P.E.R.C. NO. 88-53

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF PENNSAUKEN,

Respondent,

-and-

Docket No. CO-86-202-8

FRATERNAL ORDER OF POLICE,
GARDEN STATE LODGE #3,

Charging Party,

-and-

SUPERIOR OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Township of Pennsauken violated the New Jersey Employer-Employee Relations Act when it unilaterally changed the health insurance benefit plans for employees represented by the Fraternal Order of Police, Garden State Lodge No. 3 and Superior Officers Association.

P.E.R.C. NO. 88-53

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF PENNSAUKEN,

Respondent,

-and-

FRATERNAL ORDER OF POLICE, GARDEN STATE LODGE #3,

Docket No. CO-86-202-8

Charging Party,

-and-

SUPERIOR OFFICERS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Pachman & Glickman, Esqs.
(Steven S. Glickman, of counsel)

For the Charging Parties, Colflesh & Burris, Esqs.
(Ralph H. Colflesh, Jr., of counsel)

DECISION AND ORDER

On February 13 and March 13, 1985, the Fraternal Order of Police, Garden State Lodge #3 ("FOP") and the Superior Officers Association ("SOA") ("charging parties") jointly filed an unfair practice charge and amended charge, respectively, against the Township of Pennsauken ("Township"). The charge, as amended, alleges that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections

5.4(a)(1), (3), (5) and (7),[1/] when it: (1) unilaterally changed the employees' health benefits plan; (2) refused to make retroactive salary payments; (3) refused to reduce the parties' negotiated agreement to writing, and (4) falsely advised the I.R.S. that retroactive money was paid to employees in the SOA unit in 1984. As a remedy for the alleged unilateral health benefits change, the charging parties requested a return to the former plan.[2/]

On July 10, 1985, a Complaint and Notice of Hearing issued. On July 15 and July 29, respectively, the Township filed an Answer and an Amended Answer. It admits implementing a new health benefits package, but denies this violated the Act. It denies the Complaint's other allegations.

On August 29 and October 31, 1985, and January 24 and May 6, 1986, Hearing Examiner Arnold H. Zudick conducted hearings. The

---

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (7) Violating any of the rules and regulations established by the commission."

2/ On June 27, 1985, the Commission Designee denied the charging parties' request for interim relief. I.R. No. 85-14, 11 NJPER 441 (¶16151 1985).

parties examined witnesses, introduced exhibits and argued orally.[3/]

On April 28, 1987, the Hearing Examiner issued his report and recommended decision. H.E. No. 87-61, 13 NJPER 389 (¶18156 1987). Rejecting the Township's jurisdictional and contractual defenses, he concluded that the Township violated the Act when it reduced the level of insurance benefits. He recommended the Commission order the Township to: (1) reimburse employees for any losses incurred due to the health plan changes; (2) stop unilaterally changing the level of insurance benefits; (3) negotiate in good faith over the level of benefits, and (4) post a notice of the violation. The Hearing Examiner recommended that the Complaint's other allegations be dismissed. He found that the Township and the Charging Parties had legitimate disagreements over contract language which were not resolved until the contract was signed and that the Township was not obligated to make the retroactive salary payments before then.

3/ At the outset, the Township moved to dismiss the Complaint on the basis of State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), arguing that the parties' dispute primarily involved a question of contract interpretation which should be resolved through the negotiated grievance procedure. The Hearing Examiner denied the motion. On March 6, 1986, the Chairman denied the Township's motion for special permission to appeal. At the close of the charging parties' case, the Township again moved to dismiss the Complaint. The Hearing Examiner dismissed the alleged 5.4(a)(7) violation, reserved judgment on the IRS issue, and denied the motion on all other charges. He granted the motion on the IRS issue in his recommended decision.

On May 11, 1987, the Charging Parties filed exceptions. They assert that the Township wrongfully delayed signing the contract and paying the retroactive monies by raising new proposals after agreement had been reached.

On June 1, 1987, after receiving an extension of time, the Township filed lengthy exceptions and a sixty-six page brief.[4/] In summary, it contends that: (1) the Complaint should have been dismissed under Human Services because the dispute involves an alleged breach of contract; (2) the Township had a contractual right to change the plan; (3) it negotiated in good faith before changing benefits; (4) the Charging Parties are estopped from bringing this action because they did not object to the proposed change, and (5) the remedy should include a return to the previous plan.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 7-29) are accurate. We adopt and incorporate them here.

This charge should not have been dismissed under Human Services. That case holds that mere breaches of contract based on good faith differences over contract interpretation would not, even if proven, rise to the level of a refusal to negotiate in good faith under subsection 5.4(a)(5). This case is different. It involves a claim that the Township unilaterally changed the level of health insurance benefits. As the Hearing Examiner correctly pointed out,

---

4/ It also requested oral argument, but we deny it.

we have already held that such a Complaint may not be dismissed under Human Services. City of South Amboy, P.E.R.C. No. 85-16, 10 NJPER 511 (¶15234 1984).[5/]

We again must decide whether a change in insurance carriers violated subsection 5.4(a)(5). The legal principles are clear. A change in insurance carriers in itself does not violate the Act because that involves a permissive, not a mandatory subject of negotiations. Rather, the issue is whether the change in carrier also changed the level of insurance benefits. City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439 (¶12195 1981). In this case the facts are not in dispute. Although most of the insurance benefits remained the same, there was unquestionably a change in the level of benefits. Some benefits improved. However, the new plan also provides lesser benefits for other procedures.

5/ We deem it appropriate to point out, however, that this case could have been deferred to binding arbitration since deferral is the preferred mechanism when a charge essentially alleges a violation of subsection 5.4(a)(5) interrelated with a breach of contract. Human Services; Brookdale Comm. College, P.E.R.C. 83-131, 9 NJPER 267 (¶14122 1983). Such cases should be deferred before hearing, however. It would only unduly delay the resolution of this case to defer now. Although deferral is preferred, we have the authority to resolve contract claims to determine whether an unfair practice has occurred. Tp. of Jackson, P.E.R.C. No. 82-79, 8 NJPER 129 (¶13057 1983). There is a fundamental difference between cases which are dismissed under Human Services and those deferred to arbitration under Brookdale. The former cases do not involve unfair practices because the breach, even if proved, would not establish a unilateral alteration of a term and condition of employment. The latter cases do involve potential unfair practices, but can still be heard by an arbitrator for the reasons set forth by us in Brookdale.

Thus, the change violated the Act unless the Township had a clear and unequivocal contractual right to make it which indicated that the employee organization had waived the right to negotiate. E.g., City of South Amboy, P.E.R.C. No. 85-16, 10 NJPER 511 (¶15234 1984); see also Red Bank Reg. Ed. Ass'n v. Red Bank Bd. of Ed., 78 N.J. 122, 140 (1978); Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd App. Div. Dkt. No. A-1818-80T8 (5/24/82). The Township relies on this portion of Article XXII:

> A. The Township agrees to maintain in effect either the above coverage [the Blue Cross/Blue Shield coverages] or its equivalent.
>
> D. No deletions or changes in this program will be made without the consent of both parties concerned.
>
> I. The Township has the right to change insurance carriers or institute a self-insurance program so long as the same or better benefits are provided after written notification to the Association.

Specifically, the Township argues that it has met its negotiations obligation because the change resulted in the "same or better" benefits being provided. Although recognizing that certain benefits have been diminished, it argues that because other benefits have been increased, the new plan "on balance" has provided the "same or better benefits." We do not accept this defense under this case's circumstances. Waivers are not to be read expansively and we will not do so here. The contract does not clearly give to the Township an "on balance" option. "On balance" is simply not in the contract. Nor was there any negotiations history supporting this

interpretation. An employer may not unilaterally determine which plan is better "on balance." Bor. of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127, 129 (¶15065 1984). Although a negotiations agreement may give an employer that right, this one does not.6/

We also do not believe that the Township met its negotiations obligation before implementing the new plan. The meetings relied upon were information sessions where the Township explained the benefits offered under the new plan. The employee organizations' consent was not solicited and, in fact, was withheld. Under these circumstances, the Township did not meet its negotiations obligation. See Hamilton Tp. Bd. of Ed., P.E.R.C. No. 87-18, 12 NJPER 737, 739 (¶17276 1986), appeal pending App. Div. Dkt. No. A-1551-86T8. Nor under these circumstances should the Charging Parties be estopped from claiming that the Township's unilateral action violated the Act.

The Township asserts that the remedy should include a return to the status quo including those benefits which had been improved. We do not read the Hearing Examiner's recommendation to be inconsistent with this. In any event, we believe that a return to the status quo is appropriate here. In

---

6/ The Township has argued that the Hearing Examiner's analysis is flawed because he did not find that the Township violated the Act when it unilaterally increased dental coverage. The charging parties have not claimed that such increases violated the Act so we need not consider it. Hunterdon Cty., P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986).

fact, throughout this litigation the Charging Parties requested that remedy. See Hunterdon Cty. P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986), recon. den. P.E.R.C. No. 87-150, 13 NJPER 506 (¶18188 1987), appeal pending App. Div. Dkt. No. A-5558-86T8 (an employer which unilaterally grants favorable benefits contrary to its statutory duty to negotiate may not unilaterally terminate such benefits absent a request to do so by the union). Accordingly, we believe the appropriate remedy is to order a return to the status quo: the benefits that existed under the prior plan; reimburse employees for the actual losses;[7/] order that negotiations occur prior to future changes and post a notice.

Finally, we agree that the Complaint's remaining allegations should be dismissed. Apparently, both the Township and the Charging Parties had continued to make proposed contract changes after the preliminary memorandum of agreement had been signed. Under these circumstances, the Township's delay in signing the contract for two or three months while awaiting the Charging Parties' response to one of its proposals did not violate the Act. The claim that the Township falsely advised the IRS that retroactive money was paid in 1984 was not proved.

ORDER

The Township of Pennsauken is ordered to:

A. Cease and desist from:

7/ However, for the reasons expressed in Metuchen, the employer is not entitled to a set-off.

1. Interfering with, restraining or coercing its police employees in the exercise of the rights guaranteed to them by the Act by unilaterally reducing health insurance benefits.

