P.E.R.C. NO. 2022-45

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RIDGEFIELD BOARD OF EDUCATION,

Respondent

-and- Docket No. CO-2020-061

RIDGEFIELD EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants a motion of the Ridgefield Education Association for summary judgment on its unfair practice charge alleging that the Ridgefield Board of Education violated subsection 5.4a(5) and, derivatively, 5.4a(1) of the Act when it unilaterally announced that unit members must work at least 32 hours per week to be eligible for health insurance benefits. The Commission finds that although the parties' agreement is silent on the issue, the record supports a past practice by which benefits were made available to those who worked less than 32 hours per week; but the record does not reflect a precise minimum benefits threshold. The Commission further finds that the Board ill-advisedly relied on an opinion from an employee of the Division of Pensions and Benefits, as it omitted the controlling statute and regulation, which provide employers discretion to establish a benefits threshold of 25 hours or more. As a remedy, the Commission orders the Board to negotiate in good faith over any proposed changes to the health benefits eligibility requirement; and further orders the parties to make a good faith effort to mutually determine the status quo ante with respect to the minimum weekly work hour requirement for health benefits, subject to further Commission proceedings as needed if, within 120 days, such effort is not successful.

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

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Appearances:

For the Respondent, Cleary Giacobbe Alfieri Jacobs, LLC (Bradley D. Tischman, of counsel)

For the Charging Party, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, PC (Albert J. Leonardo, of counsel)

DECISION

On September 6, 2019, the Ridgefield Education Association (Association) filed an unfair practice charge (UPC or Charge) against the Ridgefield Board of Education (Board) alleging the Board violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically subsection 5.4a(5), and, derivatively, 5.4a(1),[1/] when, on August 1, 2019,

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 (continued...)

it unilaterally increased the work-hours per week requirement for Association members' eligibility for health insurance coverage by the Board. The Charge alleges the Board's action was: contrary to a past practice by which employees working at least 25 hours per week were eligible for health insurance coverage; and constituted unilateral changes to terms and conditions of employment, in violation of the Act. On April 27, 2021, the Director of Unfair Practices issued a Complaint and Notice of Pre-Hearing on the UPC's allegations.

On February 16, 2022, the Association filed a motion for summary judgment, supported by a brief, exhibits and the certification of its President, Darla Ferdinand. On March 1, 2022, the Board filed a cross motion for summary judgment, supported by a brief, exhibits and the certification of its Business Administrator, Julyana Ortiz. On March 8, 2022, the Association filed a reply brief in opposition to the Board's cross motion for summary judgment.

We have reviewed the record, and we summarize the undisputed material facts as follows.

SUMMARY OF FACTS

1. The Board and the Association are, respectively, public employer and public employee representative within the meaning of the Act, and subject to its provisions.

1/ (...continued)
representative."

2. The Association is the exclusive collective negotiations representative for all certificated full-time and regular part-time teaching staff members, including non-certificated Licensed Practicing Nurses, and excluding supervisors and administrators.

3. The Association and the Board are parties to a collective negotiations agreement (CNA) effective from July 1, 2020 through June 30, 2024, which succeeded a CNA in effect from July 1, 2017 through June 30, 2020.

4. The 2020-2024 CNA and the 2017-2020 CNA each contain, at Article 22, a provision entitled "Insurance Protection," which states, in pertinent part:

> A. The Board shall provide health-care insurance protection for school employees. The employee shall be entitled to any plan encompassing all provisions under the New Jersey State Health Benefit Plan, or equal or better than any other health plan that provides like coverage. The Board medical plan shall include the State Health Plan Prescription Drug Plan.[2/]

5. Both CNAs are silent on the subject of whether or to what extent, if any, an employee's eligibility for health insurance benefits is or was contingent upon any specific amount of hours worked per week.

6. Both CNAs specify a 185-day work year, but they contain no provisions addressing or defining the length of a work day or work week in terms of hours (or otherwise), nor do they specifically address the subjects of full- or part-time employment, or otherwise define them.

7. The record contains no evidence that the Board ever adopted a resolution relating to a minimum number of weekly work hours required for employee entitlement to health insurance benefits.

2/ The 2020-2024 CNA included the following additional language at Article 22(A): "Employees shall contribute to his/her health benefits plan in accordance with the rates set forth in Ch. 78, P.L. 2011, unless modified by future law."

8. In 2019, an Association unit member, J.S., submitted a proposal to the then Interim Superintendent to reduce J.S.'s weekly work hours from a full-time to a part-time schedule of approximately 26 hours per week. J.S. sought and was provided with representation from the Association with respect to his request.

