

H.E. NO. 2004-8

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

In the Matter of

TOWNSHIP OF UNION,

Respondent,

-and-

Docket No. CO-H-2002-152
CO-H-2002-153
CO-H-2002-163

FMBA LOCAL NO. 46;
FMBA LOCAL NO. 246;
PBA LOCAL NO. 69,

Charging Parties.

SYNOPSIS

A Hearing Examiner grants Respondent Township of Union's motion for summary judgment and recommends that the Commission dismiss a Complaint alleging that the Township unlawfully delayed providing information concerning a change in health care carriers. Specifically, the Hearing Examiner found that the Township made a reasonable good faith effort to respond to the unions' requests on health benefits and the change in carrier by providing information it possessed in a timely manner, seeking information from the carrier which it did not have and providing the unions with information as soon as it obtained it. Additionally, the Hearing Examiner found that the information provided was useful in establishing a change in the level of benefits during the critical period before the change in carrier.

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PBA LOCAL NO. 69,

Charging Parties.

Appearances:

For the Respondent,
Stanton, Hughes, Diana, Cerra, Mariani & Margello,
attorneys
(Mark Diana, of counsel)

For the Charging Parties, FMBA,
Fox and Fox, attorneys
(Dena Epstein, of counsel)

For the Charging Party, PBA,
Zazalli, Fagella, Nowak, Kleinbaum & Friedman,
attorneys
(Paul L. Kleinbaum, of counsel)

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

On November 30, 2001, FMBA Local No. 46 and FMBA Local No. 246 and on December 4, 2001 PBA Local No. 69 filed unfair practice charges with the Public Employment Relations Commission alleging that the Township of Union violated 5.4a(1) and (5) of

the New Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,^{1/} by announcing its intention to change insurance carriers from Horizon Blue Cross/Blue Shield of New Jersey ("Horizon") to Oxford Health Insurance ("Oxford") effective January 1, 2002. The charges also allege that the employer failed to provide the unions with adequate information concerning the proposed change.^{2/}

Applications for interim relief seeking a restraint of the change in carrier accompanied the charges. On December 28, 2001, Commission Designee Susan Wood Osborn issued an interlocutory decision, I.R. No. 2002-7, 28 NJPER 86 (¶33031:2001). She found that the change in carrier would demonstrably change the network of participating providers, thus constituting a change in employee benefits. The designee denied the unions' request that the Township be restrained from changing carriers, but ordered the Township to establish an interim program to guarantee that

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

^{2/} On April 24, 2003 Local 246 amended its charge to reflect that it is the exclusive bargaining representative of fire officers, not rank-and-file firefighters, as was set forth in its original charge. Firefighters are exclusively represented by Local 46.

employees have funds available to pay any up-front costs of medical care and any additional costs of medical treatment that would have been covered under the Horizon plan, during the pendency of this litigation. She also directed the Township to negotiate the procedures for implementing the interim program with the charging parties or, alternatively, the Township could maintain the Horizon plan pending compliance with any statutory or contractual obligations. Finally, the designee ordered the Township within ten days to provide charging parties with all relevant documents concerning the insurance coverage. Additionally, if the information was not currently in the Township's possession she directed it to make every good faith effort to obtain the information from Oxford Health Plan and Horizon Blue Cross/Blue Shield.

The designee denied the charging parties' request for interim relief concerning current retirees, finding that they were not "employees" covered by the Act.

Subsequently, on January 25, 2002, the Township moved to have the record supplemented and to have the interim relief decision reconsidered by the full Commission. On January 14, 2002, the PBA filed a cross-motion for reconsideration regarding the denial of restraints concerning the change in carrier asserting that the carrier change is either mandatorily or, at least, permissively negotiable. It also opposed the Township's

motion for reconsideration. On January 18, 2002, the FMBA Locals filed briefs in opposition to the Township's requests.

On March 27, 2002, the Commission denied the Township's applications and found no extraordinary circumstances to supplement the record or reconsider the designee's decision. It also denied the Township's request for a stay of the order pending emergent review in the Appellate Division. P.E.R.C. No. 2002-55, 28 NJPER 198 (¶33070 2002).

As to the cross-motions for reconsideration, the Commission found no extraordinary circumstances warranting reconsideration of the designee's order requiring the employer to create an interim program to maintain the current level of benefits. Therefore, there was no need to disturb the status quo. Finally, the Commission determined that there were no extraordinary circumstances warranting reconsideration of the designee's decision denying interim relief as to retirees.^{3/}

On December 18, 2002, the component of the charges alleging a change in health benefits was deferred to arbitration. On January 2, 2003, an Order Consolidating Cases and Consolidated Complaint and Notice of Hearing issued on the remaining allegations of the charges concerning the Township's refusal to provide certain information requested by the FMBA Locals and the

3/ The Township's subsequent motion to the Appellate Division for leave to appeal was denied. Township of Union v. FMBA Local No. 46, M-000414-02 (App. Div. 2002).

PBA. After several adjournments requested by the parties, a hearing was scheduled for June 26, 2003.

On January 13, 2003, Respondent filed its answer generally denying that it refused to provide information regarding the level of health benefits. It asserts that to the extent such information existed when requested, the Township provided it immediately. Any other information was provided as soon as the Township obtained it from Oxford. It contends that there are presently no outstanding document or information requests.

On May 9, 2003, Respondent filed a Motion for Summary Judgment with the Commission together with supporting brief, certifications and exhibits. On May 23, 2003, the Chair referred the Motion to me for a decision pursuant to N.J.A.C. 19:14-4.8.

The PBA and FMBAs filed briefs in opposition together with certifications and exhibits on May 30, 2003 and June 6, 2003 respectively. The Township filed a reply brief and supplemental certifications on June 20, 2003.

Summary judgment will be granted:

if it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant . . . is entitled to its requested relief as a matter of law.