2. Refusing to negotiate in good faith with the FOP and SOA concerning a term and condition of employment of employees included in the units, by unilaterally reducing health insurance benefits.

B. Take the following affirmative action:

1. Reinstate the insurance plan benefits that existed prior to the Township's unilateral change in health insurance plans.

2. Immediately reimburse FOP and SOA unit members for any losses incurred due to the change in health insurance carriers.

3. Engage in good faith negotiations with the FOP and SOA before changing the level of health insurance benefits.

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

5. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

C. The allegations of violations of 5.4(a)(3), (6), and (7) are dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
December 21, 1987
ISSUED: December 22, 1987

APPENDIX A

NOTICE TO ALL 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 our police employees in the exercise of the rights guaranteed to them by the Act by unilaterally reducing health insurance benefits.

WE WILL cease and desist from refusing to negotiate in good faith with the FOP and SOA concerning a term and condition of employment of employees included in the units by unilaterally reducing health insurance benefits.

WE WILL reinstate the insurance plan benefits that existed prior to the Township's unilateral change in health insurance plans.

WE WILL immediately reimburse FOP and SOA unit members for any losses incurred due to the change in health insurance carriers.

WE WILL engage in good faith negotiations with the FOP and SOA before changing the level of health insurance benefits.

Docket No. CO-86-202-8 TOWNSHIP OF PENNSAUKEN
(Public Employer)

Dated _____ By _____
(Title)

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 St., CN 429, Trenton, NJ 08625 (609) 984-7372.

H.E. NO. 87-61

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

In the Matter of

TOWNSHIP OF PENNSAUKEN,

Respondent,

-and- Docket No. CO-85-202-8

FRATERNAL ORDER OF POLICE
GARDEN STATE LODGE #3 and
SUPERIOR OFFICERS ASSOCIATION,

Charging Parties.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Township of Pennsauken violated §§5.4(a)(5) and derivatively (a)(1) of the New Jersey Employer-Employee Relations Act when it unilaterally changed the major medical, vision, and prescription drug heath plans which contained different benefit levels than the predecessor plans. The Hearing Examiner recommended that the employees be reimbursed for any losses incurred as a result of the change, and that the Township negotiate in good faith with the FOP and SOA for such new health plans.

The Hearing Examiner also recommended that the §§5.4(a)(3), (6) and (7) allegations be dismissed, and that an allegation that the Township unlawfully withheld retroactive salaries be dismissed.

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.

H.E. NO. 87-61

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

In the Matter of

TOWNSHIP OF PENNSAUKEN,

Respondent,

-and- Docket No. CO-85-202-8

FRATERNAL ORDER OF POLICE
GARDEN STATE LODGE #3 and
SUPERIOR OFFICERS ASSOCIATION,

Charging Parties.

Appearances:

For the Respondent
Pachman & Glickman, Esqs.
(Steven S. Glickman, Of Counsel)

For the Charging Party
Colflesh & Burris, Esqs.
(Ralph H. Colflesh, Jr., Of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was jointly filed with the Public Employment Relations Commission (Commission) on February 13, 1985 and amended on March 13, 1985, by the Fraternal Order of Police Garden State Lodge #3 (FOP) and the Superior Officers Association (SOA)(Charging Parties),[1/] alleging that the Township of Pennsauken (Township) violated subsections 5.4(a)(1), (3), (5) and

---

1/ The FOP and SOA are two different labor organizations representing two different units of employees employed by the Township of Pennsauken. However, this Charge was filed jointly because the primary issues raised by the Charge are the same for each unit.

(7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).[2/] The Charging Parties alleged that the Township unilaterally changed certain provisions of the employee health benefits plan; that it refused to sign a new collective agreement; and that it refused to make retroactive salary payments. The SOA also alleged that the Township falsely advised the U.S. Internal Revenue Service (IRS) that retroactive money was paid to the employees in the SOA unit in 1984.[3/] The Charging Parties are seeking an order returning the health benefits plan to the status quo ante; reimbursing employees for any loss incurred by the changes; requiring the Township to sign the agreements negotiated with each bargaining unit; requiring the payment of the retroactive salaries plus interest; directing the Township to amend the W-2 forms for SOA members for 1984 and reimburse those employees for any related costs; and directing the Township to pay the Charging Parties' costs of suit.

2/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (7) Violating any of the rules and regulations established by the commission."

3/ The Township did not prepare retroactive checks for the FOP unit. Consequently, the FOP was not involved in the W-4 issue.

Pursuant to N.J.A.C. 19:14-9.2, the Charging Parties on June 3, 1985, filed a motion for interim relief with an Order to Show Cause which was signed on June 6, 1985 and made returnable on June 24, 1985. The Township submitted a brief in opposition to the motion on June 17, 1985. A hearing was conducted on the return date as scheduled.

The Charging Parties sought an order requiring the Township to sign the contracts, requiring the Township to pay the retroactive salaries, requiring the Township to reinstitute the previous health plan, and requiring the Township to issue new W-4 forms for SOA unit members and inform the IRS of its error.

At the interim relief hearing I issued a bench decision and denied the motion for interim relief. I found that the Charging Party had not demonstrated a substantial likelihood of success and irreparable harm because a clause in the parties' recently expired agreements, and in their recently negotiated (but then not signed) agreements gave the Township the right to change the health carrier as long as the same or better benefits were provided. I concluded that a full hearing was necessary to determine whether a contractual defense had been established. A written interim relief decision, Township of Pennsauken, I.R. No. 85-14, 11 NJPER 441 (¶16151 1985) was issued on June 27, 1985.

A Complaint and Notice of Hearing (Exhibit C-1) was issued on July 10, 1985. The Township filed an Answer (Exhibit C-3) on July 15, 1985 and an Amended Answer (Exhibit C-4) on July 29, 1985 denying having committed any violation of the Act.

Hearings were held in this matter on August 29 and October 31, 1985, and January 24 and May 6, 1986.[4/] At hearing on August 29 the Township moved to dismiss the Complaint and the Charging Parties opposed the motion (TA14-TA30). The Township's motion was based upon several reasons including the Commission's holding in State of N.J. (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984)(Human Services), where the Commission refused to issue a complaint and found that the issue therein should have been resolved through the parties' grievance procedure. The Township here similarly argued that the complaint be dismissed because the issue, it believed, primarily involved contract interpretation which could be resolved through the grievance procedure. The Township also argued that the Commission had no jurisdiction over the IRS and could not resolve the W-4 issue (TA14-TA27).

Although I denied the Township's motion I did hold that I would not attempt to determine in this hearing whether the Township violated any provision of the IRS Code. I found that matter outside my jurisdiction. I did allow the Charging Parties to attempt to prove that it gave inaccurate information to the IRS in violation of our Act, that is, in an attempt to coerce, intimidate, or discriminate against employees because of the exercise of their

---

4/ The transcripts from the above hearings will be referred to as follows: August 29--TA; October 31--TB; January 24--TC; and May 6--TD.

rights under our Act (TA32-TA33). With regard to the Human Services argument, I held that said case did not apply here because the change in the health plan affected material terms and conditions of employment and that the Commission in Human Services reserved the right to hear such cases itself (TA36-TA39).

The Charging Parties rested their case at hearing on October 31, and at the commencement of the hearing on January 24 the Township again moved to dismiss the Charge. The Township's motion was based, in part, upon its assessment of the facts developed by the Charging Parties, but it also again heavily relied upon Human Services (TC3-TC21). The Charging Parties opposed the motion (TC21-TC33). I denied the motion particularly with respect to the merits of the case and the Human Services issues. I found that at that point in the proceedings all favorable inferences had to be given to the Charging Parties, the parties opposing the motion (TC36-TC41). Dolson v. Anastasia, 55 N.J. 2 (1959); New Jersey Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979); Twp. of North Bergen, P.E.R.C. No. 78-28, 4 NJPER 15 (¶4008 1977).

With respect to the IRS issue, however, I held that I was inclined to grant the motion, but reserved final decision at that time to review the record (TC41-TC42). Having reviewed the record, I find that the Township is entitled to a dismissal of that aspect of the Charge. The SOA did not develop any facts from which I could find or infer that the reason the Township inaccurately reported income on the employees' 1984 W-4 forms was motivated by an intent

to discriminate against those employees or the SOA because of the exercise of rights protected by the Act. Nor did the Township's actions in that regard have the tendency to interfere with the exercise of the rights protected by our Act. The remedy for that action can be (if it has not already been) pursued before the IRS.

I did grant the Township's motion regarding the Charging Parties' allegation that the Township violated subsection 5.4(a)(7) of the Act. I found that the Charging Parties did not prove that the Township violated any Commission rule or regulation (TC42).

After my ruling on the motion the Township reserved the right to file an interlocutory appeal pursuant to N.J.A.C. 19:14-4.6 assuming the hearing was not completed that day (TC42-TC44). The Township began, but did not complete, the presentation of its case that day, and a fourth hearing was scheduled for February 26, 1986 (TC111).

On January 31, 1986 the Township filed a motion with the Commission requesting special permission to appeal my denial of the motion to dismiss. The new motion resulted in a cancellation of the hearing scheduled for February 26, 1986. The Charging Parties filed their opposition to the motion on February 27, 1986. On March 6, 1986 the Chairman denied the Township's request for special permission to appeal. On March 7, 1986 I rescheduled the hearing for May 6, 1986.

The last transcript was received on July 1, 1986 and both parties filed post-hearing briefs, the last of which was received on

September 26, 1986. The Charging Parties filed a reply brief on October 17, 1986. On March 9, 1987 the Charging Parties filed a motion (a letter of March 4, 1987) to reopen the record. The Township filed a letter in opposition to that motion on March 13, 1987. I denied that motion on March 19, 1987.[5/]

Upon the entire record I make the following:

Findings of Fact

1. The Township of Pennsauken is a public employer within the meaning of the Act, and the FOP and SOA are employee representatives within the meaning of the Act.