9. In order to address J.S.'s request, on July 15, 2019, Ortiz emailed the following inquiry to the New Jersey Division of Pensions and Benefits (DPB):

> We have a teacher switching from Full-Time to Part-Time. What are the minimum amount of hours the teacher has to work to be eligible for [health] benefits? We do not have any resolutions filed stating the minimum hours required to work to be offered benefits. Our current part-time employees are not offered benefits.

10. On July 16, 2019, Ortiz received the following response from a DPB representative:

> Following is from Employer's Pensions and Benefits Administration manual for SHBP/SEHBP [State Health Benefits Plan/School Employees Health Benefits Plan] which is located at [web link omitted]:
>
> When an employee changes from active full-time employment to part-time employment, the employee's coverage in the SHBP/SEHBP will be terminated, unless the employee is eligible for coverage under Chapter 172.
>
> Full-time status is defined as a minimum of 35 hours for state employees, 32 hours for local government or education employees. If coverage is terminated, the employee may continue coverage under the COBRA program. Should employment resume to full-time status, the employee must reestablish eligibility for coverage and wait two months before coverage will become effective.
>
> Chapter 172 will not apply in this case since your location is a local board of education. Please refer to "Health Benefits Coverage for

> Part-Time Employees" which is located on our website at [web link omitted].

11. On July 18, 2019, Ferdinand met with then-Superintendent Rory McCourt to discuss J.S.'s proposal. In a follow-up email to McCourt, Ferdinand wrote, in pertinent part:

> As I explained today, the Association's understanding is that as long as the employee works a minimum of 25 hours per week, he/she is eligible for Health & Medical benefits. While a higher threshold of minimum hours could be established, it would need to be negotiated as per PERC law, and in our case, it has not been.
>
> To support the Association's understanding of the 25-hour minimum, I cite the following:
>
> 1. See page 5 of the NJ Direct Member handbook, below and attached [attachment omitted].
>
> "The New Jersey State Health Benefits Program Act defines eligibility for SEHBP for local employees as no less than 25 hours per week, or more if required by contract or resolution."
>
> 2. See page 8 of the Department of Treasury, Division of Pensions and Benefits Handbook, also attached [attachment omitted].
>
> 3. In addition, as one past example, former RMHS Korean language teacher, [Y.K.], was full-time then made part-time and received health and medical benefits during the school year(s) that her teaching schedule put her over the 25 hours per week threshold.

12. On August 1, 2019, McCourt replied, in pertinent part, as follows:

> To ensure the most thorough review of [J.S.'s] proposal was conducted, I requested the Board Attorney review his proposal in conjunction with (1) the information Julyana received [on July 16, 2019] from the New

> Jersey Department of Pensions and Benefits, and (2) the information you kindly provided to us. However, the Board Attorney confirmed the same after her review.
>
> . . . [excerpt from DPB's July 16, 2019 email to Ortiz (item 10, supra) omitted.]
>
> Additionally, we reviewed the situation relative to [Y.K.] and found that the Board of Education did agree to provide benefits to her for a temporary three-month period of time. However, the Board did not pass a resolution agreeing to provide benefits to part-time employees indefinitely under a certain amount of hours.
>
> Therefore, [J.S.] would not be eligible for benefits under the proposal he submitted to Mr. Petrelli.
>
> To that end, I will write [J.S.] to let him know the Board cannot meet his proposal as is. However, I will also let him know that the District is amenable to reducing his current full-time position as a Social Worker/SAC to that of a part-time Social Worker under the stipulations that (1) he would not be eligible for health benefits as an employee of the District, and (2) he would still need to also retain the SAC position, although part-time at a stipend amount prorated to his new salary.
>
> I will also confirm for [J.S.] that the District still employs him as a full-time Social Worker/SAC, which will be his status assuming he no longer wishes to pursue a reduction in your [sic] hours. However, if he does wish to proceed with the proposed reduction in hours under the circumstances above, to please let me know in writing by Friday, August 15th.

On August 2, 2019, McCourt sent a similar email to J.S., informing him that he "would not retain benefits" if he reduced his hours to encompass a work schedule of "25 hours

per week, which [J.S.] proposed would enable [him] to remain eligible for health benefits."

13. Ferdinand responded to McCourt on August 1, 2019, in pertinent part as follows:

> Since this completely contradicts what our long-standing mutual understanding of part-timers eligibility for benefits is, I will be referring this to our NJEA legal counsel. I'll get back to you as soon as I have a legal opinion.
>
> As an aside, [Y.K.] had benefits for the remainder of the school year once her working hours increased. It was never offered to her as a temporary (3 month) benefit from the board; rather it was a mutual understanding between the Association, the then superintendent (Romano) and the former BA (Villanueva) that [Y.K.] was legally eligible for benefits due to her new schedule exceeding the 25 hours threshold. I have copious notes and emails to support this. I am not sure where the information for a 3-month temporary gift of benefits from the Board came from, but that is not at all what was discussed.

