agreed to participate in a Health Care Cost Containment Committee (HCCCC). This is a joint labor/management committee intended to discuss health care cost issues.

7. In 1996, the SHBC contracted with Buck Consultants to review the quality and cost of the health and dental plans included in the State Health Benefits Program. Buck submitted a report to the SHBC in early 1997 noting several problems with the dental program.

In February 1997 when the SHBC began its process to renew DPO contracts for the 1998 Fiscal Year (July 1, 1997 - June 30, 1998), two insurance providers, CIGNA and United Concordia, notified the SHBC they would not renew their contracts for the State Dental Program primarily because of the level of DPO copayments. Another provider, BeneCare, notified the SHBC it would renew for Fiscal 1998, but would not renew again if the copayments remained unchanged. CIGNA covered many of the State employees who reside in Pennsylvania where it is more difficult to secure DPO coverage.

As a result of that action, Buck was directed to review the State DPO Program. Apparently in late 1997 or early 1998, Buck submitted its additional report to the SHBC and recommended various changes, mostly increases, to DPO copayments. The SHBC incorporated various copayment changes as part of the DPO contract renewal package for Fiscal Year 1999 (July 1, 1998 - June 30, 1999). Those changes included copayment charges for covered DPO procedures ranging from $10.00 to $75.00 for over 100 services which were previously fully paid procedures, and copayment increases ranging from $25.00 to $75.00 for approximately 39 additional covered procedures. Those new or increased copayments went to participating physicians. They were not an economic benefit to the State.

The DPO contract renewal package for Fiscal 1999 specified for the first time a code and copayment, if any, for

each covered procedure. Certain procedures not previously covered were added to the list of procedures, some with, and some without a copayment. Although the copayment for many procedures were increased, some copayments decreased. Certain procedures whose coverage was implied under the prior contract but refused by some DPO's, and some procedures developed after the inception of the DPO program and refused by some DPO's were added to the renewal contract without copayments.

8. At a meeting on February 20, 1998, the SHBC distributed copies of the DPO renewal contract to be implemented on July 1, 1998 which included the copayment increases described above. Dudley Burdge, a CWA staff representative for Local 1032 who also participates for CWA at HCCC meetings, received a copy of the renewal contract that day.

Between February 20 and February 27, 1998, neither the CWA nor any other union representing State employees contacted the SHBC or Division of Pensions and Benefits regarding the renewal package. At a meeting on February 27, 1998, the SHBC formally approved the contract renewal package for DPO's including the above noted copayment changes and additions to become effective July 1, 1998. There is no evidence that the Governor, the Office of Employee Relations (OER), or any department of the State encouraged the SHBC to increase copayments. After the SHBC approved the renewal package all of the existing DPO's renewed the contracts for Fiscal 1998, and CIGNA requested and was returned to

the program providing coverage to State employees living in Pennsylvania.

Joy Schulman, a CWA staff representative with Local 1034, was at the February 27th meeting but neither she nor anyone else addressed the SHBC about the renewal package. Neither Burdge nor Schulman is employed by CWA's national organization, and neither has been authorized to negotiate on behalf of the national organization.

9. By letter dated May 5, 1998, Robert Pursell, CWA'a Area Director, notified David Collins, OER's Deputy Director, that the CWA believed the State could not implement the copayment changes without negotiations. Pursell argued that Article 40 of the parties' collective agreement prevented the copayment changes, and he offered to "discuss" the matter with the State and other affected unions.

By letter of May 26, 1998, Deputy Director Collins responded to Mr. Pursell noting that the copayment changes were not negotiable because the SHBC had the statutory authority to make the changes, but he expressed his willingness to discuss the changes within HCCC parameters.

10. The State and CWA have negotiated over health benefit levels on several occasions. In negotiations for the parties' 1981-83 collective agreement the State agreed to pay the cost of a plan with increased medical benefits. In the negotiations for the 1995-99 collective agreement, the parties

agreed to modify the State's cost for the agreed upon health plan. Additionally, over the years the parties have negotiated over the copays and deductibles for the prescription drug plan.