2. From 1982 through December 31, 1984 employees represented by the FOP and SOA were covered by a health benefits plan which included the following separate components: a major medical plan provided by Blue Cross and Blue Shield; hospitalization by Blue Cross; surgical benefits/physician coverage by Blue Shield; a dental program; a vision care program; and a prescription drug program. Effective January 1, 1985 the Township unilaterally changed provisions of the major medical plan, the prescription drug plan, and the vision care plan which the Charging Parties allege was done in violation of the

---

5/ In their March 9, 1987 motion the Charging Parties asked to reopen the record to present evidence regarding a limitations clause in CP-4, the new health plan. On March 13, 1987 the Township filed (a letter of March 10, 1987) its opposition to the motion to reopen. I dismissed the motion but held that since CP-4, and CP-3 the former health plan, were already in evidence, I reserved the right to review that evidence and make my own conclusions.

Act. The Charging Parties did not allege any violation with respect to changes in the hospitalization plan, the surgical benefits plan or the dental plan.

3. The major medical plan that existed through 1984 was offered by Blue Cross and Blue Shield (Exhibit CP-3), and provided that any two family members each had to satisfy a separate $100 deductible, and then the plan paid 80% of the first $2000 of covered medical expenses, and then 100% of covered expenses thereafter up to a lifetime maximum of $1,000,000 (Exhibits CP-3, R-3). Dependent children were covered to age 23, but there were no automatic "survivor benefits" in the plan.[6/] The major medical plan also provided for mental and nervous care on an inpatient, outpatient and out-of-hospital basis with full plan benefits up to a maximum of 10,000 per year each for inpatient and outpatient and a $20,000 combined lifetime maximum (CP-3).

CP-3 lists a variety of covered and excluded expenses, but does not list any limitations based upon pre-existing conditions, that is, conditions existing at the time the insurance starts. CP-3 did not provide an accidental death provision or a

---

6/ "Survivor Benefits" provide that the health plan will remain in effect for a period of time for surviving dependents of a deceased employee. CP-3 does explain that under New Jersey law surviving dependents may continue coverage for 180 days after the employee's death, and it (CP-3) refers the dependent to the employee's enrollment official for further details. I infer from that language that the plan did not automatically provide such a benefit, but that it was available at some cost to the dependents.

group life insurance provision. Life insurance was available on a voluntary basis at some cost to the employee (R-3).

4. The vision care plan that was in place prior to 1985 provided for specific dollar amount coverages for specific items as seen below:

Item	
Eye Examination	$ 25.00
Single Vision Lenses	25.00
Bifocal lenses	37.50
Trifocal Lenses	50.00
Lenticular (double-convex) Lenses	125.00
Contacts - Elective	43.75
Contacts - Required	250.00
Frame Allowance	18.75
Benefit Period	
Exams and Lenses	12 months
Frames	24 months

In that plan there was no particular panel of doctors; rather, employees chose their own eye doctor and the employee or dependent was covered to the extent provided for in the above schedule (TA48). Under that plan patients would be reimbursed for examinations every year.

At hearing Dr. Jay DeMesquita, an optometrist in Pennsauken, testified that he and another optometrist (Dr. Zorn) handle 80% to 90% of all vision care in Pennsauken (TA61). He explained that to initiate coverage under the policy a patient had to fill out an insurance form which was available in his office or in Township offices. The patient was then examined, provided glasses if necessary, and then the form was given to the Township and referred to the company for payment within three to five weeks

(TA55-TA56). In an emergency, Mesquita would just treat the patient and complete the form afterwards (TA74-TA75).

5. The prescription drug plan in effect prior to 1985 required a $1.00 deductible. The surgical plan in effect at that time was the Blue Shield 14/20 plan, and the hospitalization plan was the Blue Cross 120 day coverage plan (R-3).

6. The Township and the Charging Parties were parties to separate collective agreements which expired on June 30, 1984. Those agreements provided in pertinent part in Art. 21 for the SOA and Art. 22 for the FOP (TA6-TA9) that, under certain circumstances, the Township could make changes in health benefits. Those contracts included Blue Cross/Blue Shield hospital, surgical and major medical coverage, and dental, vision, and prescription drug coverage.

With respect to the Blue Cross/Blue Shield coverages the contracts provided that:

> Art. 21 or Art. 22
>
> A. The Township agrees to maintain in effect either the above coverage [the Blue Cross/Blue Shield coverages] or its equivalent.

With respect to the dental, vision, and prescription drug programs the contracts provided that:

> Art. 21 or Art. 22
>
> D. No deletions or changes in this program will be made without the consent of both parties concerned.

The last clauses in Articles 21 and 22, respectively, provided that:

Art. 21 or Art. 22

I. The Township has the right to change insurance carriers or institute a self-insurance program so long as the same or better benefits are provided after written notification to the Association.7/

The parties were engaged in separate negotiations for new agreements during the summer of 1984 (TB53). During those negotiations the Charging Parties separately proposed a change in the surgical benefits plan from the Blue Shield 14/20 plan to the Blue Shield PACE plan (TB19, TB53, TD6). The Charging Parties proposed no other changes to the health benefits plan.

In response to the Charging Parties' "PACE" proposal(s) the Township Administrator, Kenneth Carruth, testified that he told the FOP and SOA that before he could consider their demand(s) he needed to know the cost to the Township (TD7). In late summer or early fall a special "joint" FOP, SOA and Township negotiations session was held and a representative of Blue Shield (Fred Mann) reviewed the cost of the PACE plan (TB39-TB40, TB54). Mann reviewed with the parties ways to offset the increased cost of the PACE program to the Township, including an increase of the deductible or co-pay for the prescription drug plan from $1.00, to $2.00 or $3.00 (TB40-TB41).

7/ The parties did not put into evidence the agreement(s) which expired on June 30, 1984. In the interim relief hearing, however, the parties agreed that the language in the 1984-86 agreement(s), which is J-1 herein, contains the same pertinent language as contained in the prior agreement(s). (Interim relief hearing, transcript of June 24, 1985 at p. 19).

Neither the FOP nor the SOA agreed to increase the prescription drug co-pay at that time, but the FOP agreed to consider it (TB41).[8/]

There was no evidence of any further negotiations over an increase in the prescription drug co-pay. On November 9, 1984, approximately two months after the negotiations session where Fred Mann spoke (TB54-23), the Township and SOA signed a memorandum of agreement (Exhibit C-1C) for a new collective agreement. The pertinent parts of C-1C provide as follows:

> (2) The P.A.C.E. Plan of Health Insurance shall be implemented no later than 7/1/85.
>
> (3) The N.J. State Disability Plan shall be implemented in the second year of the contract.

8/ Carruth characterized Fred Mann's presentation of the PACE plan and the possible prescription co-pay increase as an FOP and SOA "proposal," and that the FOP and SOA seemed inclined to agree to that "proposal" because Fred Mann had been asked by the FOP to discuss the PACE plan (TD9-TD10). While it is true that the FOP asked Mann to discuss the PACE plan at the joint meeting (TB19-TB20), Mann was not part of the negotiating committee for either the FOP or SOA and was not a representative of either labor organization for purposes of negotiations. Carruth testified that the "bargaining team sitting at the table" (TD10) agreed to Mann's co-pay suggestion, but he (Carruth) did not explain who actually agreed or which labor organization he was referring to. Carruth then testified that although there was nothing put in writing about a co-pay increase (TD10, TD31), he, nevertheless, thought the FOP and SOA had agreed in negotiations to increase the prescription co-pay in exchange for the PACE plan (TD32).

I find that Carruth's belief that the FOP and SOA agreed to a prescription co-pay increase was not supported by the evidence. Neither the FOP nor SOA ever proposed or agreed to such an increase. Mann was not making negotiation proposals on behalf of the FOP or SOA. He was merely discussing a possible offset to the cost of implementing the PACE plan, but there is insufficient basis to find that either union agreed to implement Mann's suggestion.

> (8) Any prior agreements between the Parties in these negotiations shall be incorporated in the new contract....All items not covered by this memorandum are dropped....

There was no language in C-1C providing for a change in the prescription drug co-pay in exchange for the PACE plan, or for changes in the major medical or vision plans.

C-1C was subject to approval and ratification by both parties. The SOA ratified the memorandum sometime between November 9 and November 28, 1984, and the Township ratified the memorandum by resolution of November 28, 1984 (CP-19 Resolution No. 84-339).

7. In late November 1984 (after C-1C was signed) the Township scheduled a meeting for November 27 or 28 with the FOP, SOA, and at least one other union to allow a Township insurance consultant to review portions of the health benefits plan with employees and to propose some changes in the plan (TD11-TD14, TD50, TB21, TB23). There were no questions at that meeting by the FOP or SOA regarding the prescription co-pay (TD13-TD14). George Bowman, president of the FOP, and David Wilkers of the SOA, testified that the November 27 meeting was not a negotiations session (TB23, TB56). Bowman indicated that the FOP had always negotiated separately (TB21-TB22). Wilkers also indicated that the SOA had always negotiated separately (TB57). Ken Carruth also testified that the November 27 meeting was not intended to be a negotiations session (TD55). In fact, on cross-examination Carruth testified that the Township and the Charging Parties did not come to an agreement at the November 27 meeting. He said:

> No, I don't think we had an agreement because there was some questions raised at that session that I couldn't answer. (TD59-4).

Carruth further testified that at the conclusion of the November 27/28 meeting he asked the Charging Parties to respond to him in writing regarding their (FOP and SOA) concerns about the health plan discussed by the Township's insurance consultant that day (TD16). But Carruth also testified that at that same time he told the Charging Parties that it was the Township's intent to implement that plan the first of the year (TD16).

On November 28, 1984 the Township passed a resolution, Resolution No. 84-341 (CP-19), authorizing the Township Administrator to take the necessary steps to implement the employees new health benefit plan effective January 1, 1985 subject to the following pertinent condition.

> (2) That the Administrator receive from the...Fraternal Order of Police, Lodge 3, both patrol and superior officers, an agreement[s] of that Union[s] no later than December 6.

Carruth testified that the Township received no such agreement(s) by December 6, but that it implemented the change in health insurance anyway (TD61).