14. By email to McCourt dated August 14, 2019, J.S. withdrew his proposal to work part-time, and advised that he would return as a full-time employee.

15. The Association filed its UPC on September 6, 2019, challenging McCourt's August 1, 2019 email (item 12, supra) as constituting "unilateral changes to the terms and conditions of employment, specifically, increasing the work hours per week requirement for eligibility for health insurance coverage."

16. The record contains evidence that on one prior occasion the Board proposed in negotiations a minimum weekly work hour threshold for health insurance benefits eligibility for teachers; and on another prior occasion the Board came close to considering taking action by resolution to establish such a threshold for all employees, including teachers. But on those prior occasions such requirements were neither agreed upon nor enacted:

A. Ortiz certifies that during negotiations for the 2020-2024 CNA, the Board proposed a 30 weekly work hour threshold for health benefits eligibility. However, the relevant language of Article 22, Section A remained unchanged from the 2017-2020 CNA.

B. In 2016, Item 10 on the Board's agenda for its September 8 public meeting listed a proposed resolution, entitled Establishment of Medical Benefits Eligibility, by which the Board "wishe[d] to establish that all employees must work not less than thirty (30) hours per week to receive health benefits under the Board's current medical insurance coverage." But the Board pulled the resolution from its agenda, and took no action on it, after the Association objected in an email sent by Ferdinand to the then-Superintendent prior to the Board's September 8 meeting, as follows:

> The Association advices [sic] that Resolution Item #10 on the Board of Education Meeting Agenda for this evening, Thursday, September 8, 2016 be pulled, as it poses a violation for the following reasons.
>
> 1) This resolution violates PERC as it is a mandatorily negotiated topic that has not been negotiated. (See PERC Law)
>
> 2) The thirty work hours stated in the resolution violate the REA contract. (See the Article 1, Paragraph 2 of the Secretarial Contract[3/])
>
> 3) The New Jersey State Health Benefits Program Act defines eligibility for SEHBP for local employees as "no less than 25 hours per week, or more if

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3/ The record contains excerpts from a 2017-2020 and a 2020-2024 CNA between the Board and the Association, covering a unit of secretarial employees, each of which specifies that insurance benefits are not applicable to unit members who work fewer than 24½ hours per week; and a 2018-2021 CNA between the Board and the Ridgefield Teaching Assistants Association, specifying that the benefits are not applicable to those working fewer than 25 hours per week.

required by contract or resolution". (See page 3 of the Department of Treasury, Division of Pensions and Benefits Handbook).

17. The record also contains evidence of prior occasions when certain teachers employed by the Board received health insurance benefits while working in less than full-time positions:

    A. A teacher, E.B., received health insurance benefits prior to the 2013-2014 academic year, when she worked as a "4/5 teacher." A "4/5" position equates to a ".8 FTE"[4/]. Commencing with the 2013-2014 school year, at her own request, E.B.'s position was reduced to that of a "2/5 teacher," whereupon she obtained health insurance benefits through COBRA.

    B. Another teacher, Y.K., worked full-time through the 2016-2017 school year. For the 2017-2018 school year, the Board reduced Y.K.'s position to that of a ".67 FTE teacher". In September of 2017, Y.K. emailed the then-Superintendent, concerned over her "loss of full-time status and ... health benefits." Y.K., accompanied by Ferdinand, subsequently met with the Superintendent regarding this issue. During a public meeting on October 12, 2017, the Board adopted a resolution approving "the increase of employment for [Y.K.] from (.67) to (.83) . . . effective October 16, 2017 through June 30, 2018." The Board does not dispute the Association's assertion that Y.K. received health insurance coverage from the Board for the entirety of the 2017-2018 school year, including while working in the .83 FTE position.

4/ As the term "FTE" is not defined in the record, we take administrative notice of the following Wikipedia entry: "Full-time equivalent (FTE). . . is a unit that indicates the workload of an employed person (or student) in a way that makes workloads or class loads comparable across various contexts. . . . An FTE of 1.0 is equivalent to a full-time worker or student, while an FTE of 0.5 signals half of a full work or school load." https://en.wikipedia.org/wiki/Full-time_equivalent.