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

A party seeking a motion for summary judgment claims there is no genuine issue of material fact and that it is entitled to

judgment on the undisputed facts and applicable law. See generally, N.J.A.C. 1:1-12.5 and R. 4:46-2(c). In considering a motion for summary judgment, all inferences must be drawn against the moving party and in favor of the party opposing the motion. The motion must be denied if a genuine issue of material fact exists. Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995).

In determining whether a genuine issue of material fact exists, the fact finder must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540. If that issue can be resolved in only one way, it is not a "genuine issue" of material fact. A motion for summary judgment should be granted cautiously - the procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Ed. Serv. Comm'n, P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); N.J. Dept. of Human Services, P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988).

Applying these standards, and relying upon the briefs, certifications and supporting documents, I make the following:

FINDINGS OF FACT

1. The Township of Union is a public employer within the meaning of the Act. FMBA Local No. 46 and Local No. 246 and PBA Local No. 69 are public employee representatives within the meaning of the Act and represent, respectively, firefighters, fire officers and police officers employed by the Township.

2. The Township and FMBA Local Nos. 46 and 246 are parties to two separate collective negotiations agreements effective from January 1, 2000 through December 31, 2003. Article XIV of the Local 46 contract and Article XI of the Local 246 contract, entitled "Insurance", are identical. These articles set forth that basic and major medical, dental and prescription drug coverage for all active and retired members shall be "at least equal to that which has heretofore been in effect."

Basic and major medical coverage are also subjects in paragraph K of Articles XIV and XI. Paragraph K in both contracts allows each Local one member appointed to a Group Health Insurance Review Committee which consists of union representatives from the FMBA Locals, the PBA, SOA, Council No. 8 and Council No. 8 Supervisors as well as the Township Administrator or his designee. The purpose of the committee is to review and recommend to the Township Committee "appropriate modifications to group health coverage to either enhance benefit

levels, reduce costs, or both." Recommendations of the committee are by majority vote and are binding on its members.

3. The PBA and Township are parties to a collective negotiations agreement effective from January 1, 2000 through December 31, 2003. Article IV of the contract contains language concerning medical coverage including the "at least equal to" provision as well as the provision regarding the Group Health Insurance Review committee contained in both FMBA contracts.^{4/}

4. Since at least 1997, the Township contracted with Horizon for its employees' health insurance coverage, a traditional indemnity coverage. The Horizon contract is for a one year term commencing on August 1 of each year. Each year since 1997 Horizon increased its premiums: 3.5% for 1998-1998; 3.5% for 1999-2000; and 8.85% for 2000-2001.

In May of 2001, the Township's insurance broker, Stuart Migdon of BGIA insurance agency, informed Township Administrator Frank Bradley that Horizon's 2001-2002 renewal quote forecasted a 14.85% increase. Migdon recommended that the Township get a competing quote from Oxford. After an exchange of proposals over a couple of months from both Oxford and Horizon, Migdon

^{4/} The PBA did not submit its contract or any certified statement regarding the contract term or contents. However, its charge recites these facts which are neither admitted, denied or explained in the Answer. Therefore, I deem them to be admitted. N.J.A.C. 19:14-3.1.

determined that the Oxford proposal resulted in a savings to the Township of \$122,500.

5. On August 16, 2001, Bradley met with the Group Health Insurance Review Committee to advise that the Township was considering a change in carrier. In addition to Bradley those present at the meeting included Migdon, Chief of Administrative Services Karen Infanger, Oxford Regional Vice-President Michael Munoz, Township Labor Counsel Thomas McCormack, and union representatives. PBA President Dale Baird could not attend but was represented by Detective Gregory Rossi.^{5/}

Munoz distributed to all attendees a brochure describing Oxford's services, a draft Summary of Benefits, a letter from Oxford guaranteeing coverage "equal to or better than" that provided by Horizon^{6/}, and Oxford's New Jersey Provider

5/ Baird states he was notified on August 15 of the August 16 meeting. The Township asserts it sent notification of the meeting on August 10. The dispute is not material.

6/ The letter states specifically that "Oxford Health Plans of NJ agrees to provide benefit levels which are equal to or better than the current plan for the employees of Township of Union with no loss of coverage levels as long as it can be documented that such loss has occurred. If it can be documented Oxford Health Plans will correct and readjudicate the claim...Oxford Health Plans understands that there is potential for misunderstandings during a transition to any new carrier. For this reason, we have taken the necessary steps to assure that we are prepared to work with you and your members to identify and resolve any specific issues we encounter as we transition your plan."

Directory. Additionally, he gave an oral presentation detailing key benefits and services provided by Oxford.

Also, Munoz assured those present that he had reviewed Horizon's benefit book and that Oxford's "equal to or better than" guarantee letter was based on his review of those benefits. Next, he explained that although he had provided a draft summary of benefits, if Oxford was awarded the contract, a formal benefits book would be prepared and distributed to every employee as was custom in the industry.

As to the list of network providers, in addition to the written provider directory he distributed Munoz gave attendees an internet web site to access the most current network provider information. Munoz also explained the contractual arrangement between Oxford and First Health to provide national network services for employees and retirees outside of Oxford's coverage area and gave a web site for access to First Health information.

Finally, Munoz stated that for employees treated by doctors not participating in the Oxford/First Health network, coverage would be the same as was currently provided to employees under the Horizon plan who were treated by non-participating doctors. Specifically, he explained that under Oxford's traditional indemnity plan, employees could receive treatment from any physician or hospital, but, like Horizon, if an employee sought treatment outside of the network, claims would be paid at the

highest usual and customary rate (UCR) or 90% of the Health Insurance Association of America (HIAA) tables. These tables are used by Horizon and Oxford to determine UCR reimbursement rates to providers. The non-participating doctor could chose to bill the employee directly requiring the employee to seek reimbursement from Oxford. Any discrepancies between Horizon and Oxford payment would be matched by Oxford under the "equal to or better than" guarantee.