On November 29, 1984 the SOA sent Carruth a letter, Exhibit CP-16, rejecting the changes to the health benefits plan proposed by the Township on November 27/28, 1984. In CP-16 the SOA indicated it wanted to retain its then present level of benefits that appeared in Article 21, and that it only agreed to change the benefits by implementing the PACE plan as agreed to in their memorandum of

agreement (C-1C). Having received CP-16, the Township knew that the SOA would not agree to any changes in the health plan except the PACE plan, and that there was no agreement with the SOA to increase the prescription drug co-pay in exchange for the PACE plan.

Carruth testified that he interpreted CP-16 to mean that the SOA "...did not want any reduction in the level of benefits that they receive from their employer." (TD43-TD44)

Also on November 29, 1984 the Township sent the FOP and SOA a letter, Exhibit R-2, giving the Charging Parties the answers to questions raised at the November 27 meeting regarding the proposed changes in the vision and dental plans.

On November 30, 1984, the Township and the FOP signed a memorandum of agreement, Exhibit C-1D, for a new collective agreement. C-1D contained the same language regarding the PACE plan and the State Disability Plan as contained in items (2) and (3) of C-1C cited hereinabove. C-1D, however, did not contain any language similar to item (8) in C-1C.

In their post-hearing briefs both the Charging Parties and Township indicated that subsequent to November 1984 the Township prepared the drafts for the new collective agreements. In its brief the Township alleged that on December 4, 1984 it met with the SOA and reviewed the draft of its agreement, and that on December 5, 1984 it (Township) sent the FOP the draft of its collective agreement. Other than establishing that it was the Township that prepared the drafts, there was no evidence on the record regarding the parties' actions on December 4 and 5, 1984.

8. By letter of December 13, 1984, Exhibit CP-6, Carruth confirmed the scheduling of separate meetings for the FOP and SOA on December 18, 1984 regarding heath benefits. Bowman testified that at that meeting the Township reviewed its proposed health plan and told the FOP that the plan would be implemented on January 1, 1985 (TB45). The Township was proposing changes in the vision and dental plans, an increase in the prescription drug co-pay, a change in the major medical deductible[s], and a change in the coverage for mental and nervous disorders (TD21-TD22, TD38-TD41). Bowman testified that the FOP expressed its opposition to changes in those plans (TB45).

Carruth testified that the December 18 meeting was the first time he became aware of the FOP's "concern" over increasing the co-pay in exchange for the PACE plan. Carruth felt that there had been such an agreement (TD31, TD38). Bowman testified, however, that there was no agreement within C-1D or outside C-1D where the FOP would consent to changing health benefit language in exchange for PACE (TB51).

I credit Bowman's testimony and find that neither the SOA nor the FOP agreed to increase the prescription drug co-pay in exchange for PACE. An increase in the prescription drug co-pay in exchange for PACE was first raised in negotiations in late summer or early fall 1984. That possibility was raised by an insurance consultant, not by the Charging Parties, and it was not the Charging Parties' proposal. Note 8, supra. There was no agreement at that time to increase the prescription co-pay (TB41). Carruth admitted

that neither the SOA nor the FOP agreed in writing to increase the prescription co-pay (TD31). Thus, on November 9, 1984 when the SOA and Township signed C-1C which included implementation of the PACE plan without any reference to an increase in the prescription co-pay, the Township had to know that it was agreeing to implement PACE without increasing prescription co-pay.

Similarly, there was no agreement with the FOP prior to November 27/28 to increase prescription co-pay, and Carruth admitted that there was no such agreement reached on November 27/28 (TD59). On November 30, 1984, the Township and FOP signed C-1D which included implementation of the PACE plan without any reference to an increase in prescription co-pay. Since there was no prior agreement reached on increasing prescription co-pay, the Township, once again, had to know that it was agreeing to implement PACE without increasing prescription co-pay. Thus, I do not credit Carruth's unsupported assertion that the parties had reached an agreement to increase the co-pay in exchange for PACE.

The December 18 meeting did not change the above findings regarding the co-pay, nor did that meeting result in the Charging Parties' agreeing to changes in the major medical, vision, or dental plans. The SOA on November 29 in CP-16 had already clearly expressed its opposition to any changes other than PACE. The FOP on December 18 had expressed its opposition to any other changes (TB45).

Carruth was asked on direct examination whether on December 18 either the SOA or FOP responded to his statement that he

intended to implement the new health plan on January 1, 1985, and he responded: "I don't believe so." (TD23, TD24-4). Carruth was then asked whether either the SOA or FOP told him that the new insurance coverage was unacceptable, and he responded: "No, they did not." (TD24-7). I do not credit Carruth's testimony. I have already credited Bowman's testimony that on December 18 he had voiced his opposition to the new plan. Bowman was asked on cross-examination:

> Do you recall the meeting on December 18, when the Township reviewed the plan, what response, if any there was from the F.O.P. at that time?

and he responded:

> That we were opposed to it. (TB45).

Bowman's response can only be interpreted as meaning that the FOP found the new plan unacceptable even if he did not use that word. Moreover, Carruth's response to the first question indicates that he really did not remember what Bowman had said.

With respect to the SOA, CP-16 had already clearly expressed to the Township that the SOA did not want to deviate from the existing plan other than to implement PACE. That letter demonstrates that the SOA would find any other changes unacceptable.

9. On January 1, 1985 the Township implemented the new salaries provided for in C-1C and C-1D, but since a new agreement had not been completed and signed it did not pay the salary increase retroactive to July 1, 1984. That same day (January 1, 1985) the Township also implemented several changes in the health benefits plan affecting FOP and SOA unit members. It implemented the PACE

plan although it was not required to do so pursuant to negotiations until July 1, 1985 (C-1C, C-1D); implemented the State disability insurance plan; and implemented changes in the major medical, prescription, vision, and dental plans. There was no change in the hospitalization plan.

The changes in the above pertinent plans were as follows:

a. Dental Plan - The dental plan was changed only by adding orthodonture coverage to the plan. There was no change in the carrier or the preexisting level of benefits (R-3, TA168, TC58).

b. Prescription Drug Plan - A new carrier provided the prescription plan and implemented (on January 1, 1985) a $2.00 (rather than a $1.00) co-pay or deductible (R-3, TA124, TC87). The coverage or level of benefits of the new plan seem to be the same as the old plan.[9/] Effective September 1, 1985, however, a $1.00 co-pay was implemented (the $2.00 co-pay was then discontinued) because of additional money that became available as a result of changes in the major medical coverage (TA124, TC87, TD28-TD30).

c. Vision Plan - There were substantial changes made in the vision plan. In addition to a change in carriers, the new plan

---

9/ The record shows that there was one incident early in the administration of the new prescription plan when that plan was not honored by a particular pharmacy (TA88-TA93). That situation proved to be a mistake by the particular pharmacy and the situation was remedied, and the employee reimbursed (TC63-TC65). There was no other evidence of any problem with the new plan (TA93).

(known as "VSP") instituted a panel of doctors feature. If patients or dependents use a panel doctor there is no out-of-pocket expense for the covered procedures or items listed below except if elective contacts are over $100 (C-1E, R-3). If patients or dependents use a non-panel doctor they are reimbursed as follows:

Item	VSP
Eye Examinations	$30.00
Single Vision Lenses	20.00
Bifocal Lenses	30.00
Trifocal Lenses	40.00
Lenticular (double-convex) Lenses	60.00
Contacts - Elective	50.00+
Contacts - Required	50.00
Frame Allowance	25.00
Benefit Period	
Exams and Lenses	18 months
Frames	18 months

+ This allowance is $100.00 when using a panel doctor.

There are several significant differences between the level of benefits paid under the old plan (see Finding No. 4, supra), and the level of benefits paid if using a non-panel doctor under the new plan. For example, the old plan paid more for lenticular lenses and required contact lenses than the new plan. More significantly, the old plan covered employees and dependents for an examination every 12 months, whereas the new plan only covers them for an examination every 18 months even if a panel doctor is used (R-3). DeMesquita testified that he recommends an eye exam every year (12 months) especially for children (TA53). He also testified that most employees were not regularly examined every twelve-month period (TA72).

DeMesquita also testified that both he and Dr. Zorn are panel doctors (TA46, TA61). DeMesquita testified, however, that when considering the reimbursements provided under the old plan in comparison to the reimbursements provided under the new plan when not using a panel doctor, the old plan was better (TA53). Robin Ladd, the Township's current insurance administrator, also testified that there may be instances where an employee (or dependent) would be better off with the reimbursement under the old plan rather than with the reimbursements for a non-panel doctor under the new plan (TC81-TC82).

DeMesquita also testified regarding the administration of the new plan in comparison to the administration of the old plan. He explained that under the new plan the patient must first pick up a card, send it to VSP and wait for a claim form to be sent back before he/she could be examined (TA56).[10/] Under the old plan, however, the patient could pick up a claim form from the Township or doctor's office and be examined immediately (TA58).

DeMesquita also explained that under the new plan there is more delay in obtaining glasses or contact lenses. He indicated that under the old plan he could use any laboratory he wished which usually completed the work in from one to seven days, but that under the new plan he was required to use only specific laboratories which took from seven to twelve days to complete the work (TA58-TA59).

10/ The claim form is valid for several months after it is issued (TA73). DeMesquita also indicated that his appointments are generally scheduled two weeks ahead (TA74).

Finally, DeMesquita testified that in emergencies under the old plan he would just treat the patient and do the claim form later, and could still send for glasses to any laboratory (TA74-TA75). Under the new plan, however, the doctor must first call VSP for authorization before treating the patient, and must still send for glasses to a contracted laboratory which still takes more time (TA75).[11/]

d. Major Medical Plan - Effective January 1, 1985 the new major medical coverage was provided by the Guardian Life Insurance Company as set forth in Exhibit CP-4. When implemented, that plan had a deductible provision providing that any three family members each had to satisfy a separate $100 deductible (CP-5), and then the plan paid 100% of covered medical expenses with an unlimited maximum (TA126, TA162, TC54, TC92-TC93, CP-4, p. 27,3046). That deductible provision and coverage was changed, however. Effective September 1, 1985, the deductible was reduced to two family members paying $100 deductible each and the coverage was changed to 80% for the first

---

11/ In its post-hearing brief the Township characterized DeMesquita's testimony as meaning that the new vision plan was equal to or better than the old plan. That, however, is a mischaracterization of his testimony. DeMesquita did indicate that by using a panel doctor there was no liability to the employee (TA70), but he also testified that when comparing the reimbursements when using a non-panel doctor to the reimbursements under the old plan, the old plan was better (TA53). DeMesquita also explained how the negative elements in the administration of the new plan could adversely affect employees. I find that although the new plan might be better under particular circumstances, it is not better for employees choosing to use a non-panel doctor.

