

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LAKELAND REGIONAL BOARD OF
EDUCATION,

Respondent,

-and-

Docket No. CO-2009-454

LAKELAND EDUCATIONAL SECRETARIES'
ASSOCIATION,

Charging Party,

-and-

LAKELAND REGIONAL BOARD OF
EDUCATION,

Respondent,

-and-

Docket No. CO-2009-455

LAKELAND REGIONAL HIGH SCHOOL
TEACHERS' ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's recommended decision in an unfair practice case filed by the Lakeland Educational Secretaries' Association and the Lakeland Regional High School Teachers' Association against the Lakeland Regional Board of Education. That decision recommended that the Commission find that the Board violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1) and (5), when it changed health care coverage and did not meet its contractual obligation to maintain health care benefits at a level that was "equal to or better than" the benefits employees had prior to the change in carriers. The Commission rejects the Board's exceptions, finding that Hearing Examiner correctly applied precedent regarding the mandatory negotiability of the level of health benefits. The Commission also dismissed the Board's exceptions and the Association's cross-exceptions to the recommended remedy.

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

P.E.R.C. NO. 2014-38

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Charging Party.

Appearances:

For the Respondent, Adams, Stern, Gutierrez and
Lattiboudere, LLC, attorneys (Derlys M. Gutierrez, of
counsel)

For the Charging Party, Zazzali, Fagella, Nowak,
Kleinbaum and Friedman, attorneys (Richard A. Friedman,
of counsel, Kathleen Naprstek Cerisano, on the brief)

DECISION

This case is before the Commission on exceptions, filed by
the Lakeland Regional Board of Education and cross-exceptions
filed by the Lakeland Educational Secretaries' Association and
the Lakeland Regional High School Teachers' Association from a
Hearing Examiner's Report and Recommended decision [H.E. No.

2012-011, 39 NJPER 71 ([28 2012)] in these consolidated unfair practice cases.^{1/} Charges alleging that the Board violated N.J.S.A. 34:13A-5.4a were filed after the Board unilaterally, and during the term of collective negotiations agreements and/or during negotiations for successor agreements, changed, effective July, 1, 2009, the health insurance carriers from two Horizon plans identified in the agreements to coverage offered under the School Employees Health Benefits Program (SEHBP).^{2/} The Hearing Examiner found that the carrier change altered the level of benefits that had been available under the two plans listed in the contracts between the Board and the Associations.

Neither party takes material exception to the Hearing Examiner's Findings of Fact which we adopt in their entirety and summarize in pertinent part.

1/ After the unfair practice charges were filed, the Secretaries' Association and the Teachers' Association were merged into one collective negotiations unit represented by the Lakeland Education Association. We will maintain the original caption, but as the charges and issues are identical we will refer to the charging parties as "Association."

2/ Although other violations of the Act were alleged in the charges, as amended, a complaint was issued on the allegations that the Board violated N.J.S.A. 34:13A-5.4a(1) and (5). 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. . . ."

Faced with significant increases in the costs of its existing health insurance plans (ultimately 30 per cent in 2008-2009 and projected to be 50 per cent in 2009-2010) the Board sought to switch from the insurance carriers identified in its current or most recent collective negotiations agreements to coverage available under the SEHBP. Adhering to the existing health insurance plans were likely to force the Board to make other significant changes in the Board's educational programs including layoffs of teachers and support staff, reducing transportation and cutting cafeteria services [H.E.'s Findings of Fact Nos. 5, 7 and 9].

The contracts acknowledged that the Board could change carriers. However as set forth in its contract with the Teachers' Association:

b. If, during the time that this contract is in effect, the Board elects to change insurance carriers, the Board agrees to provide coverage equal to or better than the health plan currently in effect . . .

[Article XVIIb., Teachers Association contract]^{3/}

Board representatives neither discussed or negotiated changing health insurers with representatives of the Secretaries Association [H.E.'s Findings of Fact No. 5].

^{3/} The most recent contract between the Board and the Secretaries' Association contains analogous language.