The unions then requested a reference list of other Oxford clients.

Either during or shortly after the meeting Bradley asked Munoz if benefit booklets could or would be supplied prior to the beginning of the coverage period. Munoz explained that this would not be possible because Oxford was offering a customized plan designed to match Horizon's benefits exactly, not an existing off-the-shelf plan. Munoz further explained that it was custom in the industry for detailed benefit booklets to be issued after the coverage period begins.

According to Munoz, benefit booklets are typically prepared from six to twelve months after the policy effective date.

Charging Parties' expert, Brian Golick, however, testified that it is customary in the industry to provide benefit booklets within the first two quarters of the policy year, but typically

for public sector employees within the first two months after coverage begins.

Both experts agree that benefits booklets are not prepared or provided until after the coverage period begins. In any event, regardless which expert is correct, Munoz informed Bradley during or after the meeting that the booklets would not be available before the coverage period and the reasons why they would not be provided before that time.

6. By letter dated September 6, 2001, PBA President Dale Baird informed Township Administrator Bradley that the PBA opposed any change in health carriers. He also advised Bradley that the PBA had insufficient documents from which to determine that Oxford would provide "at least equal to" coverage as provided by Horizon. Accordingly, Baird requested the following documents and information in order to analyze the coverage offered by Oxford and determine its cost effectiveness to the Township:

- (1) the insurance policy;
- (2) the summary plan description of health insurance coverage proposed by Oxford Health Insurance;
- (3) a copy of any analysis comparing benefits proposed by Oxford Health Insurance with those currently in place by Blue Cross/Blue Shield;^{2/}

^{2/} In an earlier letter dated August 16, 2001 to Bradley, PBA
(continued...)

(4) the provisions for coverage of retirees who live out of State by Oxford Health;

(5) premiums paid by the Township for Oxford coverage and current premiums for Horizon; and

(6) commissions, if any, paid by Oxford to obtain the Township's insurance business.

Baird suggested that no change in health insurance coverage be made until the PBA reviewed the foregoing information.

7. On September 10, 2001 the Township Committee met in executive session with union representatives who were invited to discuss the possible change in health insurance carrier. In attendance at the meeting were Bradley, Munoz, Migdon, Township Clerk/Assistant Administrator Nancy Issenman, Township Counsel Thomas Plaia and union representatives. Munoz and Migdon were present to answer any questions pertaining to the change in carrier but were excused, at the unions' request, at the beginning of the meeting.

Thereafter, the attendees discussed the possible change including the bidding process, the final quotes and the savings the Township would realize with Oxford. The unions raised concerns about out-of-state retiree coverage. Bradley assured

7/ (...continued)

Attorney Paul Kleinbaum also requested the insurance policy and summary plan description as well as any comparison of benefits which may have been done by the Township or Oxford.

them that Township Labor Counsel McCormack was reviewing the Oxford materials to confirm that the coverage would meet the "at least equal to" standard. McCormack was reviewing the same materials provided to the unions at the August 16 insurance committee meeting, namely Oxford's brochure describing its services, a draft summary of benefits, the coverage guarantee letter and the Oxford provider directory.

After two hours Migdon and Munoz were invited back before the Committee but there were no questions from the unions. Migdon and Munoz were informed by Bradley that the Township was giving the unions 45 days to review Oxford's proposal and raise any questions and that, thereafter, the Township Committee would make a decision on the proposal.

8. On September 21, 2001, in response to the September 6, 2001 letter from Baird requesting certain information, Infanger, on behalf of Bradley who was on medical leave provided:

- (1) a copy of the Horizon benefit booklet which she felt represented the Township's contract with Horizon;
- (2) Oxford's Health Plans information packet;
- (3) Oxford's draft of a summary of benefits for the Township;
- (4) a list of school boards and governmental entities currently utilizing Oxford; and
- (5) Oxford's letter guaranteeing benefit levels.

Infanger determined that this information was in response to the items 1 through 4 requested by Baird in his September 6 letter. Infanger did not address items 5 and 6 in Baird's September 6 letter which requested information regarding premiums paid by the Township for Oxford and Horizon coverage, and commissions, if any, paid by Oxford to obtain the Township's insurance business.

Infanger also informed Baird that although Oxford had given the Township information verbally regarding retirees, that information was not in writing but she had requested Oxford to provide a written summary of that coverage. She then confirmed that she would forward any additional information as received.

9. On October 10, 2001 PBA Attorney Kleinbaum responded to Infanger's September 21 letter. He asserted that the information provided was inadequate for purposes of comparing benefits and requested the following information:

1. A list of Oxford network doctors in the tri-state area as well as States in which retirees lived, namely, Florida, Nevada, Arizona and California;
2. For retirees, how Oxford intends to handle their benefits, whether their benefits will be any different and what specifically the benefits are under the new plan;
3. With respect to the administration of the plan, whether employees will have up-front costs for treatment, prescription etc. or whether it will be handled the same as the Horizon plan;

4. Oxford's COBRA rates for the last five years; and

5. Premiums paid by the Township for the Oxford plan.

10. On October 30, 2001 during the 45-day review period, Baird sent a letter to Township Mayor Peter Capodice confirming that the Township had provided certain information. However, Baird had not received and once again requested:

- (1) a copy of the Oxford insurance policy;
- (2) an analysis comparing both companies;
- (3) retiree coverage benefits under Oxford;
and
- (4) insurance premium quotes including any commissions paid to the insurance broker.

Baird also informed Capodice of PBA concerns relating to Oxford's inexperience with traditional insurance plans, its coverage limited to the tri-state area versus Horizon's nationwide coverage, and Oxford's smaller physician network (60%) in the tri-state area versus Horizon's (80%). He requested Capodice reconsider his position regarding the change in carriers.