$2000, and 100% thereafter (TC100). Dependent children are covered to age 23, except that covered children who are students are covered to 25 (TA165, TC54). The new plan also provides for survivor benefits of six months (TA165, TC55).

The new plan provides for mental and nervous care on an inpatient and outpatient basis but in different amounts compared to the old plan (TA132-TA135). The new plan provides coverage as follows:

> Inpatient: Full plan benefits for 60 days.
> Outpatient: 50% reimbursement to $1000 per year (C-1E, R-3, TC75-TC76).

The new plan lists a variety of covered and not covered expenses, and also lists a limitation for pre-existing conditions (CP-4, p. 27,5024).[12/] Under the pre-existing condition the covered person must wait at least three months with no treatment to begin coverage. The new plan also provides accidental death and life insurance coverage (CP-4, TA154, TC47-TC48).

10. Although the Guardian plan included a three-person deductible for major medical when it was implemented, the Township argued that it intended to implement a plan with only a two-person deductible, then 80% of the first $2000 of covered expenses and 100% thereafter. By letter of January 3, 1985 (Exhibit CP-7), the Township's attorney informed the Charging Party's attorney that the

---

12/ A pre-existing condition is a sickness or injury for which a covered person receives medical care or treatment within three months before the insurance started (CP-4).

Township revised the new major medical plan to a two-person deductible rather than its (Township's) original proposal of a three-person deductible.

In addition, Ladd testified that the new plan was intended to be the same as the old plan (TC54), a two-person deductible and 80% for the first $2000 (of covered expenses then 100% thereafter) from the start, but that he had made an error when he completed the Guardian application (TC51-TC53, TC72). The application was prepared as a three-person deductible and 100% coverage (TC92-TC93). Ladd indicated that he was not aware of the mistake until the new plan booklet, CP-4, was issued sometime in April 1985 (TC52, TC72-TC73). Ladd contacted Guardian and requested that the plan be changed (TC53, TC73). He was told that the Township had to send a letter requesting the change, but he testified that the change had not been implemented by August 29, 1985 (TC73-TC75).

The record shows that in the summer of 1985, as late as August 21, 1985, the Bowman family was assessed a three-person deductible for major medical coverage (CP-5). The Township, through its attorney, stated for the record that any family assessed three deductibles would be reimbursed by the Township without any set off from having received 100% coverage after the deductibles were paid (TB84-TB86). The Township administrator testified that any employee who was assessed a third deductible could submit a bill to the Township and would be reimbursed by the Township (TD28).

11. The record shows that during 1984 police officer Michael Bonuomo's wife submitted claims to Blue Cross/Blue Shield under the old major medical plan (CP-3) for her son's required speech therapy sessions. Blue Cross/Blue Shield paid those claims and reimbursed her the required 80% after the $100 deductible (CP-2A, 2B, 2C, TA103, TA107-TA108). In early 1985 Mrs. Bonuomo submitted the same claim for her son's required speech therapy to Guardian under the new plan. It was based upon the same therapy and provided by the same practitioner as that submitted to Blue Cross/Blue Shield (TA104, TA109). On July 1, 1985 Guardian denied the claim and stated on the claim form (Exhibit CP-1) that:

> charges for speech therapy in connection with this diagnosis are not covered under your plan. (CP-1)

Mrs. Bonuomo testified that she sent Guardian a written appeal of the denial of her claim and explained the nature of her son's problem but received no response (TA109-TA110). Mrs. Bonuomo resubmitted her appeal one week before she testified at this hearing (August 29, 1985)(TA110).

Guardian representative, Joanna Hassler, testified that Bonuomo's claim was first denied because no information was provided explaining the medical reason for the therapy (TC97). The subsequent information submitted by the speech therapist was not sufficient so Guardian contacted the doctor to ascertain the medical reason for the referral to a speech therapist. Guardian was still not satisfied with the information received from the doctor (TC97). Hassler testified that Guardian received a Blue Cross/Blue Shield

statement that they (BC/BS) had previously paid for such therapy, and, on that basis alone, Guardian made an "administrative exception" and processed Bonuomo's claim (TC97-TC98). Hassler testified that Guardian felt that Blue Cross/Blue Shield "must have had detailed medical information as to why that claim would be processed." (TC98)

Although I credit Hassler's testimony that Guardian processed Bonuomo's claim because Blue Cross/Blue Shield had previously processed similar claims, I do not credit her testimony to show that Blue Cross/Blue Shield had any more medical information than Guardian had to justify the claim. Hassler only testified that Blue Cross/Blue Shield "must have had detailed medical information." But that was a guess. Hassler really did not know what information Blue Cross/Blue Shield had in making its decision. A Guardian representative received information from the speech therapist and the doctor and still was rejecting the claim. Then Hassler admitted that Guardian made an administrative exception only because Blue Cross/Blue Shield had approved similar claims. I infer from that information that the Guardian plan did not cover the claim, but agreed to process it only because the previous plan had processed such claims. I believe that still leaves open the question of whether Guardian would cover such a claim from an employee who had not submitted a similar prior claim to Blue Cross/Blue Shield.

12. On January 3, 1985 the Township attorney sent CP-7 to the Charging Party's attorney regarding the major medical deductible and the dental plan. On January 13 the Charging Party's attorney sent the Township's attorney a letter (CP-17) regarding the draft of the new SOA agreement and recommended seven specific changes to the draft. On January 14, 1985 (CP-8) the Charging Parties responded to CP-7 regarding changes in the medical insurance. The Charging Parties expressed disagreement with any changes other than those negotiated in C-1C and C-1D. On January 17, 1985 (CP-9) the Charging Parties informed the Township's attorney that they would sign the new enrollment cards but not waive their right to contend that the changes had to be negotiated. On February 1, 1985 (CP-10) the Township responded to CP-8 and maintained that the Township had provided information regarding the changes during "negotiations." Also on February 1, 1985 (R-1) the Township responded to CP-17 and agreed to three of the seven proposals, but did not agree on the other four items. On February 7, 1985 (CP-11) the Charging Parties notified the Township's attorney that a charge would be filed, and requested the Township to make the retroactive salary payments. (The charge was filed on February 13, 1985). On February 8, 1985 (CP-12) the Charging Parties recommended five revisions in the language for the new collective agreements. On February 15, 1985 (CP-13) the Township responded to CP-12 and agreed to three or four of the Charging Parties' proposals, but disagreed with two proposals. On February 24, 1985 the Charging Parties responded to

R-1, and indicated there was a serious disagreement over whether the word "physician" should be placed in Art. 15, Sec. E. On February 26, 1985 (CP-15) the Charging Parties responded to CP-13 and informed the Township's attorney that unless the salary increase was paid retroactively, and unless the word "physician" was placed in the agreement, the Charging Parties would make those issues part of the charge. In their reply brief the Charging Parties noted that the "physician" issue was the only unresolved issue as of February 26, but they presented no evidence to show when it was resolved. In their post-hearing brief the Charging Parties argued that as of March 12, 1985, the Township had refused to reduce the negotiated agreements to writing. March 12 was the date of the Charging Parties' amended charge (C-2) alleging that the Township violated the Act by refusing to pay the retroactive salary increase. However, there was no evidence showing whether the "physician" issue had been resolved at that point.

13. On July 1, 1985 the parties signed their new collective agreements (both represented as J-1). There was no evidence to explain why the contracts were not signed between February 26, 1985 (when CP-15 was sent) and July 1, 1985. J-1 contained the following complete health insurance clause (Article 21 for the SOA and Article 22 for the FOP (TA6-TA9)):

> Hospitalization and Medical-Surgical Insurance
>
> A. Each Police Officer and their families shall receive the following coverages under New Jersey Blue Cross and New Jersey Blue Shield:
>
> 1. Blue Cross, Comprehensive Extended

2. Blue Shield
3. Extended Benefit, Known as Rider J
4. Major Medical Plan

The Township agrees to maintain in effect either the above coverage or its equivalent.

B. Effective no later than July 1, 1985, the Township shall implement the New Jersey Blue Cross and New Jersey Blue Shield PACE Plan.

C. The cost of said hospitalization and medical-surgical insurance shall be borne by the Township of Pennsauken.

D. Each Police Officer and their families shall receive a Dental Program and an eyeglass and prescription program. The said program to be adopted by mutual agreement of both parties concerned. No deletions or changes in this program will be made without the consent of both parties concerned.

E. The cost of the said dental plan, eyeglass plan and prescription plan shall be borne by the Township of Pennsauken.

F. Each Police Officer will have the right to choose his own medical facility for emergency treatment if he is injured while on duty. Thereafter, Workmen's Compensation law shall determine control of treatment.

G. Effective January 1, 1986, the Township shall implement the New Jersey State Disability Plan.

H. If available, the Township agrees to pay up to a maximum of sixty-five ($65.00) dollars per year per Police Officer for the purchase of a vicarious liability insurance plan. Any increase in the premiums above the sixty-five ($65.00) dollars per year per Police Officer will be borne by the individual Police Officer or the Association.

I. The Township has the right to change insurance carriers or institute a self-insurance program so long as the same or better benefits are provided after written notification to the Association.

After J-1 was signed, the Township paid the retroactive salary increases (TA12-TA14).

Analysis

The Motion To Dismiss

The Township argued that the instant complaint should have been dismissed because the case rests upon an interpretation of the clauses in Articles 21 and 22, respectively, and involve an alleged mere breach of contract which is more appropriate for arbitration. The Township argument is based entirely upon the Commission's decision in Human Services.