During the Fall and Winter of the 2008-2009 school year, Board members and their representatives had discussions with representatives of the Teachers' Association, but no formal agreements were reached. In March 2009, in response to a question from Association President Anthony Caleca, the Board would not agree to reopen the agreement and negotiate about health insurance. Caleca indicated the Association would seek compensation for all unit members if benefits were altered. He maintained that a change in health benefits would violate the agreement [H.E.'s Findings of Fact Nos. 10 & 15].^{4/} On April 21, 2009, the Board formally voted to provide health insurance coverage, effective July 1, through the SEHBP.

Reviewing the expert testimony and detailed comparisons among the plans, the Hearing Examiner found, that while some coverage under SEHBP was better, the change resulted in reduced benefits in several areas [H.E.'s Findings of Fact No. 14].

Based upon her findings and conclusions, the Hearing Examiner recommends that we find that the Board violated the New Jersey Employer-Employee Relations Act, particularly N.J.S.A. 34:13A-5.4a(1) and (5), when, in exercising its right to switch

^{4/} The Board and the Administrator's Association agreed to create a fund, administered by a third party and lasting only one year, to cover shortfalls resulting from the change in coverage. The Board proposed a similar arrangement, again to last for one year, to the Teachers' Association which rejected that plan.

health care carriers, it provided coverage that did not meet its contractual obligation to maintain health care benefits at a level that was "equal to or better than" the level of benefits enjoyed by employees prior to the change in carriers. H.E. No. 2012-011, 39 NJPER 71 (¶28 2012).^{5/} The Hearing Examiner recommends that we order the Board to establish a fund to cover employee medical costs which would have been, but were not, paid under either of the two plans that were available to unit employees had the Board not changed insurance carriers.^{6/} H.E. No. 2012-11 at 20-22, 39 NJPER 71 at 75-76.

The Board has filed four exceptions to the Hearing Examiner's recommended decision. Two challenge her legal conclusions that it violated the Act and the other two challenge aspects of the remedial order she has recommended. The exceptions make these assertions:

1. As the Hearing Examiner found that the Board was faced with an unprecedented fiscal crisis that had

^{5/} The parties' grievance procedures end in advisory, not binding, arbitration. An unfair practice charge alleging that an employer has breached a contract by unilaterally changing health care benefits, is normally deferred to binding grievance arbitration. Hazlet Tp. Bd. of Ed., P.E.R.C. No. 95-78, 21 NJPER 164 (¶26101 1995). Compare Harrington Pk. Bd. of Ed., D.U.P. No. 98-11, 23 NJPER 484 (¶28231 1997) (complaint issued on charge alleging health benefit changes where final step was advisory arbitration).

^{6/} The details, duration and reimbursement/payment procedures of the fund are spelled out in the Hearing Examiner's decision and recommended order. H.E. No. 2012-11 at 20-22, 39 NJPER 71 at 75-76

to be addressed during the 2008-2009 school year, the Board's change of health insurance plans did not violate the Act.^{7/}

2. As part of her finding that the Board violated the Act by making unilateral changes without prior negotiations, the Hearing Examiner "speculated" that the Association "may have been willing" to negotiate over changes in current health plans.
3. The Hearing Examiner's remedy of a fund for health care reimbursement should have included a third party to administer the fund and review claims.
4. The Hearing Examiner's remedy with respect to employees who had traditional plan coverage prior to July 1, 2009, provided a windfall payment to those employees and improperly assumed that all those who had been covered by the traditional plan would have waived that coverage to move into the PPO plan that was the other health insurance option prior to the Board's change.^{8/}

The Association urges that we adopt the Hearing Examiner's findings and her legal conclusion that the Board's change in carriers violated the Act.

^{7/} The Board refers to the Hearing Examiner's finding that it sought health care changes to avoid undesirable program and personnel changes and cuts.

^{8/} The pertinent collective negotiations agreements provided in relevant part:

Any person in the existing unit, wishing to change from the Traditional to the Non-Traditional PPO Plan must sign up by the open enrollment deadline for the PPO Plan coverage. The savings would be split as follows: a one time payment in the first year of 70% employee and 30% Board. This change will remain for the balance of this contract. This stipend will be paid in the first month of the implementation of this clause.

But it seeks these modifications in the recommended remedy:

1. That the waiver payments be extended not only to those employees who had traditional plan coverage as of July 1, 2009, but also to those who were eligible to be in the traditional plan after that date.
2. As the parties agreement was in effect until June 30, 2010 and they have executed a successor agreement that provides for SEHBP health coverage to take effect on July 1, 2011, they were free to extend the waiver payment period until that date rather than the May, 2010 effective date of the amendments to [N.J.S.A. 52:14-17.31a] as reflected in the Hearing Examiner's recommended order.