11. In November 2001 Infanger was informed that the Township intended to accept Oxford's health insurance proposal replacing Horizon effective January 1, 2002. By memorandum dated November 13, 2001, she informed all Township employees of the change in carriers. Oxford informed retirees directly.

The memorandum explained Oxford's guarantee to provide benefits "equal to or better than" those provided by Horizon and advised the employees of educational meetings conducted by Oxford representatives in Town Hall from November 26 through November 29 for all employees and retirees. Also included with the memorandum was an enrollment packet which included Oxford's NJ provider directory and information relating to various Oxford services.

12. Information sessions were conducted on November 26, 27, 28 and 29, 2001 at which employees were given a formal presentation regarding the Oxford benefit plan and invited to ask questions. Several hundred employees and retirees attended over the four day period. In response to their concerns regarding Oxford's use of First Health for national network services, the Township and Oxford agreed to utilize Multi-Plan for national network services instead.

13. As a result of the FMBAs' November 30, 2001 filings of the unfair practice charges regarding the change in insurance carrier, the Township Committee decided not to adopt a formal resolution awarding the contract to Oxford until after the Commission issued its ruling on the request to enjoin the change in carriers.

14. On December 3, 2001 Bradley wrote Labor Counsel McCormack requesting his advice regarding the PBA request for a

copy of the health insurance proposals and confirming the Township's decision to change its carrier to Oxford.

15. In December 2001 Oxford prepared and sent to Migdon a draft Summary of Coverage to be distributed to all employees and retirees for review to ensure that it in fact matched the benefits previously provided by Horizon. Migdon conducted the review based on the Horizon benefit booklet which had been supplied to the unions and his general knowledge of the Township's benefit plan as the Township's health benefits broker.

In late December 2001, after he completed his review, Migdon sent Infanger the draft Summary of Benefits Coverage for active employees and retirees prepared by Oxford which she then distributed to all union representatives on December 26, 2001 and to all employees and retirees in early January 2002 together with Oxford membership cards.

16. On December 27, 2001 after the Commission Designee denied the unions' request to enjoin the change in carriers but granted other relief - e.g. an interim program to make employees whole for any differences in the Horizon and Oxford Plans and ordering the Township to provide documents in its possession within ten days regarding Oxford and Horizon coverage or to make every good faith effort to obtain the information requested - the Township Committee unanimously passed a resolution awarding the health insurance contract to Oxford effective January 1, 2002.

17. In late January 2002, Oxford prepared and sent to Migdon, for review draft Group Enrollment Agreements which constitute the formal contracts between the carrier and employer memorializing the agreement to provide coverage. It is customary within the insurance industry to prepare such agreements after the coverage period begins.

Migdon forwarded the drafts to the Township in February 2002 to review. The review was completed on May 2, 2002 after which Bradley signed the Group Enrollment Agreements on behalf of the Township. The Agreements were executed by Oxford on May 16, 2002 and returned to the Township on May 21, 2002. The agreements were immediately provided to the unions.

18. In July 2002 Oxford mailed to every employee and retiree a Member Benefit Handbook and Certificate of Coverage describing in detail the benefits provided by the Oxford plan. These documents together with the Group Enrollment Agreements and the Oxford guarantee letter of "equal to or better than" health coverage constitute the insurance plan documents.

19. At the end of July 2002 the Township received a report prepared by the FMBAs' expert, Brian Golick. The report identified 13 discrepancies between the Horizon and Oxford coverage plans. Golick based his findings on an examination of the Local 46 contract, the Horizon benefit booklet, Horizon's contract with the Township, Oxford's Summary of Coverage for

active employees and retirees provided on December 26, 2001, Oxford's revised Summary of Benefits provided on June 4, 2002, Oxford's Group Enrollment Agreement signed on May 16, 2002 and Oxford's Benefits Administration Guide.

Subsequently, over the course of several months Munoz and Golick, through the attorneys, exchanged letters addressing the discrepancies between Oxford and Horizon coverage identified by Golick. Munoz, by letter dated August 12 to Migdon, responded to the Golick comparison study. He disagreed with Golick's conclusions. Munoz felt that the comparison did not reflect the true benefits provided by Oxford and addressed each alleged discrepancy in a point-by-point analysis demonstrating that with the exception of a deductible for a second surgical opinion, Oxford's plan did provide "equal to or better than" coverage. Munoz recommended that this discrepancy be corrected.

20. During this period the FMBAs also requested information on the HIAA tables used by Horizon and Oxford in determining usual and customary rates (UCR) of reimbursement to providers. The Township responded on September 5, 2002 explaining that the insurance companies pay HIAA for the tables which are proprietary and prevent Oxford from disseminating them. However, it was the Township's understanding that the tables provided to Oxford, Horizon and other insurance companies are uniform. There was no

dispute that Oxford and Horizon both reimburse for out of network services at the 90th% of HIAA.^{8/}

21. On November 14, 2002 in a memorandum entitled "Amendment to Certificate", distributed to all employees and retirees, Munoz identified areas which needed further clarification or better illustration as a result of Golick's comparison. These were the areas he addressed in his August 12 letter responding to Golick's comparison study.

ANALYSIS

The issue in this case is not whether the Township provided relevant information to the unions upon request; there is no dispute that the Township had a duty to provide information regarding the Horizon and Oxford health insurance programs, both before and after the change in carrier from Horizon to Oxford. Rather, the issue in this case is whether requested information was provided to the unions in a timely manner. A collateral issue is whether the Township had a duty to request certain information it did not yet have in its possession from Oxford

^{8/} In a letter dated September 12, Golick wrote to the FMBA attorney that the subscription agreement entered into between the insurance company and HIAA or Ingenix is a licensure agreement and may prevent Oxford from disseminating the tables to the unions. Golick suggested that the FMBA request more pertinent information concerning how often Horizon and Oxford load up-dated HIAA tables into their respective systems. There is no evidence in the record that the unions requested this information.

and/or communicate its inability to obtain that information to the unions.