In Human Services the Commission held that a breach of a collective negotiations agreement was not enumerated in the Act as an unfair practice, and that an allegation of such a breach based upon differences over contract interpretation would not rise to the level of a refusal to negotiate in good faith. 10 NJPER at 421. The Commission concluded that:

> ...a mere breach of contract claim does not state a cause of action under subsection 5.4(a)(5) which may be litigated through unfair practice proceedings and instead parties must attempt to resolve such contract disputes through their negotiated grievance procedures. 10 NJPER at 421.
>
> We believe that parties should be encouraged to use their own negotiated grievance procedures for the resolution of contract disputes and should not be entitled to substitute this Commission for a grievance procedure which they have specifically agreed upon as the appropriate method for resolving a particular contractual dispute. 10 NJPER at 422.

In its post-hearing brief the Township argued that the Commission in Human Services "greatly narrowed its jurisdiction with respect to contractual disputes alleged as unfair practices." I do not agree. The Commission in Human Services certainly narrowed its

jurisdiction to a certain extent, but it did not hold or mean to imply that it would refuse to hear all matters alleging contractual disputes as unfair practices. The Township is apparently arguing that Human Services should have a broad application, but I believe it was intended to be applied in limited circumstances.

After enunciating its holding in Human Services the Commission specifically said:

> This holding does not mean, however, that a breach of contract is never evidence of an unfair practice or that we do not have the power to interpret collective negotiations agreements. 10 NJPER at 422.

The Commission in Human Services explained that in Township of Jackson, P.E.R.C. No. 82-79, 8 NJPER 129 (¶13057 1983) it specifically held that it had such jurisdiction and that a breach of contract might rise to the level of a refusal to negotiate in good faith. The Commission then held that:

> ...if the contract claim is sufficiently related to specific allegations that an employer has violated its obligation to negotiate in good faith, we would certainly have the authority to remedy that violation under subsection (a)(5). 10 NJPER at 422.

The Commission in Human Services then explained that to determine whether a charge predominantly relates to the 5.4(a)(5) obligation to negotiate in good faith, or is an unrelated breach of contract claim which does not implicate any obligations arising under the Act, "it is necessary to look closely at the nature of the charge and all the attendant circumstances." Id. at 422. The Commission then listed several examples of situations in which it would entertain unfair practice proceedings.

> A specific claim that an employer has repudiated an established term and condition of employment may be litigated in an unfair practice proceeding pursuant to subsection 5.4(a)(5). See Jackson; Elizabeth; and Cherry Hill. Compare Sea-Bay Manor Home, 253 NLRB No. 68, 106 LRRM 1010 (1980). This example is most clearly illustrated by an employer's decision to abrogate a contractual clause based on its belief that the clause is outside the scope of negotiations. In re Local 195 v. State, 88 N.J. 393 (1982). Thus, we will entertain unfair practice cases in which an employer has already repudiated a clause based on such a belief or in which an employer has raised a scope of negotiations defense to a contract claim. See Elizabeth In re Town of Kearny, P.E.R.C. No. 82-12, 8 NJPER 441 (¶13208 1982); In re Township of Irvington, P.E.R.C. No. 82-63, 8 NJPER 94 (¶13038 1982). A claim of repudiation may also be supported, depending upon the circumstances of a particular case, by a contract clause that is so clear that an inference of bad faith arises from a refusal to honor it or by factual allegations indicating that the employer has changed the parties' past and consistent practice in administering a disputed clause. See Cherry Hill; Oak-Cliff-Golman Baking Co., 207 NLRB No. 1063, 85 LRRM 1035 (1973). In addition, we will entertain charges in which specific indicia of bad faith over and above a mere breach of contract are alleged. See National Dairy Products Corp., supra. We will also entertain charges which indicate that the policies of our Act, rather than a mere breach of contract claim, may be at stake. See Galloway Twp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978). See also Oak-Cliff-Golman Baking Co., supra; Papercraft Corp., 212 NLRB No. 55, 86 LRRM 1697 (1974). Id. at 422-423.

The Commission concluded that list by explaining that it was not limited to those examples.

> We emphasize that these examples are not meant to be exhaustive and instead the Administrator of Unfair Practices must examine the allegations of each case to determine whether there is a sufficient nexus between the duty to negotiate in good faith and an alleged contractual violation to warrant the issuance of a Complaint. ID. at 423.

Human Services is comprised of two cases with separate fact patterns but both of which involve contract interpretation. In the first case an unclassified State employee was dismissed. The

parties' collective agreement, under certain circumstances, provided for a hearing before a department or agency head for unclassified employees who were dismissed from service. Under the State's interpretation of the specific clause the employee was not entitled to the hearing. Under the union's interpretation of the clause he was entitled to the hearing.

In the second case the issue involved whether permanent part-time employees were entitled to longevity payments pursuant to the parties' collective agreement.

The Commission in Human Services concluded that both cases involved only contract interpretations. There was no attempt by the State to repudiate its collective agreement, nor did the State change any established term and condition of employment. Thus, the Commission determined that those cases were more appropriate for resolution pursuant to the parties' own grievance procedure.

There are striking differences between the Human Services facts and the instant facts. Here the Township unilaterally changed material terms and conditions of employment. Although the Township raised a contractual defense, if that defense fails, the Township would have committed a 5.4(a)(5) violation because it unilaterally changed a term and condition of employment. That would not have been the result in Human Services because if the State's interpretation of the contract clauses did not prevail there still would have been no change in an established term and condition of employment.

In addition, since, in the instant matter, both the old collective agreements, and J-1, provided for specific health insurance, and since that insurance had an established level of benefits, if the Township's contractual defense for changing the level of benefits fails, the Township would have repudiated the pre-existing level of benefits by unilaterally establishing a different level of benefits. Despite the fact that it is necessary to interpret Articles 21 and 22 to reach a decision herein, I believe that the predominant issue here relates to the obligation to negotiate in good faith. It is not a "mere" breach of contract issue as existed in Human Services.

My holding above is supported by both the facts and legal conclusions of the Commission's decision in City of South Amboy, P.E.R.C. No. 85-16, 10 NJPER 511 (¶15234 1984)(South Amboy). In South Amboy the City unilaterally changed medical insurance carriers and altered health insurance coverage for a unit of police officers. The union filed a charge alleging a 5.4(a)(5) violation. The City argued that the change complied with the parties' collective agreement which included a clause permitting a change of carriers "so long as the coverages enumerated in this agreement are maintained at their equivalent levels." 10 NJPER at 511.

In reliance upon the Director of Unfair Practice decisions that gave rise to Human Services,[13/] the Administrator of Unfair

---

13/ State of N.J. (Dept. of Human Services), D.U.P. No. 84-11, 9 NJPER 681 (¶14299 1983), and State of N.J. (Office of Employee Relations), D.U.P. No. 84-12, 10 NJPER 3 (¶15002 1983).

Practices refused to issue a complaint in the South Amboy matter.[14/] That decision was appealed to the Commission and resulted in the Commission's South Amboy decision which ordered the issuance of a complaint. The Commission held:

> The charge alleges that the employer has unilaterally decreased insurance benefits afforded to members of the negotiations unit. Such an allegation, if proved, would amount to a violation of 5.4(a)(5). 10 NJPER at 511.

The Commission in South Amboy explained that it had recently issued the decision in Borough of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984)(Metuchen), where it held that a unilateral reduction in health insurance benefits resulting from a change in carriers was an unfair practice. The Commission in South Amboy then held that:

> Given Metuchen, we are not divested of our unfair practice jurisdiction simply because the City's defense is based upon an assertion that the contract permits the unilateral action or the unfair practice, if proved, may also constitute a breach of contract. Id. at 511.

The Commission in South Amboy concluded that since Metuchen established that employees had a statutory right not to have their health benefits unilaterally reduced, that the charge in that case (South Amboy) predominantly related to the obligation to negotiate. Id. at 512.

14/ City of South Amboy, D.U.P. No. 84-24, 10 NJPER 211 (¶15106 1984).

In note 5 of South Amboy the Commission distinguished the Human Services facts. It explained that in Human Services the pertinent employee rights involved were ones given by contract depending upon the parties' contractual interpretations. Whereas in South Amboy the pertinent employee rights, the right to have the same level of benefits maintained despite a change in carriers and the right against a unilateral change in terms and conditions of employment, are statutory rights that do not depend upon contract interpretation. Id. at 513. Since contract interpretation was merely a defense in South Amboy, the Commission held that the case predominantly involved statutory questions and whether there was a unilateral change.

South Amboy is obviously applicable here. The instant facts are virtually the same. The Township has merely raised a contractual defense to its changes in the health benefits provisions. But the question is whether the Township unilaterally changed a statutory right, the right of employees to have their same level of benefits after a change in carriers. Thus, the predominant issue here relates to the Township's 5.4(a)(5) obligation to negotiate in good faith, rather than a breach of contract claim.

Based upon the above analysis the motion to dismiss is denied.

The Merits

There were three issues raised by the Charging Parties, and one additional issue raised by the SOA. The Charging Parties

jointly alleged violations over the changes in the health insurance package, the refusal to sign the agreements and the refusal to pay the retroactive salaries. The SOA also alleged a violation over the IRS issue.

I find that the Township violated the Act by changing the insurance level of benefits. The Township's contractual defense did not succeed. Its interpretation of the pertinent language in Articles 21(I) and 22(I), respectively, was too broad and well beyond the otherwise clear meaning of the contract. The Township, however, did not violate the Act by withholding the payment of retroactive salaries or signing the agreement until July 1985. I previously disposed of the IRS issue by granting the motion to dismiss.

The Change in Health, Vision, And Prescription Benefits

In City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439 (¶12195 1981)(Newark), the Commission held that the identity of an insurance carrier with regard to police (and fire) employees was a permissive subject of negotiations, but would become mandatorily negotiable if a change of benefits would affect the level of benefits.

> ...[w]ith respect to police and fire employees in New Jersey, the identity of an insurance carrier is a permissive subject for negotiations....However, where changing the identity of the carrier affects terms and conditions of employment, i.e., the level of insurance benefits, and the administration of the plan, it is a mandatory subject for negotiations. 7 NJPER at 440.