11. The CWA became the majority representative of four units of State employees[2/] in 1981. Prior thereto those employees had been represented by the New Jersey Civil Service Association/State Employees Association (CSA/SEA). The first State-CWA collective agreement was effective from 1981-1983, with subsequent agreements covering 1983-1986, 1986-1989, 1989-1992, 1992-1995 and the current agreements 1995-1999.

The above collective agreements between the State and the CWA do not specifically discuss DPO copayments. Some relevant articles of the 1995-99 agreements include:

> Article VI, Section C, Dental Care Plan,
>
> 1. Full-time employees and eligible dependents shall be eligible for the State-administered Dental Care Program which shall be continued during the life of this Agreement.
>
> 2. Participation in the Program shall be voluntary with a condition of participation being that each participating employee authorize a bi-weekly salary deduction not to exceed 50 percent of the cost of the type of coverage elected, e.g. individual employee only, husband and wife, parent and child or family coverage.
>
> 3. Each employee shall be provided with a brochure describing the details of the Program and enrollment information and the required forms.

2/ Those units include the Administrative and Clerical Services Unit; the Professional Unit; the Primary Level Supervisors Unit; and the Higher Level Supervisors Unit.

4. Participating employees shall be provided with an identification card to be utilized when covered dental care is required.

5. An optional Group Dental program which will provide services through specific dental clinics will be made available to employees in this unit. Participation in this program shall be voluntary with a condition that each participating employee authorize a bi-weekly salary deduction not to exceed 50 percent of the cost of the coverage for a one year period. Employees will be able to enroll in only one of the two programs or in no program at all.

The Article on Maintenance of Benefits, Effect of Agreement and Complete Agreement[3/] states:

A. Maintenance of Benefits

The fringe benefits, which are substantially uniform in their application to employees in the unit, and which are currently provided to those employees, such as the Health Benefits Program, the Life Insurance Program and their like, shall remain in effect without diminution during the term of this Agreement unless modified herein or by subsequent agreement of the parties.

B. Effect of Agreement

Regulatory policies initiated by the various institutions and agencies where these employees are working which have the effect of work rules governing the conditions of employment within the institution or agency and which conflict with any provision of this Agreement shall be considered to be modified consistent with the terms of this Agreement, provided that if the State changes or intends to make changes which have the effect of

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3/ The Maintenance of Benefits clause is designated as Article XL (40) in the parties Professional Unit, Primary Level Supervisors Unit and Higher Level Supervisors Unit agreements, but is designated as Article XXXIX (39) in the parties Administrative and Clerical Services Unit agreement.

elimination in part or in whole such terms and conditions of employment, the State will notify the Union and, if requested by the Union within ten (10) days of such notice or of such change or of the date on which the change would reasonably have become known to the employees affected, the State shall within twenty (20) days of such request enter negotiations with the Union on the matter involved, providing the matter is within the scope of issues which are mandatorily negotiable under the Employer-Employee Relations Act as amended and further if a dispute arises as to the negotiability of such matters, that the procedures of the Public Employment Relations Commission shall be utilized to resolve such dispute.

C. Complete Agreement

The State and the Union acknowledge this and any Memoranda of Understanding attached hereto to be their complete Agreement inclusive of all negotiable issues whether or not discussed and hereby waive any right to further negotiations except as may otherwise be provided herein or specifically reserved for continued negotiation by particular reference in memorandum of understanding pre-dating the date of signing of the Agreement and except that proposed new rules or modifications of existing rules governing working conditions shall be presented to the Union and negotiated upon the request of the Union as may be required pursuant to Chapter 303 of the Laws of New Jersey, as amended.

The dental care language in Article VI, Section C of the 1995-1999 agreement was the same in the 1992-1995, 1989-1992, and 1986-1989 agreements, it was not materially different in the 1983-1986 agreement, and did not include paragraph five or any reference to the Group Dental program in the 1981-1983, 1979-1981, or 1977-1979 agreements.

ANALYSIS

Summary judgment will be granted if there are no material facts in dispute, and if either the movant or cross-movant is entitled to relief as a matter of law. N.J.A.C. 19:14-4.8(d); 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).