The unions assert that the Township failed to provide relevant, requested information during the critical period before its own decision to change carriers in November 2001. The unions contend this information would have strengthened their interim relief application seeking to restrain the carrier change. The information which was provided during the pre-carrier change period, they contend, was inadequate to enable them to compare benefit levels to insure that Oxford's benefits were equal to those provided by Horizon or, in the alternative, to establish that the change in carriers would change the level of benefits.

The Township contends that requested information was provided as soon as the Township had the information or was able to get it. The member benefit handbooks and group enrollment agreements, which were provided after the Oxford coverage period began in January 2002, as is customary in the industry, had not been prepared by Oxford or provided to the Township. Therefore, it contends, the Township could not provide information it did not possess and did not exist.

The Standard of Review

It is settled law in New Jersey that a public employer generally has a statutory duty to provide a majority representative with information relevant to an employee

organization's representational duties and contract administration, including grievance processing. Relevance is liberally construed - the information need only be related to the union's function as the collective negotiations representative and appear reasonably necessary for the performance of this function. Hardin and Higgins, Developing Labor Law 856, 859 (4th ed. 2001); J.I. Case Co. v. NLRB, 253 F. 2d 149, 41 LRRM 2679 (7th Cir. 1958). Relevance is determined through a discovery-type standard; therefore, a broad range of potentially useful information is allowed to the union for effectuation of the negotiations process. State of New Jersey (OER) and CWA, P.E.R.C. No. 88-27, 13 NJPER 752, 754 (¶18284 1987), aff'd NJPER Supp. 2d 198 (¶177 App. Div. 1988). Various types of information - particularly concerning terms and conditions of employment - are presumptively relevant. Specifically, an employer is obligated to provide documents and information about any change in health insurance plans. Lakewood Bd. of Ed., P.E.R.C. No. 97-44, 22 NJPER 397 (¶27215 1996).

The failure or refusal to provide information relevant to contract administration, such as health plan documents, is a refusal to negotiate in good faith. City of Atlantic City, P.E.R.C. No. 89-56, 15 NJPER 11 (¶20003 1988). See also, University of Medicine and Dentistry of New Jersey, 144 N.J. 511 (1996); UMDNJ (School of Osteopathic Medicine), P.E.R.C. No. 93-

114, 19 NJPER 342 (¶24155 1993); NJ Transit Bus Operations, Inc., P.E.R.C. No. 89-127, 15 NJPER 340 (¶20150 1989).

An employer must also provide relevant information in a timely fashion. The information, however, must be in the employer's control or possession before a violation will be found. State of N.J. (OER) and CWA, P.E.R.C. No. 88-27, 13 NJPER 752, 754 (¶18284 1987), recon. den. P.E.R.C. No. 88-45, 13 NJPER 841 (¶18323 1987), aff'd NJPER Supp. 2d 198 (177 App. Div. 1988); N.J. Transit Bus Operations, Inc., P.E.R.C. No. 88-12, 13 NJPER 661 (¶18249 1987), aff'g H.E. No. 87-65, 13 NJPER 423, 428 (¶18164 1987).

The Act's unfair practice provision parallels its counterpart in the National Labor Relations Act (NLRA) governing private sector labor relations. 29 U.S.C. 158 and 160. Precedents under the unfair practice provision of the federal act may guide us in interpreting our Act. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 159 n.2 (1978); Galloway Tp. Bd. Of Ed. V. Galloway Tp. Ass'n of Ed. Secretaries, 78 N.J. 1 (1978).

The federal cases set forth the general principal that an employer has an obligation to furnish to a union on request, information that is relevant and necessary to its representation of employees in its bargaining unit. Detroit Edison Co. V. NLRB, 440 U.S. 301, 303 (1979); NLRB v. Acme Industrial Co., 385 U.S.

432, 435-436 (1967); Woodland Clinic, MEBA AFL-CIO, 331 NLRB 735, 164 LRRM 1289 (2000). Moreover, an employer must respond to the information request in a timely manner. Leland Stanford Junior University, 307 NLRB 75, 80, 140 LRRM 1284 (1992). An unreasonable delay in furnishing information is as much a violation of Section 8(a)(5) of the NLRA as a refusal to furnish information at all. Valley Inventory Service, 295 NLRB 1163, 1166, 131 LRRM 1800 (1989).

In determining whether an employer unlawfully delayed responding to an information request, the Board applies a totality of the circumstances analysis. It requires a reasonable good faith effort to respond to the request as promptly as circumstances allow taking into consideration the complexity and extent of information sought, its availability and the difficulty in retrieving the information. Samaritan Medical Center, 319 NLRB 392, 398, 151 LRRM 1375 (1995); West Penn Power Company, 339 NLRB No. 77, 2003 NLRB Lexis 377 (2003). The Board does not expect an employer to supply information it does not have. Kathleen's Bakeshop, LLC, 337 NLRB 169, 171 LRRM 1131 (2002).

The Unions' Requests and Township Responses

Discussions between the Township and unions regarding the proposed carrier change began initially in the summer of 2001 and continued through the fall of 2001 regarding the proposed change.