We find that the parties are at odds over, and/or that there is insufficient documentary (or other) evidence from which to establish undisputed material facts, with regard to the following aspects of the record:

- The Association certifies that the Board, at all material times and in accordance with past practice, would deem employees working at least 25 hours per week as eligible for health insurance coverage.

- Ortiz certifies that since January 16, 2019, when she began performing the Business Administrator role, the District has "consistently maintained the position" that Association members must work at least 30 hours each week to receive health insurance benefits from the District, pursuant to the Patient Protection and Affordable Care Act ("ACA"), 26 U.S.C. § 4980H(c)(4). Ortiz further certifies that she "was not privy to any discussions with respect to this issue prior to 2019."

- The Board certifies as to a lack of any District records establishing 25 weekly work hours as the threshold for Association members to receive health benefits.

- The record contains no information or documents responsive to interrogatories posed by the Association to the Board, seeking to ascertain: (1) the amount of hours Y.K. worked per week for each week of the 2017-2018 academic year; (2) the number of hours E.B. worked per week for the 2009-2010 through 2012-2013 academic years; and (3) the dates those employees received health insurance and/or a prescription drug plan from the Board, during the relevant years.

- Ortiz certifies that she was "unable to determine" the precise number of hours that corresponds to either the (.8) FTE designation during the 2012-2013 school year, the last year that E.B. received health insurance benefits from the District, or to Y.K.'s (.83) FTE designation during the 2017-2018 school year.

STANDARD OF REVIEW

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). N.J.A.C. 19:14-4.8(e) provides:

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

In determining whether there exists a "genuine issue" of material fact that precludes summary judgment, we must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540. We "must grant all the favorable inferences to the non-movant." Id. at 536. No credibility determinations may be made and the motion must be denied if material factual issues exist. N.J.A.C. 19:14-4.8(e); Brill, Judson, supra. The summary judgment procedure is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 183 (App. Div.

1981), certif. denied, 87 N.J. 388 (1981); UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

ARGUMENTS OF THE PARTIES

The Association argues it is entitled to summary judgment because the Board altered the requirements for health insurance coverage, a mandatorily negotiable topic, without negotiations with the Association. By unilaterally changing the eligibility requirement, the Association contends, the Board reduced the level of health insurance coverage, thereby eliminating it for some members, and violated its duty to negotiate in good faith. The Association further contends that, prior to the Board's unilateral action, Association members needed to work a minimum of 25 hours per week in order to qualify for health insurance coverage from the Board. The SEHBP Summary Plan Description and N.J.S.A. 52:14-17.26(c)(2) make clear, the Association argues, that employees who work at least 25 hours per week can be deemed full-time for purposes of health insurance eligibility.

The Association contends the Board's acknowledgment of and prior compliance with a past practice establishing the 25-hour minimum is evidenced by the Board's adjustment of Y.K.'s schedule to a (.83) position in the 2017-2018 school year (following Y.K.'s voicing concern over losing her health benefits at a (.67) position), and the Board's rescission (following the Association's objection) of the September 2016 resolution that

would have established a 30-hour minimum. The Board's withdrawal of the resolution, the Association argues, was an "adoptive admission" of, and consent to, a governing past practice of a 25-hour threshold for benefits. The Association contends the appropriate remedy is for the Commission to order the Board to restore the prior 25-hour minimum.

The Board, in support of its cross-motion, argues that it is entitled to summary judgment as a matter of law. It contends: there is no "legal basis" for the Association's claim; there is a "lack of anything in writing" reflecting that the Board ever recognized a 25-hours per week threshold for health benefits; agreed-upon terms to that effect in other CNAs are not enforceable with respect to Association unit members; and the facts that over the prior ten-year period two Association members received health benefits while working between 25 and 30 hours per week, and that the Board withdrew its 2016 resolution, are insufficient evidence of a past practice establishing a 25 weekly work-hour threshold for health benefits.[5/]

The Board further argues that the Complaint is premature and that there is a lack of a "current dispute" because: the work

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5/ The Board argues that because the parties' CNA does not specify the number of hours that Association members must work in order to be eligible for health insurance, the appropriate "gap filler" is 30 weekly work hours as provided by the Patient Protection and Affordable Care Act (ACA), 26 U.S.C. § 4980H(c)(4).

hours of J.S. (who withdrew his request for reduced hours after the Board responded that he would thereby be ineligible for health benefits) were never reduced; J.S. has "continuously received" health benefits from the Board; and the Association has not requested, nor has the Board denied, health benefits for any other members whose permanent assignment was limited to more than 25 but less than 30 hours per week.