The Board responds that the Association's proposed expansion of the waiver payments would improperly make it applicable to unit members who had freely eschewed the Traditional Plan prior to the change to SEHBP coverage.

Board Exceptions 1. and 2.

These exceptions challenge the Hearing Examiner's legal conclusion that the Board violated the Act when it changed health insurance carriers to reduce increasing health care costs rather than make other program changes and layoff personnel.

We reject Exception 1. Although the Board's financial exigencies were undisputed, it was bound to honor the terms of its contracts and could not make unilaterally changes in the existing terms and conditions of employment absent the

Associations' agreement through collective negotiations.^{9/}

The Board does not challenge the Hearing Examiner's determination that the differences in the plans' benefits violated the "equal to or better than" standard or that there were no collective negotiations before the changes were implemented. The cases cited by the Hearing Examiner regarding the mandatory negotiability of the level of health benefits and a majority representative's right to either voluntarily agree to reopen an existing contract for renegotiations or to decline to

^{9/} New laws affecting public employee compensation and benefits, in order not to impair existing contractual obligations as required by the "contracts clause" [Article I, Section 10] of the federal constitution, provide that where a collective negotiations agreement is in force on the law's effective date, the new provisions will not apply until the current contract expires. An example is N.J.S.A. 52:14-17.46.9.b., one of the statutes describing the SEHBP. It provides in pertinent part (emphasis supplied):

b. The obligations of any employer to pay the premium or periodic charges for health benefits coverage provided under the [SEHBP] . . . may be determined by means of a binding collective negotiations agreement, including any agreement in force at the time the employer commences participation in the School Employees' Health Benefits Program. . .

Commencing on the effective date [May 21, 2010] of P.L. 2010, c.2 and upon the expiration of any applicable binding collective negotiations agreement in force on that effective date, employees shall pay 1.5 percent of base salary, through the withholding of the contribution, for health benefits coverage . . .

do so are pertinent and her application of them was correct [H.E. No. 2012-11 at 15-16, 39 NJPER 71 at 74-75]. The Board's unilateral action violated the Act, both with respect to its change during the life of its agreement with the Teachers' Association and during the period after the agreement with the Secretaries' Association had expired. See N.J.S.A. 34:13A-5.3; N.J.S.A. 34:13A-33 (barring implementation of new terms and conditions of employment until new contract reached); and Galloway Tp. Bd. of Ed v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 n.9 (1978) (obligation to refrain from unilateral action "applies at all times").^{10/}

We also reject Board Exception 2. The Hearing Examiner was not "speculating" when she posited that the Associations may have been willing to consider changes in existing health care coverage. Rather, that comment reflects the goal and purpose of collective negotiations which is to set employee working conditions based on bilateral agreement as opposed to unilateral,

^{10/} Bloomfield Bd. of Ed., P.E.R.C. No. 2011-55, 37 NJPER 2 (¶2 2011) does not provide a defense for the Board's actions. That case held that, given the inability to recoup remitted salary payments from tenured personnel, the payment following the expiration of a contract of increments, in amounts higher than statutorily mandated caps, would have imposed a greater hardship on the Board than the non-receipt of those monies by eligible teachers while negotiations were in progress. And, that decision was a ruling on injunctive relief and not a determination on the merits of the unfair practice charges.

employer action. See Hunterdon Cty. and CWA, 116 N.J. 322, 329 (1989).

Exceptions to the Proposed Remedy

The Hearing Examiner's remedy contains a protocol for employees to submit documents in support of claims for payment of the difference between payments under the SEHBP plans and coverage for the same services under the two plans identified in the agreement.^{11/} The Board's third exception asserts that a third party should be appointed to administer the claims.