Following its stated rationale in Newark, the Commission issued Metuchen and found that where a change in insurance carriers

results in a change of the level of benefits it violates 5.4(a)(5) of the Act. In Metuchen the Commission also adopted the private sector holding that even if the new plan was better than the former plan or provided certain additional benefits, that was irrelevant in deciding whether the change violated the Act. The relevant issue was whether the union consented to the change. 10 NJPER at 128-129.[15/] Thus, the Commission in Metuchen concluded that the charging party must establish that the level of benefits actually changed,[16/] and if it did, then whether the change in benefits was for the better or for the worse, the employer was still in violation of the Act.

Metuchen has been applied in subsequent decisions. In both City of New Brunswick, P.E.R.C. No. 85-61, 11 NJPER 24 (¶16012 1984), and Borough of Closter, P.E.R.C. No. 86-95, 12 NJPER 202 (¶17078 1986), the employer unilaterally changed insurance carriers which resulted in a change in the level of benefits. In both cases some of the benefit levels in the new plans were better than in the previous plans, but some were not, and in both plans the employer argued that the new plans as a whole were better than the old plans. In both cases the Hearing Examiner found, and the Commission

---

15/ The Commission in Metuchen relied upon Keystone Consolidated Industries, 237 NLRB No. 91, 99 LRRM 1036 (1978), and NLRB v. Keystone Consolidated Industries, 653 F.2d. 304, 107 LRRM 3143, 3146, n. 2 (7th Cir. 1981).

16/ See Connecticut Light & Power Co., 476 F.2d 1079, 82 LRRM 3121, 3123 (2nd Cir. 1973).

affirmed, that the benefit levels between the old and new plans had been unilaterally changed, and pursuant to Metuchen that was a violation of the Act.

Since the Commission in Metuchen held that a charging party must establish that the level of benefits actually changed, 10 NJPER at 129, my analysis must begin by determining whether there was, in fact, a change in this case. Throughout its post-hearing brief the Township argued that the new plans were the same or better than the old plans, yet it also argued that the Charging Parties failed to establish that the level of benefits in the vision and major medical plans actually changed. (Township's brief pp. 41, 44). The Township is wrong. Having admitted that the new plans were implemented, and having acknowledged that the new vision plan and mental and nervous portion of the new major medical plan contain a different level of benefits than the old plans, the Township cannot logically argue that the Charging Parties failed to establish a change. The Township apparently believes that because the Charging Parties did not show that any employees actually suffered some loss due to the implementation of the vision and mental and nervous portions of the new plans that they did not prove a change. That belief, however, misses the point made in Metuchen. The Charging Parties are not required to prove actual loss to establish a 5.4(a)(5) violation; they need only prove that the new plans are different from the old plans.

The undisputed evidence here is that the new plans are different. The new vision plan contains a panel of doctors feature not contained in the old plan, a level of reimbursements (for non-panel doctors) different than the level of reimbursements in the old plan, and coverage for exams only every 18 months rather than every 12 months. The mental and nervous reimbursements in the new major medical plan are different from those reimbursements in the old plan, and the prescription drug co-pay is higher in the new plan as compared to the old plan. Thus, contrary to the Township's assertion, the Charging Parties have proved that the plans were in fact changed.

Under the Metuchen, New Brunswick and Closter cases it was enough to prove that the new plans were different to prove a violation of the Act. Here the plans are also different but the Township is not asserting a managerial prerogative as its defense; it is asserting a strict contractual defense, and is relying on the same or better language in Articles 21(I) and 22(I), respectively.

In its post-hearing brief the Township argued that the "same or better" language in J-1 was a relative term that permitted the instant changes. The Township argued that "same or better" was meant to apply "on balance" (Township's brief p. 37), and that all of the changes resulted in a "better" plan. The Township concluded that since it complied with its collective agreements it did not

violate the Act. Pascack Valley Bd.Ed., P.E.R.C. No. 81-61, 6 NJPER 554, 555 (¶11280 1980).[17/]

The sum of the Township's argument is that by agreeing to the language in Articles 21(I) and 22(I), respectively, the Charging Parties have waived the right to further negotiate over health insurance benefit levels that are "better" than the previous levels. While there are many cases in which the Commission has dismissed complaints because a union has, pursuant to clauses in a collective agreement, waived the right to further negotiate over a particular term and condition of employment,[18/] the Commission has consistently held that a contractual waiver of a majority representative's right to negotiate will not be found unless a unilateral change is clearly, unequivocally and specifically authorized by the language in the collective agreement. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. Bd.Ed., 78 N.J. 122, 140 (1978); State of New Jersey, P.E.R.C. No. 77-40, 3 NJPER 78 (1977); Deptford Bd.Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd App. Div. Docket No. A-1818-80T8 (May 24, 1982); Ramapo State College,

---

17/ In Pascack the Commission held that an employer satisfies its negotiations obligation if it acts in accordance with its collective agreement. See also Borough of Moonachie, P.E.R.C. No. 85-15, 10 NJPER 509 (¶15233 1984); Randolph Twp. Bd.Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); Bound Brook Bd.Ed., P.E.R.C. No. 83-11, 8 NJPER 439 (¶13207 1982).

18/ For example, see Old Bridge Municipal Utility Authority, P.E.R.C. No. 84-116, 10 NJPER 261 (¶15126 1984); Randolph Twp. Bd.Ed., supra; Randolph Twp. School Board, P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980); Pascack Valley Bd.Ed., supra.

P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985); Willingboro Bd.Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985).

After considering Articles 21 and 22, respectively, in their entirety, and after applying the instant facts to those Articles, I find that there was no waiver, and that the Township did not comply with the collective agreements.

The law with respect to the negotiability of insurance level of benefits, and with respect to contractual waivers, is that they should be given a narrow and strict interpretation. In Red Bank, supra, the Supreme Court held that "contractual language alleged to constitute a waiver will not be read expansively. 78 N.J. at 140.

In Metuchen the Commission established that any change in the level of benefits must be negotiated. In order to constitute a waiver of the right to negotiate over any changes in insurance benefit levels a clause must be clear, not subject to various interpretation, and must specifically authorize the kind of change actually implemented by the employer. The instant clause did not authorize the kind of changes the Township implemented.

The Township made two mistakes. It failed to give any meaning to the language in Articles 21 and 22(D), and it read the language in Articles 21 and 22(I) too expansively. A well established rule of contract construction is that every word, phrase or sentence in a contractual clause has meaning. See generally Spotswood Bd.Ed., P.E.R.C. No. 86-34, 11 NJPER 591 (¶16208 1985).

In Articles 21 and 22(D) the parties agreed to dental, eyeglass (vision) and prescription drug programs. Section (D) then concluded:

> The said program to be adopted by mutual agreement of both parties concerned. No deletions or changes in this program will be made without the consent of both parties concerned. (Emphasis added).

The last sentence of Section (D), that no deletions or changes will be made without consent of both parties, applies to the dental, vision and prescription drug programs and must have some meaning or it would not have been placed in the contract. The meaning of that language, on its face, is that there will be no changes in those plans without the union(s) consent. The "no deletions or changes" language applies specifically to the dental, vision and prescription plans. The language in Articles 21 and 22(I), however, even if given the Township's interpretation of "better" as being "on balance," only applies to Articles 21 and 22 in general. But where, as here, there is specific language (in Section (D)), it will take precedence over the general language (in Section (I)).

The language in 21 and 22(I) was meant to apply to 21 and 22(A) which enumerated the hospital, surgical and major medical coverage. Articles 21 and 22(A) concluded with the sentence that the Township agreed to maintain the above coverage or its equivalent. That language implied that a change might occur, and Articles 21 and 22(I) set forth the conditions for any changes, i.e., "same or better." If the language in Section (I) was allowed to take precedence over the "no change" language in Section (D), it

would render the Section (D) language meaningless, and that could not have been the parties' intent.

Thus, even if the changes in the vision plan made the plan better (which they did not), since Section (D) did not permit any changes in the vision plan without the Charging Parties' consent, the Township's unilateral implementation of the new vision plan violated the Act.

Since I previously found that the Charging Parties had not agreed to increase the prescription drug co-pay, the Township's unilateral implementation of a plan with a $2.00 co-pay also violated the Act. The Township's assertion that the additional dollar of co-pay was de minimis is without merit.[19/]

Even if Section (I) applied to the vision plan, I find that the changes to that plan, the major medical plan, and the prescription plan did not make those plans better within the meaning of the clause. In its post-hearing brief the Township argued that the phrase "same or better" was meant to apply "on balance." I disagree. There is nothing in Section (I) or any other part of Articles 21 and 22 to suggest that "same or better" was meant to be applied "on balance" as opposed to being "same or better" under all circumstances. Since the Supreme Court held that contract language will not be read expansively with respect to a waiver, it is

---

19/ I am not finding that the Township's change in the dental plan was a violation only because the Charging Parties did not allege that change to be in violation of the Act.

inappropriate to apply "same or better," "on balance" because "on balance" here represents a more expansive interpretation, whereas, "same or better" under all circumstances is a more restrictive interpretation of that clause.

The Supreme Court has also held that:

> ...the court will not make a different or a better contract than the parties themselves have seen fit to enter into. Washington Construction Co. Inc. v. Spinella, 8 N.J. 212, 217 (1951).

Here the parties did not say that "same or better" would be applied "on balance" or in a general sense, and the Township cannot read something into the contract language that does not otherwise appear.

The perfect example of how "same or better" should be applied has already been demonstrated in this case regarding the dental plan. Assuming that the language in Section (D) did not exist or apply to the dental plan, the Township's change in the dental plan fell squarely within the meaning of "same or better." The dental plan was changed only by adding a new component, orthodonture coverage. All of the pre-existing reimbursement levels of the old plan were implemented in the new plan. The new dental plan was certainly better for some employees, those who could take advantage of orthodonture coverage, but was otherwise exactly the same (no changes) for employees who could not make use of orthodonture. Thus, no employee could possibly be any worse off under the new dental plan than he/she had been under the old plan, and that would have been the parties' intent in Section (I). Had the Charging Parties alleged a violation over the change in the

dental plan, and had the dental plan not been subject to the conditions in Section (D), I would find that the change to the dental plan was protected by Section (I).

The changes in the vision and major medical plans obviously do not comport with my holding of how "some or better" should apply. The Township argued that both the new vision plan, and the mental and nervous component of the new major medical plan, were better than their counterparts in the old plan. But the Township argues only that they are better "on balance." It does not argue, nor did it prove, that the changes to those plans are better in every instance or would at least not leave any employee or dependent any worse off than he/she would have been under the previous plans.