The Board also maintains that the facts of this case fail to establish a violation of the separate elements of either subsections 5.4a(1) or 5.4a(5) of the Act. As to the latter, the Board contends it did not refuse to negotiate over health benefits eligibility, and the Association did not submit a demand to do so. The Board points to the fact that it did attempt (unsuccessfully) to negotiate the issue during the last round of contract negotiations, and again "[d]uring the pendency of this proceeding."

The Board also contends that the "default law" for school employees is that their entitlement to health benefits can be set at 25 weekly work hours only if an employer implements a resolution to that effect. The Board relies on the fact that it never adopted such a resolution. The Board argues that cases relied upon by the Association, in which the Commission found that unilateral changes to minimum weekly work-hour health

benefit thresholds violated the Act[6/], are distinguishable because in those cases the employers had adopted resolutions.

Finally, the Board argues that it properly relied upon, and was "legally obligated" to abide by, the DPB's expert guidance that J.S. could not continue to receive health benefits while working a less than a full-time schedule.

In opposition to the Board's cross-motion for summary judgment, the Association argues that the Charge is not premature, because the Board unilaterally determined that unit members must work at least 30 hours per week in order to be eligible for health insurance benefits, and it applied this requirement to J.S. when he sought a reduction in work hours. This, the Association argues, violated subsection 5.4a(5) of the Act and, derivatively, subsection 5.4a(1). The Board's argument that the parties' conduct was not repeated sufficiently to form a past practice should be rejected, the Association contends, because the Board identified no unit members who worked between 25 and 30 hours per week, who did not receive health benefits. The Association avers that the ACA neither prohibits the Board from providing health insurance to employees who work less than 30 hours per week, nor imposes that eligibility requirement on

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6/ Including: Fort Lee Bd. of Ed., H.E. No. 2020-7, 46 NJPER 560 (¶128 2020); Paterson State-Operated School District, P.E.R.C. No. 2002-2, 27 NJPER 319 (¶32113 2001); and Frankford Tp. Bd. of Ed., P.E.R.C. No. 98-60, 23 NJPER 625 (¶28304 1997).

employees. The Association further argues that the ACA has no application to this matter because only legislation or regulations of the SEHBP are binding on the Board, as an SEHBP District.[7/] The Association maintains that the Board was not absolved of its duty to negotiate by the communication it received from a DPB employee regarding J.S.'s reduced-hour request, because that DPB employee's opinion was erroneous, it was also not a regulation or statute, and it was therefore not binding. The Association, it contends, was not a party to the Board's communication with the DPB, and it had no opportunity to inform such an opinion. Finally, the Association disputes, as false and without a basis in the record, the Board's uncertified contention that the Association failed to negotiate with the Board, including during the course of this UPC proceeding, potentially referring to settlement discussions and/or conference calls with the Commission's Hearing Examiner prior to the parties' filing of summary judgment motions.

7/ The Association cites Berlin Bor., P.E.R.C. No. 2019-36, 45 NJPER 322 (¶85 2019), a case also relied upon by the Board, which addressed a dispute controlled by the SHBP Act and implementing regulations, wherein we explained: "Once a local government employer has elected to participate in the SHBP, it is 'a participating employer under the program, subject to . . . the rules and regulations of the commission relating thereto.' N.J.S.A. 52:14-17.37(a)."

ANALYSIS

As a preliminary matter, we note that the Association's UPC was prompted, in part, by the Board's reliance on the DPB employee's July 16, 2019 opinion that an employee's coverage in the SHBP/SEHBP will be terminated when that employee changes to less than full-time employment, defined as 32 hours per week. But in its cross-motion, the Board also contends that since January of 2019 it consistently took the position that 30 hours per week was the minimum benefits threshold. For purposes of this decision, we will assume that the Board's current position, based on its reliance on the more recent DPB opinion, is that the minimum benefits threshold is 32 hours per week.

N.J.S.A. 34:13A-5.3 sets forth a public employer's obligation to negotiate with a majority representative before changing working conditions:

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

Consistent with the Act, the Commission and courts have held that changes in negotiable terms and conditions of employment must be addressed through the collective negotiations process because unilateral action is destabilizing to the employment relationship and contrary to the principles of our Act. See, e.g., Atlantic Cty., 230 N.J. 237, 252 (2017); City of Newark, P.E.R.C. No. 2022-34, 48 NJPER 366 (¶82 2022); Middletown Tp., P.E.R.C. No.

98-77, 24 NJPER 28, 29-30 (¶29016 1997), aff'd, 334 N.J. Super. 512 (App. Div. 1999), aff'd, 166 N.J. 112 (2000); Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 337-338 (1989); and Galloway Twp. Bd. of Educ., 78 N.J. 25, 52 (1978).