^{11/} The recommended order with respect to the reimbursement fund provides in relevant part (emphasis supplied):

[T]he Board must establish a fund upon which employees may draw to cover medical costs which would have been, but were not, paid under either the Horizon Blue Cross/Blue Shield traditional plan applicable to unit employees who would have been in that plan after July 1, 2009, had the Board not changed insurance carriers, or the Horizon Direct Access plan applicable to unit employees who would have been in that plan after July 1, 2009, for covered medical services. Upon provision of acceptable evidence by the employee to the Board establishing the amount of such additional expense incurred resulting from a lesser reimbursement under the SEHBP, the Board will make an up-front payment from the fund to either the employee directly or to the provider of the medical services so that the employee will not be required to make an out-of-pocket payment. The Board will immediately reimburse any employee for any eligible claims under this program upon submission of acceptable evidence by an employee pertaining to covered, eligible medical expenses incurred by an employee since July 1, 2009. The parties are free to negotiate a different payment arrangement for administering the fund.

As the proposed order would permit the parties to negotiate a different payment arrangement, the Board is free to suggest that a third party administrator be used, but we will not order it. The Hearing Examiner cited an appellate court ruling, later affirmed by the Supreme Court, where an arbitrator ordered reimbursements in analogous circumstances. See Borough of East Rutherford v. East Rutherford PBA Local 275, 213 N.J. 190 (2013). Her order is consistent with that ruling and with our rulings in other similar cases. See, e.g. Franklin Lakes Bd. of Ed., I.R. No. 2010-8, 35 NJPER 465 (¶153 2009); Union Tp. and FMBA Local No. 46, FMBA Local No. 246 and PBA Local No. 69, I.R. No. 2002-7, 28 NJPER 86 (¶3031 2001), recon. den. P.E.R.C. No. 2002-55, 28 NJPER 198 (¶33070 2002).^{12/} We will adopt it.

The prior agreement gave employees, who were covered under the Traditional Plan, an incentive to voluntarily move to the less costly coverage in exchange for a payment. As a result of the Board's unilateral, mid-contract change, employees with traditional coverage as of July 1, 2009 were involuntarily moved to a lower level plan. To remedy their loss of the waiver payment, the consideration for moving out of the Traditional Plan, the Hearing Examiner proposed:

^{12/} The Appellate Division of the Superior Court declined to grant Union Township's motion seeking review of the Commission's interlocutory ruling.

Any employee included in either Association who had completed the required forms acceptable to the business administrator prior to the May 2010 effective date modifying Title 52 concerning waiver of health benefits must be treated in accordance with the terms of the waiver provision in the respective collective agreements. After May 2010, employees eligible to waive health benefits coverage will be subject to the statutory limitations set forth in Title 52.^{13/}

The Board's final exception asserts that this portion of the remedy improperly assumes that all employees in the Associations chose to waive their traditional plan coverage. The Board overlooks the fact that the Board stripped those employees of their ability to opt for waiver payments because the Board's unilateral action involuntarily forced them out of the Traditional Plan and into one of the SEHBP coverage options. We dismiss this exception.

^{13/} We infer that the Hearing Examiner's reference to title 52 was to this section of N.J.S.A. 52:14-17.31a:

c. In consideration of filing a waiver as permitted in subsections a. and b. of this section, an employer may pay to the employee annually an amount, to be established in the sole discretion of the employer, which shall not exceed 50% of the amount saved by the employer because of the employee's waiver of coverage, and, for a waiver filed on or after the effective date [May 21, 2010] of P.L.2010, c.2, which shall not exceed 25%, or \$ 5,000, whichever is less, of the amount saved by the employer because of the employee's waiver of coverage.

The Association asserts that this remedy should not be limited to those employees who had traditional plan coverage as of the date of the change, but should also be available to all employees covered by the Agreements, including employees who were not currently enrolled in the traditional plan when the Board imposed the new health insurance coverage. In addition, citing its successor contract with the Board which provides that SEHBP coverage shall take effect on July 1, 2011 (rather than 2010 when the prior agreement expired) the Association asserts that:

1. Unit members should be able to apply for waiver payments until June 30, 2011 and;
2. As the Teachers' Association prior contract was still in effect when the pertinent amendments to Title 52 took effect, waiver payments should be at the rate set by that agreement and not the reduced level provided in the amended law and reflected in the Hearing Examiner's proposed order.

We deny the Association's exceptions. The hearing examiner reasonably limited the universe of eligibles for waiver payments to employees who were already in the traditional plan. And, as its contract with the Board expired on June 30, 2010, thus making the amendments to N.J.S.A. 52:14-17.31a.c. effective on that date at the latest, there is no basis for the Association to seek waiver payments at the contract rate, as opposed to the new statutory rate, beyond that milestone.^{14/}

^{14/} Even if waiver payments at the contract rate until June 30, 2010 were legal, we decline to order that the eligibility
(continued...)