Between August 16, 2001 and October 30, 2001, the unions themselves, or through their counsel or the Group Health Insurance Review Committee, requested copies of the insurance policies and summary plan descriptions of any plans which the Township was considering "before any new insurance is implemented" (Kleinbaum letter to Bradley dated August 16, 2001) as well as the following information:

1. Reference list of Oxford clients
2. Any analysis comparing benefits
3. Oxford out-of-state retiree coverage
4. Premiums paid for Horizon and Oxford coverage
5. Commissions, if any, paid by Oxford to the Township
6. List of network doctors in the tri-state area as well as other States, specifically, Florida, Nevada, Arizona and California.
7. Oxford's COBRA rates for the last five years.^{2/}

In response to these requests Oxford representative Munoz distributed information to the unions on August 16, 2001 including a brochure describing Oxford's services, a draft summary of Oxford benefits, a letter guaranteeing benefits "equal to or better than those provided by Horizon and Oxford's New

^{2/} In an October 30, 2001 letter to the Mayor, PBA President Baird conceded that the Township had provided "certain information" previously requested by the PBA. He then listed information which had not been provided. COBRA rates are not listed. Thus, I infer that this information was previously provided.

Jersey provider directory. Additionally, on September 21, 2001, in response to PBA President Baird's September 6 request for information, Infanger provided Munoz' previously distributed materials as well as the Horizon member handbooks (the "contract" with Horizon) and a list of Oxford clients. She also confirmed that she had asked Oxford to provide a written summary of retiree health coverage which the unions had requested and would forward this information to the union upon receipt.

As to the Oxford insurance policy, there is no single document which represents the insurance policy or contract in the context of group health insurance. The plan consists of a series of documents including the certificate of coverage/member benefit booklet, the group enrollment agreements and, in this instance, the Oxford guarantee letter. Since the group enrollment agreements and certificate of coverage/member benefit handbooks did not exist until May and July 2002 respectively, Infanger responded to the PBA's requests for the insurance contract or plan documents as well as a comparison of benefits by providing, among other items, a copy of Horizon's benefit's booklet which she considered the insurance contract with Horizon, Oxford's letter guaranteeing coverage equal to Horizon and Oxford's draft summary of benefits. Subsequently, on December 26, 2001 the unions were provided with Oxford's draft summary of coverage for

active and retired employees detailing the benefits provided by Oxford and coverage limits.

As to the summary plan description, the Township contends that this document does not exist. The unions do not dispute this contention.^{10/}

As to the unions' request for any comparison of benefits, such a comparison was undertaken by Township Labor Counsel and Migdon separately. Each examined materials previously provided to the unions, including a draft summary of Oxford benefits, the Horizon member benefits booklet, Oxford's "equal to or better than" guarantee letter and Oxford's New Jersey Provider Directory. They concluded that the level of benefits offered by Oxford matched Horizon's.

Our cases do not require an employer to prepare a comparative written analysis of information provided to unions. Additionally, there is no evidence to support that the Township withheld any such written comparison from the unions.^{11/} The

^{10/} I take administrative notice that a summary plan description of an employee benefit plan is a document required under ERISA, 29 U.S.C. §1022 to be maintained and furnished to participants and beneficiaries which summarizes generally the benefits and administration of such plan. The summary plan description requirements of ERISA, however, do not apply to government-sponsored health benefits programs. 29 U.S.C. §1003(b)(1).

^{11/} The FMBAs assert in their brief that because the respective contracts require the Township to maintain benefits levels "at least equal to" Horizons, when it changed carriers, it
(continued...)

Township attorney and insurance agent compared benefits based on the same material previously provided to the unions. Their oral assertions that an analysis was completed and conclusions reached that benefit levels were the same satisfied its statutory obligation regarding a request for any comparison of benefits. See generally, New Jersey Department of Higher Education, P.E.R.C. No. 87-149, 13 NJPER 504, 505 (118187 1987) (where Commission determined that employer fulfilled statutory obligation to provide information by orally disclosing contents of memorandum concerning initial salaries of employees. It found that information need not be disclosed in the precise form requested.)

Finally, the Oxford Group Enrollment Agreement provided to the unions in May 2002 contained information concerning premium rates among other specific items.

The PBA asserts that the above-detailed information was not responsive because the documents did not enable the PBA to meaningfully compare levels of benefits. The comparison of

11/ (...continued)

must have conducted a comparative analysis. They postulate that detailed information must have existed which was not provided to the unions in order for Township Labor Counsel and/or insurance broker to conduct such an analysis. They provide no factual support for this conclusion. Moreover, certifications of Bradley and Migdon support that counsel and Migdon relied on the same documents presented to the unions to conduct their reviews.

benefits prepared by the FMBAs' expert, Golick^{12/}, utilized documents provided both before the change in carrier (Horizon's benefit book, the Local 46 contract, and Oxford's December 26 draft summary of benefit coverage) and after the January 2002 carrier change (Oxford's revised summary of benefits provided on June 4, 2002 and the group enrollment agreement^{13/}). It is undisputed that the group enrollment agreements, the June 4, 2002 revised summary of benefits as well as the member benefit handbooks containing the final statement of benefits did not exist prior to the change in carriers nor was it custom in the industry for the group enrollment agreements or member benefit booklets to be prepared and distributed until after the coverage period begins. Both the Township and the FMBA's expert concur on this fact although there is some dispute as to how long after the coverage period begins member benefit handbooks should be available.^{14/} (See Finding of Fact no. 5). This dispute as to

12/ The PBA did not retain a separate expert and appears to rely on Golick's comparison of benefits.

13/ Golick's comparison relied also on Oxford's benefits Administration Guide. It is unclear from the record before me when this document was provided.

14/ In any event, all parties agree that member benefit handbooks are customarily produced after the coverage period begins - anywhere from six months after (union expert) to within the first coverage year (Township expert). The booklets were produced in July 2002 seven months after the start of the coverage period. The one month discrepancy does not constitute a significant delay. (See Findings of

(continued...)

member benefit handbooks is not material because the comparison prepared by Golick did not utilize the Oxford member benefit handbook as a source material. Additionally, the crux of the unions' charges concerns the failure of the Township to provide the information **before** the change in carrier so that it could do a meaningful comparison of benefits. It was not possible to comply with their requests regarding the Oxford member handbooks or group enrollment agreements before the decision to change carriers or the coverage period began, because these documents did not exist.