The Commission's summary judgment rule provides:

> N.J.A.C. 19:14-4.8(d) 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.

To my knowledge, there are no material facts in dispute. The State, through the SHBC, unilaterally changed copayment levels in the DPO program. The State's second defense, statutory preemption, presents the most significant legal issue for consideration. If negotiations over DPO copayments is preempted by N.J.S.A. 52:14-17.25 et seq., the State's cross-motion for summary judgment must be granted, and I need not consider the State's three other defenses, jurisdiction, interference with the determination of governmental policy, and waiver. If negotiations are not preempted by statute, the State's other defenses must be considered.

The State primarily relied upon the language in N.J.S.A. 52:14-17.28 and N.J.S.A. 52:14-17.29(B) to prove its preemption case. The former statute authorizes the SHBC to enter into

contracts with insurance carriers to provide certain health (and presumably dental) services "on such terms as it deems to be in the best interests of the State and its employees."

N.J.S.A. 52:14-17.28 provides:

> The commission shall negotiate with and arrange for the purchase, on such terms as it deems to be in the best interests of the State and its employees, from carriers licensed to operate in the State, contracts providing hospital, surgical, obstetrical, medical and major medical expense benefits covering employees of the State and their dependents, and shall execute all documents pertaining thereto for and on behalf and in the name of the State. The commission shall not enter into a contract under this act unless the benefits provided thereunder equal or exceed the minimum standards ... for the particular coverage which such contract provides; and unless coverage is available to all eligible employees and their dependents....

The latter statute authorizes the SHBC to limit or exclude benefits under those health (and dental) contracts when necessary to avoid inequity, unnecessary utilization, duplication of services, or for other reasons.

N.J.S.A. 52:14-17.29(B) provides:

> Benefits under the contract or contracts purchased as authorized by this act may be subject to such limitations, exclusions, or waiting periods as the commission finds to be necessary or desirable to avoid inequity, unnecessary utilization, duplication of services or benefits otherwise available, including coverage afforded under the laws of the United States, such as the federal medicare program, or for other reasons.
>
> Benefits under the contract or contracts purchased as authorized by this act shall include those for the treatment of alcoholism where such

> treatment is prescribed by a physician and shall also include treatment while confined in or as an outpatient of a licensed hospital or residential treatment program which meets minimum standards of care equivalent to those prescribed by the Joint Commission on Hospital Accreditation. No benefits shall be provided beyond those stipulated in the contracts held by the State Health Benefits Commission.

The State argues that 52:14-17.29(B) gave the SHBC the unilateral authority to make the copayment changes involved here.

The CWA argues, however, that N.J.S.A. 52:14-17.29(B) cannot be read in isolation from N.J.S.A. 52:14-17.29(F) which it contends authorizes collective negotiations in this area by giving the SHBC authority to enter into contracts to provide health care (and presumably dental) benefits as may be required to implement a collective negotiations agreement.

N.J.S.A. 52:14-17.29(F) provides:

> The commission may purchase a contract or contracts to provide drug prescription and other health care benefits or authorize the purchase of a contract or contracts to provide drug prescription and other health care benefits as may be required to implement a duly executed collective negotiations agreement or as may be required to implement a determination by a public employer to provide such benefit or benefits to employees not included in collective negotiations units.

The CWA maintains that subsection (B) merely vests the SHBC with authority to avoid inequity, unnecessary utilization and duplication of services, and does not authorize it to fix the terms and costs of health benefits which, the CWA argues, would render subsection (F) meaningless.

In a slightly different context, the Commission has recently considered the import of the above cited statutes. State of New Jersey, P.E.R.C. No. 99-40, 24 NJPER 522 (¶29243 1998). In that case, the State sought to restrain the arbitration of grievances filed by the Council of New Jersey State College Locals (Council) primarily regarding reductions in health benefits. The Council filed two group grievances. The first alleged specific contract violations. The second, and the more relevant grievance to the instant matter, challenged increases in office visit copayments to $5.00 for the HMO insurance carriers, and challenged the deletion of a $50 vision hardware benefit to four HMO carriers.