N.J.S.A. 34:13A-5.4a(1), which makes it an unfair practice for a public employer to interfere with, restrain or coerce employees in the exercise of rights guaranteed by the Act, will be violated derivatively when an employer violates another unfair practice provision. This includes the duty, under subsection 5.4a(5), to negotiate in good faith concerning terms and conditions of employment. Paterson State-Operated School District, P.E.R.C. No. 2002-2, supra (employer violated 5.4a(1) and (5) by unilaterally changing definition of "full-time employment" for purposes of eligibility in SHBP); Frankford Tp. Bd. of Ed., P.E.R.C. No. 98-60, supra (same); and Fort Lee Bd. of Ed., H.E. No. 2020-7, 46 NJPER 560 (¶128 2020), supra (final by reason of no exceptions)(same). See also, Southampton Tp. Bd. of Ed., P.E.R.C. No. 2021-37, 47 NJPER 409 (¶97 2021) (board violated 5.4a(5) and, derivatively, 5.4a(1), by refusing to negotiate over scheduling of non-student faculty work days); City of Orange Tp., P.E.R.C. No. 2019-40, 45 NJPER 367 (¶96 2019) (city violated 5.4a(5) and, derivatively, 5.4a(1) when it unilaterally adopted an ordinance announcing the elimination of a contractual terminal leave benefit); and Piscataway Tp. Bd. of

Ed., P.E.R.C. No. 99-39, 24 NJPER 520 (¶29242 1998) (board violated 5.4a(5) and, derivatively, 5.4a(1) by rejecting union's demand to negotiate over personal and unpaid leave).

Health benefits are mandatorily negotiable unless preempted by statute or regulation. City of Newark, supra; State of New Jersey, P.E.R.C. No. 2000-12, 25 NJPER 402, 403 (¶30174 1999); Bor. of Woodcliff Lake, P.E.R.C. No. 2004-24, 29 NJPER 489 (¶153 2003); West Orange Bd. of Ed. and West Orange Ed. Ass'n, P.E.R.C. No. 92-114, 18 NJPER 272 (¶23117 1992), aff'd NJPER Supp.2d 291 (¶232 App. Div. 1993). More specifically, we ask not whether a statute or regulation permits an employer to take an action, but whether it precludes the employer from exercising any discretion over an employment condition such that there is nothing left to negotiate. Frankford Tp. Bd. of Ed., supra (citing, Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 330-331 (1989)).

Accordingly, we have consistently held that a statute or regulation authorizing a public employer to exercise discretion in setting eligibility requirements does not preempt negotiations over how that discretion must be exercised. Paterson State-Operated School District, supra ("So long as local employees work at least . . . [the minimum number of] hours per week [set by regulation], the regulation does not preempt negotiations over the number of hours that an employee must work to be considered full-time and therefore eligible for benefits under the SHBP");

Pemberton Tp., P.E.R.C. No. 2000-5, 25 NJPER 369 (¶30159 1999)(duty to negotiate over this issue was not excused through statutory preemption where statute authorized public employers to exercise discretion in setting health benefits eligibility requirements, but contained no statutory limitation on exercise of that discretion).

Terms and conditions of employment may arise from a past practice not contained in a CNA. New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1977) mot. for recon. den., 4 NJPER 56 (¶4073 1978). The Commission has defined past practice as a course of events "which is repeated, unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." Somerville Boro., P.E.R.C. No. 84-90, 10 NJPER 125, 126 (¶15064 1984). Where a collective negotiations agreement is silent or unclear concerning a particular term, then the parties' past practice may control. Sussex Cty., P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982).

Regarding the Charging Party's motion for summary judgment, and viewing the undisputed material facts in a light most favorable to the non-moving party, we find that the Association is entitled to judgment as a matter of law on its charge that the Board violated subsection 5.4a(5) of the Act and, derivatively, subsection 5.4a(1), when it unilaterally announced, through the

Superintendent's August 1, 2019 email to the Association, a change to the eligibility requirement for unit members to receive health insurance benefits from the Board.

The SHBP statutes and regulations govern the administration of SHBP plans, and the employees here are covered by SHBP plans.[8/] Thus, the provisions relevant to this dispute are found in the SHBP's definitional statute and regulation.[9/] The statute states, in pertinent part:

> the term "employee" means: (i) a full-time appointive or elective officer whose hours of work are fixed at 35 or more per week, a full-time employee of the State, or a full-time employee of an employer other than the State who appears on a regular payroll and receives a salary or wages for an average of the number of hours per week as prescribed by the governing body of the participating employer which number of hours worked shall be considered full-time, determined by resolution, and not less than 25
>
> [N.J.S.A. 52:14-17.26(c)(2)(emphases added).]