The fact is that neither the new vision plan nor the new mental and nervous component of the major medical plan are better in every instance. They do not favorably compare to the change in the dental plan. Under the vision plan, only those employees who choose a panel doctor are better off than under the previous plan, and even with a panel doctor, employees are only covered for an exam once every 18 months, whereas under the old plan it was once every 12 months. Thus, even with a panel doctor there is one significant lesser benefit than under the old plan. Of course, if one does not choose a panel doctor then the reimbursement levels under the new plan are mostly lower than under the old plan. To have changed the vision plan within the meaning of "same or better," assuming that Section (I) could be applied to the vision plan, the Township would

have had to offer the exact same reimbursement levels, exam time periods, type of administration and lab choices under the new plan as it did under the old, and then could have offered a panel of doctors feature. In that situation employees who did not choose a panel doctor would be no worse off under the new plan. But based upon the features of the new vision plan, there is potential for many employees to be worse off as compared to the old plan. Thus, the Township's implementation of the new vision plan did not comport with the contract and was in violation of the Act.

The result is the same regarding the changes in the mental and nervous portion of the major medical plan. Those changes could not possibly be better for every employee under every circumstance. The new plan has a different level of benefits that could leave employees worse off than they would have been under the old plan. The new plan would be better only under certain circumstances. The Township argued that the levels under the old plan were unrealistically too high in certain respects. That may be true, but then the parties should negotiate a change. The Township did not have the right to unilaterally decide to change the old mental and nervous levels even if they were too high.

When comparing the old and new mental and nervous outpatient coverage, for example, the difference is striking. The new plan is limited to $1000 per year whereas the old plan is $10,000 per year. Although the old plan had a $20,000 lifetime maximum, that does not negate the fact that in a given year an

employee has the potential to receive $9000 of additional coverage under the old rather than the new plan. Whether any employee has ever even used the benefit, or ever got above $1000 in any one year, is irrelevant. Metuchen. To have complied with "same or better" the Township would have had to offer at least the same mental and nervous benefits as provided in the old plan before adding any new features. It failed to do that and thus violated the Act by implementing the new major medical plan. Any other changes in benefit levels between the old and new major medical plans, such as the existence of a pre-existing condition clause in the new plan, also violated the Act.

With respect to the change in the major medical deductible, even when the facts surrounding the deductible are considered separate from the other aspects of that plan, the change in the deductible still violated the Act. The Township's argument that the change in the deductible was a mistake, and its offer of reimbursement, even if true, is not, at least in this case, an adequate defense to finding that the Township violated the Act. The change in the deductible was brought about by the Township's unilateral decision to change carriers. The Charging Parties were not involved in that process. It was the Township's responsibility to ensure that the new plan was properly implemented. To the extent that the Township's insurance consultant, or the carrier of the new plan, caused the wrong deductible to be implemented, and may give rise to a cause of action against those third parties, it is

irrelevant here in determining whether the Township violated the Act. The Township was responsible to ensure that the right plan was implemented. It should have checked the plan after it was implemented to be certain of its accuracy. Although the error regarding the deductibles was discovered in April 1985, it was not corrected until September 1, 1985. Thus, the wrong deductible was in place for eight full months which is an unacceptably long time given the Township's intent stated in CP-7 dated January 3, 1985 to implement a two-person deductible. Thus, I find the implementation of a three-person deductible to have been in violation of the Act. The Township's offer of reimbursement is merely a mitigation of the ultimate remedy in this case.

In sum, the Township violated the Act by changing the vision, major medical and prescription plans.

The Refusal To Sign The Agreement And Pay Retroactive Salaries.

The Township did not violate the Act by waiting until July 1, 1985 to sign the new agreement(s) or pay the retroactive salaries. Section 5.4(a)(6) of the Act provides that a public employer violates the Act by:

> Refusing to reduce a negotiated agreement to writing and to sign such agreement.

In its amendment to the Charge on March 13, 1985 the Charging Parties alleged that the Township failed to reduce a negotiated agreement to writing, but they did not technically indicate a 5.4(a)(6) filing. Nevertheless, even if I infer an (a)(6) filing the Charging Parties did not establish such a violation.

The facts show that the parties had reached memorandums of agreement in November 1984 and that the Township prepared drafts of the new agreements in December 1984. Through January and February 1985 the parties exchanged several letters regarding the wording of several contract clauses. The last letter in the series of exchanges, CP-15 dated February 26, 1985, still showed some disagreement over contract language.

The agreements were not signed until July 1, 1985, but the Charging Parties did not show when during the period from February 26 through July 1, 1985 the final language differences had been resolved. The language problems that existed in January and February appear to have been legitimate, some raised by the Charging Parties, and there was no reason to expect the contract to be signed until they were resolved. Neither a public employer nor a labor organization is required to sign an agreement until all the language is agreed upon. The burden here was on the Charging Parties to show that the outstanding language issues were not legitimate, or that the parties had, in fact, resolved all language issues. The Charging Parties, however, failed to make such proofs. Thus, I can only infer that the language issues were not resolved until just before July 1, 1985, and, therefore, no violation was committed to for signing the contracts on July 1, 1985.

The result is the same regarding the retroactive salary allegation. The Township demonstrated its good faith by implementing the new salary on January 1, 1985. It could have

waited until the contract was signed to implement the new salary and then make retroactive payments. The only payments the Township withheld until the contracts were signed was the difference between what employees received between July 1, 1984 and December 31, 1984 and what they would have received had the new salary been in effect on July 1, 1984. Of course, the new salaries were not agreed upon until November 1984; thus, the Township had to make retroactive salary payments for that time period in any event.

As was the case with the signing of the contracts, the Township was not obligated to make the retroactive payments until the contract was signed. Since the Charging Parties did not prove that it was unlawful for the Township to wait until July 1, 1985 to sign the contracts, then it was not unlawful for the Township to wait until July 1, 1985 to make the retroactive payments.

Thus those aspects of the charge alleging an (a)(6) violation, and those alleging a failure to make retroactive payments should be dismissed.

The IRS, 5.4(a)(3) And 5.4(a)(7) Allegations

The IRS issue was disposed of above. The 5.4(a)(7) issue was dismissed at hearing. Since there were no facts supporting a 5.4(a)(3) violation, that element of the Charge and Complaint is also dismissed.

Remedy

In Metuchen, New Brunswick, and Closter, the Commission did not order that the respective employers actually reimplement the

previous health plans. Rather, it ordered that employees be reimbursed for any losses actually incurred due to the changes in the health plans. That result is appropriate here especially because J-1 expired on June 30, 1986, and the parties might now be operating under a different health plan.

If no new contract or health plan has been implemented, however, and the parties are in a "status quo" situation, then the reimbursement remedy must be extended until a new agreement is implemented because the status quo would have included the old health benefit plans. Reimbursements should be made here regarding any losses incurred under the vision plan, the prescription drug plan and co-pay, and all losses under any part of the major medical plan.

Additionally, pursuant to Metuchen, the Township is not entitled to set off any reimbursements based upon any increased benefits that an employee received as a result of the implementation of the new plans. Of course, to the extent that the Township has already reimbursed employees for paying a third $100 deductible under the major medical plan, it has complied with the remedy.

The remedy must also include a cease and desist order, an order to negotiate, and a posting.

Attorney Fees And Costs Of Suit

The Charging Parties' request for fees and costs of suit are denied. Commercial Twp. Bd.Ed. v. Commercial Twp. Supportive Staff Assoc. et al., App. Div. Dkt. No. A-1642-82T2, 10 NJPER 78 (¶15043 12/8/83).

Conclusions of Law

1. The Township violated N.J.S.A. 34:13A-5.4(a)(5) and derivatively (a)(1) by unilaterally changing the level of benefits in the employees health plan.

2. The Township did not violate N.J.S.A. 34:13A-5.4(a)(3) or (7).

Recommendations

I recommend that the Commission ORDER:

A. That the Township cease and desist from:

1. Interfering with, restraining or coercing our police employees in the exercise of the rights guaranteed to them by the Act.

2. Refusing to negotiate in good faith with the FOP and SOA concerning a term and condition of employment of employees included in their units, by unilaterally changing the level of benefits of the major medical, vision and prescription drug plans.

B. That the Township take the following affirmative action:

1. Immediately reimburse FOP and SOA unit members for any losses incurred from January 1, 1985 until newly negotiated major medical, vision, and prescription drug plans are implemented (or until the date that such newly negotiated health plans were implemented, whichever applies), due to the differences in the level of benefits provided under the old major medical, vision, and prescription drug plans as compared to the new major medical, vision, and prescription drug plans.

2. Immediately engage in good faith negotiations with the FOP and SOA (separately if requested) over the level of benefits for new major medical, vision, and prescription drug plans (if it has not already done so).

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

4. Notify the Chairman of the Commission within twenty (20) days what steps have been taken to comply with this Order.

C. That all other allegations of the Complaint including the 5.4(a)(3), (7), and presumed (a)(6) alleged violations of the Act be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: April 28, 1987
Trenton, New Jersey

Appendix "A"

NOTICE TO ALL 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 our police employees in the exercise of the rights guaranteed to them by the Act.

WE WILL cease and desist from refusing to negotiate in good faith with the FOP and SOA concerning a term and condition of employment of employees included in their units, by unilaterally changing the level of health insurance benefits.

WE WILL immediately reimburse FOP and SOA unit members for any losses incurred from January 1, 1985 until newly negotiated major medical, vision, and prescription drug plans are implemented (or until the date that such newly negotiated health plans were implemented, whichever applies), due to the differences in the level of benefits provided under the old major medical, vision, and prescription drug plans as compared to the new major medical, vision, and prescription drug plans.

WE WILL immediately engage in good faith negotiations with the FOP and SOA (separately if requested) over the level of benefits for new major medical, vision, and prescription drug plans.

Docket No. CO-85-202-8 TOWNSHIP OF PENNSAUKEN
(Public Employer)

Dated _____ By _____
(Title)

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 St., CN 429, Trenton, NJ 08625 (609) 984-7372.