The State sought to restrain arbitration asserting that the grievances were preempted by SHBC statutes and regulations, particularly, N.J.S.A. 54:14-17.29(B). The State in that case argued that the SHBC exercised its regulatory authority when it set uniform copayment levels for HMO's and by eliminating a duplicative benefit for vision hardware for certain HMO's. It further argued that an arbitrator could not direct the SHBC to amend contracts with its insurance carriers.

The Council relied upon N.J.S.A. 52:14-17.28a, and 52:14-17.29(F) in arguing that collective negotiations (i.e., arbitration in that case) was authorized.4/

The Commission explained that health benefit levels were negotiable except where set or preempted by statute or regulation. 24 NJPER at 524. It noted that the SHBC is required to:

> establish a health benefits program for the employees of the State.... The commission shall establish rules and regulations as may be deemed reasonable and necessary for the administration of this act. [N.J.S.A. 52:14-17.27]

The Commission held that no statute or regulation specifically set HMO copays or reimbursement for eyeglasses. Then, without any discussion of N.J.S.A. 52:14-17.28a and 52:14-17.29(F), the Commission, paraphrasing from 52:14-17.28(B) found that the SHBC was authorized to enter into contracts with insurance companies to provide health (and presumably dental) benefits, and "to establish limitations to avoid inequity, unnecessary utilization, duplication of services, or for other reasons." Id.

4/ N.J.S.A. 52:14-17.28a provides: Notwithstanding the provisions of any other law to the contrary, the commission shall not enter into a contract under the "New Jersey State Health Benefits Program Act," ...for the benefits provided pursuant to the contract in effect on October 1, 1988, including, but not limited to, basic benefits, extended basic benefits, and major medical benefits unless the level of benefits provided under the contract entered into is equal to or exceeds the level of benefits provided for in the contract in effect on October 1, 1988, or unless the benefits in effect on October 1, 1988 are modified by an authorized collective bargaining agreement made on behalf of the State.

The Commission found that "those statutes" (presumably subsection (B)) vested the SHBC with the authority to equalize copays and eliminate the duplicate vision benefit. Thus, it restrained arbitration over those matters. Equally significant, however, was that the Commission also restrained arbitration over any challenge to the SHBC's contract with Blue Cross/Blue Shield. It said:

> Any appeal from an action of the SHBC must be made to the SHBC or in court. Id.

The State in this case relies on the decision in State of New Jersey to support its argument that subsection (B) preempted negotiations over establishing the amount of DPO copayments. It argued that the SHBC was acting within its regulatory authority to increase certain copayments to maintain the viability of the DPO program.

The CWA sought to distinguish this case from State of New Jersey. In raised four arguments. First, that in State of New Jersey, the SHBC was acting within its autonomous regulatory authority whereas here it acted as an agent of the employer; second, that in State, the SHBC acted to avoid inequity and to eliminate duplication of services as authorized by subsection (B), but here the copayment increases did neither; third, that subsection (B) must be read with subsection (F) which, it argues, authorizes negotiations over dental benefits and makes the SHBC a contracting agent for the State; fourth, that the Commission (PERC) can review actions of the SHBC to adjudicate violations of the Act particularly when the SHBC is acting as an agent of the State.

Having considered the parties' positions, and based in part on State of New Jersey, and on my own interpretation of 52:14-17.29(B) and 52:14-17.28, I find that those statutes preempted negotiations in this case and that the SHBC, therefore, acted within its authority to establish new DPO copayments. Thus, the State was not required to negotiate over those copayments under these facts and is entitled to its requested relief as a matter of law.

Before explaining the basis of my decision, I note my remarks are not intended to address the preemptive effect of the above statutes in all circumstances. My holding is limited to the facts of this case.

The pertinent facts show that the DPO copayment schedule became effective in 1984 and remained the same until July 1, 1998. There was no evidence or even suggestion that the copayment levels implemented in 1984 had been negotiated with the CWA. When the SHBC began its DPO contract renewal process in February 1997 two insurance carriers withdrew from the DPO plan because of the low copayment schedule, and a third carrier informed the SHBC it would only renew for one more year for the same reason.