It is apparent that the Township gave the unions information it had in its possession at the time each request was made or, in the alternative, made an effort to acquire the information from Oxford. For example, the written summary of retiree benefits was requested by Infanger and was provided. Also, Bradley asked Munoz at the August 16 meeting whether member handbooks could or would be supplied prior to the coverage period. It is also apparent that although certain information - e.g. member handbooks and group enrollment agreements constituting the insurance contract - was not available in the period before the decision was made to change carriers or coverage with the new carrier began, it was not standard in the industry for such

14/ (...continued)
Fact nos. 5 and 18).

documents to be prepared until after the coverage period began. Nevertheless, the unions possessed sufficient information on Oxford's plan before the change in carrier, such as the size of its provider network, to convince the Commission Designee to order the Township to set up an interim program to ensure benefit levels would not change and employees would be made whole for any out of pocket expenses resulting from the change. To that extent a meaningful comparison of benefits was accomplished during the critical period before the change in carriers was finalized.

Finally, by July 2002, when member benefit handbooks were distributed (the revised summary of benefits and group enrollment agreements had been provided in the preceding two months), the FMBAs' and PBA's requests for information had been satisfied. By his own testimony, the FMBA's expert (Golick) had sufficient information to prepare a comparison study which he shared with the Township at the end of July 2002. The Township responded to each identified discrepancy and made changes in an Amendment to Certification of the Oxford policy.

Timeliness of the Township's Response to Information Requests

Both the PBA and FMBAs contend that the delay in providing plan documents until after the coverage period began constitutes a violation of our Act. The requested information, the unions assert, was not just relevant but time sensitive because they sought, through an interim relief application, to enjoin the

change in carrier based on a change in the level of benefits. Therefore, they contend, the information was necessary before the decision to change carriers was made in November 2001.

There is no dispute that the information sought was relevant. Moreover, our cases hold that although a change in carrier is a managerial prerogative, where the change in carrier affects the level of benefits or administration of the plan, mandatory subjects of negotiations, then the employer must negotiate before changing the carrier. See Township of Union, P.E.R.C. No. 2002-55, 28 NJPER 198 (¶33070 2002) citing City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439, 440 (¶12195 1981). Therefore, to the extent that the lack of information prevented the unions from doing a meaningful benefits comparison and establishing a negotiations obligation existed before the carrier change, the information sought was time sensitive. The unions assert that the failure of the Township to provide certain documents before the interim relief application was made rendered the information useless. That argument lacks merit in this case because the facts show the Township consistently provided the unions with information within a reasonable time of receiving it. The employer was not obligated to provide the unions with information it did not have, even if that meant the unions would be unable to make a more accurate comparison of the health plans.

The cases cited by the PBA and FMBAs in support of their contention that the Township's delay in furnishing information constitutes a violation of our Act are distinguishable from the matter before me. These cases generally involve situations where the employer has the information in its possession or control and either refuses to provide it or delays providing it with no excuse or a spurious explanation for its failure to provide clearly relevant information which amounts to bad faith. See generally, The Electric Materials Company and United Electrical, 2002 NLRB LEXIS 540 at *189-192 (November 1, 2002) (where during contract negotiations, the employer had certain wage information requested by the union which the employer acknowledged was relevant but delayed supplying for six months because of asserted internal administrative difficulties in sorting the material.); Jewish Federation Council, 306 NLRB 507, 139 LRRM 1351 (1992) (where employer refused to supply information regarding employee's termination pre-arbitration.); D.J. Electrical Contracting, 303 NLRB 820, 139 LRRM 1079 (1991) (where employer only supplied information after commencement of hearing and failed to offer any explanation for delay.); Operating Engineers, Local 12, 237 NLRB 1556, 99 LRRM 1196 (1978) (where employer refused to supply relevant information in its possession concerning wages, dates of hire and job classification of unit members until after unfair practice charge was filed.); Pennco,

Inc., 212 NLRB 677, 87 LRRM 1237 (1974) (where employer at first did not respond to union requests during contract negotiations for clearly relevant information in its possession - a seniority roster, rates and classification of unit employees and a list of all fringe benefits - and then supplied incomplete information.); c.f. Newspaper and Periodical Drivers, Local No. 921, 309 NLRB 901, 142 LRRM 1260 (1992) (where Respondent union delayed for four months supplying the employer information on wage earnings of reinstated employee contending information was not relevant to issue of back pay. Board found union failed to offer adequate explanation for its failure to provide the information in a timely manner and its subsequent compliance did not cure the violation.).

Unlike these cases, the Township responded, on several occasions, in the months proceeding the change in carrier to requests for information, including information distributed at Group Health Insurance Committee meetings, a letter from Infanger, informational sessions and communications between the attorneys which resulted in the exchange of information. The only information the Township did not immediately provide (group enrollment agreements and member benefit handbooks) was **information it did not have in its possession or control and/or information which did not exist.**

Additionally, the cases cited by the unions, that the information, when finally provided, was useless to them, were not persuasive here. For instance, in Serramonte Oldsmobile, Inc., 318 NLRB 80, 151 LRRM 1373 (1995), the employer informed the union on September 14 of its intention to use a new healthcare provider for portions of its health insurance plan beginning October 1 and offered to bargain with the union over changes prior to implementation. A week later the union requested certain information in order to evaluate the proposed changes to the healthcare plan. The plan was implemented on October 1 and the information was provided on October 22. The delay was attributed by the employer to difficulty in collating the material. The Board found the employer's failure to provide the requested information in a timely manner to be an unfair labor practice.

Serramonte is distinguishable in several respects from the instant matter. First, in Serramonte the employer had physical possession of the requested information and provided a flimsy excuse for its delay in releasing it to the union (alleged internal administrative difficulties in sorting the material). Here the Township had to first obtain the information from Oxford and/or the information did not exist. Upon receipt of the information, such as the group enrollment agreements and member handbooks, it was immediately forwarded to the unions.