The regulation states, in pertinent part:

> (a) For purposes of local coverage, "full-time" shall mean:
>
> 1. Employment of any eligible employees who appear on a regular payroll and who receive a salary or wages for an average of the number of hours per week as prescribed by the

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8/ The parties' CNA requires the Board to provide health insurance through SHBP plans or their equivalent. N.J.S.A. 52:14-17.38ba permits local boards of education to do so.

9/ Substantively similar definitions apply to SEHBP plans. N.J.S.A. 52:14-17.46.2(d)(2).

> governing body of the participating employer. Each participating employer shall, by resolution, determine the number of hours worked, which shall be considered to be "full-time." In no case shall the number of hours for "full-time" be less than 25.
>
> 2. The employer, at its option, may grandfather all employees who were eligible for coverage under the location's previous definition of "full-time."
>
> [N.J.A.C. 17:9-4.6(a) (emphases added).]

As noted supra, we have consistently held that statutes or regulations authorizing public employers to exercise discretion in setting eligibility requirements do not preempt or preclude negotiations over how that discretion must be exercised, as long as the negotiated provision meets or exceeds the minimum requirement set by statute or regulation. Here, N.J.S.A. 52:14-17.26(c)(2) and N.J.A.C. 17:9-4.6(a) are preemptive only to the extent that parties may not negotiate a number less than 25 as the hours per week an employee must work in order to be considered a "full-time" employee eligible for health benefits. The statute and regulation otherwise provide discretion for an employer to establish a threshold of 25 hours or more.

The Board points to the lack of a resolution establishing a minimum benefits threshold as undermining the Association's position that the threshold was lower than 32 hours per week. However, the absence of a resolution does not negate other evidence in the record supportive of the Association's position.

Nor does the fact that the Board has not, as yet, adopted a resolution obviate its duty to negotiate in good faith over changes to any health benefits eligibility requirement.

The Board also fails to explain why a provision of the ACA, 26 U.S.C. § 4980H, is either applicable to these employees or should operate as a controlling "gap filler" in the parties' CNA to establish that Association members must work at least 30 hours each week to receive health insurance benefits from the District.

We are also not persuaded by the Board's contention that it did attempt and/or that the Association never demanded to negotiate a minimum work-hour threshold for health benefits eligibility. Although the Board may have proposed a new requirement in the last round of negotiations, that proposal was not incorporated into the resulting CNA. The record also reflects that the Association consistently objected, on the basis that the subject is mandatorily negotiable, whenever the Board unilaterally attempted to or did impose a change in the health benefits eligibility requirement, including when the Board sought to do so by its 2016 resolution (withdrawn following the Association's objection), and when it did so in response to J.S.'s reduced-hours request. And, any settlement negotiations that may have taken place during the instant UPC proceeding are immaterial. See, Mantua Tp., P.E.R.C. No. 82-99, 8 NJPER 302 (¶13133 1982) ("[a] party has the right to reject an offer of

settlement and still have the case decided on the merits"); New Jersey Institute of Technology, P.E.R.C. No. 80-54, 5 NJPER 491 (¶10251 1979), aff'd, NJPER Supp. 263 (¶218 App. Div. 1980)(employer's unilateral changes in terms and conditions of employment not cured or waived by association's failure to accept offer to negotiate several months after implementation).

As to the opinion given to the Board by the DPB employee regarding J.S.'s reduced-hours request, we find that the opinion did not provide complete information. While it may have accurately reflected the SHBP/SEHBP Manual, it did not mention the controlling statute and regulation, N.J.S.A. 52:14-17.26(c)(2) and N.J.A.C. 17:9-4.6(a). In light of that omission, the Board's unwavering reliance on the DPB employee's opinion was ill-advised. Given the Association's specific objections, the Board could have, and should have, explored the issue more thoroughly.

We now turn to the question of whether there was a binding past practice by which unit members who worked at least 25 hours per week were eligible for health insurance benefits. We find it undisputed that the parties' CNA does not specify a minimum weekly work hour threshold for health insurance benefits eligibility; and that over a significant period of time, at least two unit members received health insurance benefits while working in less than full-time positions. The Board claims these were

isolated occurrences, but it provides no examples of any other unit members who, during that same period, were denied benefits while working between 25 and 32 hours per week. However, neither party produced undisputed evidence as to the precise number of hours per week that E.B. and Y.K. worked while they received health benefits in their respective (.8) and (.83) FTE positions. No other examples were given. Yet, the Association consistently objected whenever the Board unilaterally sought to impose a new minimum benefits threshold. All things considered, we find that this record supports the existence, at least, of a past practice by which health benefits were made available to those who worked less than 32 hours per week, despite that the record does not reflect the precise minimum benefits threshold.