Pursuant to N.J.S.A. 52:14-17.28, the SHBC was required to negotiate with and arrange for the purchase of contracts with insurance carriers to provide health benefits "...on such terms as it deems to be in the best interests of the State and its employees..." In accordance with that statutory mandate the SHBC, I believe, acted to stop and reverse the trend toward carriers

dropping their participation in the DPO plan. It authorized an independent consulting firm to review the copayment schedule, and based upon the consultants' results, made changes, including increases, in that schedule. There was no evidence or suggestion that OER, the Governor or her representative(s), or any Department of the State told or persuaded the SHBC to take such action. It appears that the SHBC took that action independent of OER, not as an agent of the State, and within the best interest of the DPO plan in order to prevent any further deterioration in carrier participation in that plan.

The SHBC's action was also consistent with N.J.S.A. 52:14-17.29(B). The pertinent language in that statute gives the SHBC the authority to limit benefits for employees in its contracts with insurance carriers when

> ...necessary or desirable to avoid inequity, unnecessary utilization, duplication of services or benefits otherwise available, ...or for other reasons. [Emphasis Added].

Although I agree with the CWA that the SHBC did not change DPO copayments to avoid unnecessary utilization and duplication of services or benefits, I do not agree that its action was not intended to avoid inequity. The inequity here was the cost to insurance carriers of certain DPO procedures. It is not unreasonable to believe that after 14 years some of the copayments no longer represented market value for certain procedures. After hearing from its independent consultants, the SHBC acted to ameliorate that inequity.

Equally significant I believe, is the inclusion of the language "or for other reasons" in subsection (B). The Legislature obviously did not intend to fix the SHBC's ability to limit certain benefits to just avoid inequities, unnecessary utilization or duplication of services or benefits. It recognized there may be other reasons why the SHBC may impose such limitations. That, I believe, presents a fact-sensitive approach to analyzing SHBC action.

The "other reason" here, I find, was the need to "shore-up" the DPO program. If more carriers followed the lead set by CIGNA, United Concordia, and BeneCare, the DPO plan would be in danger of collapse. The SHBC, pursuant to its statutory mandate in N.J.S.A. 52:14-17.27 and 52:14-17.28, acted to reverse that trend by amending the copayment schedule.

The CWA's argument that subsection (F) prevents subsection (B) from preempting negotiations in this case is not persuasive. I am not finding that subsection (B) automatically authorizes the SHBC to enter into contracts with dental providers that contravene the terms of negotiated agreements. But nor do I find that subsection (F) "expressly directs" the SHBC to enter into contracts with insurance carriers to implement negotiated agreements as the CWA maintained in its brief. Subsection (F) says the SHBC "may", not "shall", purchase contracts to provide benefits "as may be required" to implement a negotiations agreement. The intent of that language, I believe, was simply to authorize the SHBC to contract for the benefits the State and any majority representative had negotiated.

But that does not prevent the SHBC from limiting or excluding certain benefits to avoid inequity, unnecessary utilization, duplication of services or benefits, or for other reasons as provided by subsection (B).

Having found that negotiations over the DPO copayments was preempted in this case, I will not consider whether a negotiations obligation existed, or if it did, whether the CWA waived any right to negotiate; whether negotiations over the DPO copayments would have interfered with a governmental policy; and, whether any contract article(s) was violated.

With respect to any challenge over SHBC contracts with DPO providers, I rely on the Commission's decision in State of New Jersey that any appeal from an action of the SHBC must be made to the SHBC or in court.

Accordingly, based upon the above findings and analysis, the CWA's motion for summary judgment is denied, the State's cross-motion for summary judgment is granted, and pursuant to N.J.A.C. 19:14-4.8(e) and 19:14-7.1, I make the following:

RECOMMENDATION

I recommend the Complaint be dismissed.

Arnold H. Zudick
Senior Hearing Examiner

Dated: March 10, 1999
Trenton, New Jersey