Next, in Serramonte the union was given only two weeks notice of the change in carrier and the information which was provided after the change rendered the employer's offer to negotiate before the change useless. Here, the Township notified the PBA and FMBAs months before a decision was made to change carriers and provided documents and conducted informational sessions for employees and retirees with Oxford representatives. The PBA and FMBAs had enough information on the Horizon and Oxford provider networks to influence the change from First Health nation-wide network to Multi-Plan and to establish that there was a change in level of benefits before the Commission Designee, thus obtaining interim relief. Therefore, the information provided before the change in carrier was not "useless". See also, Woodland Clinic, supra, (where during contract negotiations, union requested employee home telephone numbers in order to communicate with unit members. The employer initially agreed to provide the information and then delayed supplying the requested information without explanation for one month and finally released it one day before impasse was declared, thus severely reducing the usefulness of the information to the union.).

Township's Duty to Request Specific Information from Oxford and to Communicate its Inability to Provide Requested Documents

The PBA and FMBAs assert that the Township violated the Act by failing to obtain information which was not in its possession. They contend that the Township had to make a reasonable effort to secure the member benefit handbooks and other plan documents from Oxford or explain to the unions the reason why it could not.

The PBA relies on United Graphics, 281 NLRB 463, 123 LRRM 1097 (1986) and Doubarn Sheet Metal, 243 NLRB 821, 824, 101 LRRM 1556 (1979) in support of its contention. These cases, however, are distinguishable.

In United Graphics, the Board found a violation where the employer failed to obtain information from a third party which the union had requested - e.g. names, addresses, wages and benefits of temporary workers employed by an outside employment agency. Respondent employer refused to supply the information because the workers were not in its employ, were not bargaining unit employees and the information was not in its possession.

In rejecting the employer's defenses, the Board found that information regarding names was in the possession of the employer according to the stipulated facts. As to the other information sought by the union but not in its possession, Respondent never demonstrated it requested the information from the third party employment agency and that the information was unavailable.

Here, the PBA asserts that the Township never demonstrated that it requested more specific information from Oxford. However, the facts do not support this contention. Specifically, Bradley asked Munoz after the August 16, 2001 meeting of the Group Health Insurance Committee whether Oxford could provide detailed member handbooks prior to the beginning of the coverage period. Oxford representative Munoz explained that the booklets could not be prepared in that time frame because Oxford was offering a customized plan designed to match Horizon's benefits exactly, not an existing off the shelf plan and further that it was industry custom to issue detailed benefit booklets after the coverage period begins.

The PBA also asserts that it was not told nor given reasons why the insurance documents - e.g. member benefit handbooks -- would not be available until after the coverage period began or that it was industry custom not to provide such documents until then. It relies on the certification of PBA President Baird and PBA attorney Paul Kleinbaum. This failure to communicate, the PBA contends, is a violation of the Act.

However, neither Kleinbaum nor Baird was present at the August 16 2001 insurance committee meeting where Munoz explained to the attendees that if Oxford was awarded the contract with the Township to provide its health insurance, a formal benefits book would be prepared and distributed as was custom in the industry.

The PBA was represented by Detective Greg Rossi at the meeting. Detective Rossi provided no certification. Therefore, I rely on the certification of Munoz as to the information communicated at the August 16 meeting and find that the PBA, through its representative, was notified of the unavailability of the member handbooks and industry custom.

Doubarn is also distinguishable. In that case the information requested was uniquely in the possession of the employer, namely information regarding the business relationship between the employer corporation and a second corporation which had common owners and officers. Rejecting Doubarn's general assertions that it answered the union's inquiries and further information was unavailable, the Board found the information was uniquely within Doubarn's knowledge and control.

Here, unlike Doubarn, the Township provided specific information to the unions it had in its possession or as soon as it received it from Oxford. It's inability to furnish documents - e.g. member benefit handbooks -- which did not exist, is not the same as a statement generally that information is unavailable.

Finally, citing Assoc. of D.C. Liquor Wholesalers, 300 NLRB 224, 135 LRRM 1270 (1990), the FMBAs contend that the Township violated the Act by relying on Oxford's "equal to or better than" guarantee letter to satisfy the unions' requests concerning the

level of benefits and not requesting or providing more specific information. It contends that this letter amounted to a vague and general assertion which did not satisfy the FMBAs' request for information to do a comparison of benefits.

The Township counters that it never relied solely on the "equal to or better than" letter as a response to the information requests but provided the letter in conjunction with other specific and detailed information. I agree. The guarantee letter was not a "general assertion" concerning the Oxford benefits but part of an informational package consisting of documents including, but not limited to, summary of benefits coverage, provider directory, web sites, and Horizon member booklet as well as informational sessions and other meetings with union representatives.

Based upon the above findings and analysis, I make the following:

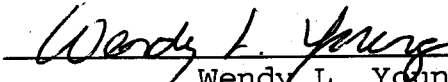
CONCLUSIONS OF LAW

Under a totality of the circumstances analysis, the Township did not unlawfully delay in responding to the unions' information requests. The Township made a reasonable good faith effort to respond to the unions' information requests on health benefits and the change in carrier by providing information it possessed in a timely manner, seeking information from Oxford which it did not have and providing the unions with information as soon as it

obtained it. Samaritan. Additionally, the information provided was useful in that it established a change in level of benefits during the critical period before the change in carrier. Consequently, the Township did not violate N.J.S.A. 34:13A-5.4a(1) and (5).

DECISION AND RECOMMENDED ORDER

The Motion for Summary Judgment is granted. I, therefore, recommend that the Complaint be dismissed.



Wendy L. Young
Hearing Examiner

Dated: November 14, 2003
Trenton, New Jersey