However, we need not decide the number of hours previously required to trigger eligibility for health benefits to conclude, as we have here, that any change to that eligibility requirement had to be negotiated with the majority representative. Hillsborough Bd. of Ed., P.E.R.C. No. 2005-54, 31 NJPER 99 (¶43 2005). The Board's failure to do so here violated its duty to negotiate in good faith regarding terms and conditions of employment and, derivatively, interfered with, restrained or coerced employees in the exercise of rights guaranteed by the Act. After finding that a party has engaged in an unfair practice, we must order the party to cease and desist from such

unfair practice. N.J.S.A. 34:13A-5.4c; University of Medicine and Dentistry of New Jersey (UMDNJ), P.E.R.C. No. 2010-12, 35 NJPER 330 (¶113 2009). We must also order such reasonable affirmative action as will effectuate the policies of the Act. Ibid; UMDNJ. We thus have broad discretion to fashion an appropriate remedy. Id. Under ordinary circumstances, we would order an employer that had unilaterally announced a change in a term and condition of employment and then refused to negotiate, to restore the status quo pending negotiations. Id. However, on this record we are unable to say, with certainty, what the status quo ante is with respect to the minimum eligibility requirement for such employees.

As a remedy, therefore, we will order the Board to negotiate in good faith with the Association over any proposed changes to the health benefits eligibility requirement. We will further order the parties, as a prerequisite to those negotiations, to make a good faith attempt to mutually determine the status quo ante with respect to the minimum weekly work hour requirement for Association members' eligibility for health benefits. Requiring such an effort is consistent with reasonable affirmative action as will effectuate the policies of the Act, considering that Ortiz admits she was not privy to discussions about this issue prior to 2019, and given the lack of documentary or other record evidence conclusively establishing a minimum benefits threshold.

We will further order that if the parties are unable to arrive at a mutual determination of the status quo ante within 120 days, they must notify the Commission and provide a summary of their negotiations, whereupon we may order further proceedings as we deem appropriate.

The Association's motion for summary judgment is granted on its charge that the Board violated subsection 5.4a(5) of the Act and, derivatively, subsection 5.4a(1), when it unilaterally announced, through the Superintendent's August 1, 2019 email to the Association, a change to the eligibility requirement for unit members to receive health insurance benefits from the Board.

The Board's cross-motion for summary judgment is denied. We retain jurisdiction.

ORDER

The Ridgefield Board of Education and the Ridgefield Education Association are ordered to:

A. Take the following actions:

1. Make a good faith attempt to mutually determine the status quo ante with respect to the minimum weekly work hour requirement for Association members' eligibility for health insurance benefits.

2. If the parties are unable to arrive at a mutual determination of the status quo ante within one hundred and twenty (120) days from the date of this Order, they must notify

the Chair of the Commission and provide a summary of their negotiations, whereupon the Commission may order further proceedings as deemed appropriate.

The Ridgefield Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act, particularly by unilaterally altering the health benefits eligibility requirement for members of the Ridgefield Education Association.

B. Take the following action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and 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.

3. Negotiate in good faith with the Ridgefield Education Association over mandatorily negotiable subjects, including the issue of unit members' eligibility for health insurance benefits.

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

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Jones, Papero and Voos voted in favor of this decision. None opposed. Commissioner Bonanni recused himself. Commissioner Ford was not present.

ISSUED: May 26, 2022

Trenton, New Jersey

NOTICE TO EMPLOYEES

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

We hereby notify our employees that:

WE SHALL, together with the Ridgefield Education Association, make a good faith attempt to mutually determine the status quo ante with respect to the minimum weekly work hour requirement for Association members' eligibility for health insurance benefits.

WE SHALL notify the Chair of the Commission, and provide the Chair a summary of our negotiations, if the parties are unable to arrive at a mutual determination of the status quo ante within one hundred and twenty (120) days from the date of this Order, whereupon the Commission may order further proceedings as deemed appropriate.

WE SHALL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act, particularly by unilaterally altering the health benefits eligibility requirement for members of the Ridgefield Education Association.

WE SHALL negotiate in good faith with the Ridgefield Education Association over mandatorily negotiable subjects, including the issue of unit members' eligibility for health insurance benefits.

Docket No. CO-2020-061 Ridgefield Board of Education
(Public Employer)

Date: _____ By: _____

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

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

APPENDIX "A"