ORDER

The Lakeland Regional Board of Education is **ORDERED** to cease and desist from:

A. Interfering with, restraining or coercing employees included in the Lakeland Education Association in their exercise of the rights guaranteed to them by the Act, particularly by unilaterally reducing the level of health insurance benefits in violation of N.J.S.A. 34:13A-5.4a(1).

B. Repudiating the express terms of the parties' collective negotiations agreement, specifically, by unilaterally reducing certain levels of health benefits mid-contract in violation of N.J.S.A. 34:13A-5.4a(5).

C. The Lakeland Regional High School Board of Education shall take the following affirmative action:

1. Establish a fund upon which employees may draw to cover medical costs which would have been, but were not, paid under either the Horizon Blue Cross/Blue Shield traditional plan applicable to unit employees who would have been in that plan after July 1, 2009, had the Board not changed insurance carriers,

14/ (...continued)
period be extended. In Piscataway PBA Local 93 v. Township of Piscataway, 2006 N.J. Super. Unpub. LEXIS 2217, the Appellate Division of the Superior Court, citing Hunterdon Cty. and CWA, 116 N.J. at 336 observed:

PERC has remedial flexibility and is not obligated to provide a complete or make-whole remedy in every unfair labor practice case.

or the Horizon Direct Access plan applicable to unit employees who would have been in that plan after July 1, 2009, for covered medical services. Upon provision of acceptable evidence by the employee to the Board establishing the amount of such additional expense incurred resulting from a lesser reimbursement under the SEHBP, the Board will make an up-front payment from the fund to either the employee directly or to the provider of the medical services so that the employee will not be required to make an out-of-pocket payment. The Board will immediately reimburse any employee for any eligible claims under this program upon submission of acceptable evidence by an employee pertaining to covered, eligible medical expenses incurred by an employee since July 1, 2009. The parties are free to negotiate a different payment arrangement for administering the fund.

Any employee included in either Association who had completed the required forms acceptable to the business administrator prior to the May 2010 effective date modifying Title 52 concerning waiver of health benefits must be treated in accordance with the terms of the waiver provision in the respective collective agreements. After May 2010, employees eligible to waive health benefits coverage will be subject to the statutory limitations set forth in N.J.S.A. 52:14-17.31a.c.

Any employee included in either Association who was enrolled in the traditional plan on June 30, 2009 and, pursuant to Board

determination was moved into the SEHBP on July 1, 2009, shall, under the terms of the collective negotiations agreement receive a one-time payment equaling 70% of the amount saved by the Board in health insurance premium cost resulting from the change.

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

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

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Jones voted in favor of this decision. None opposed. Commissioners Voos and Wall were not present.

ISSUED: December 19, 2013

Trenton, New Jersey

NOTICE TO EMPLOYEES

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

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees included in the Lakeland Education Association in their exercise of the rights guaranteed to them by the Act, particularly by unilaterally reducing the level of health insurance benefits in violation of N.J.S.A. 34:13A-5.4a(1).

WE WILL cease and desist from repudiating the express terms of the parties' collective negotiations agreement, specifically, by unilaterally reducing certain levels of health benefits mid-contract in violation of N.J.S.A. 34:13A-5.4a(5).

WE WILL establish a fund upon which employees may draw to cover medical costs which would have been, but were not, paid under either the Horizon Blue Cross/Blue Shield traditional plan applicable to unit employees who would have been in that plan after July 1, 2009, had the Board not change insurance carriers, or the Horizon Direct Access plan applicable to unit employees who would have been in that plan after July 1, 2009, for covered medical services. Upon provision of acceptable evidence by the employee to the Board establishing the amount of such additional expense incurred resulting from a lesser reimbursement under the SEHBP, the Board will make an up-front payment from the fund to either the employee directly or to the provider of the medical services so that the employee will not be required to make an out-of-pocket payment. The Board will immediately reimburse any employee for any eligible claims under this program upon submission of acceptable evidence by an employee pertaining to covered, eligible medical expenses incurred by an employee since July 1, 2009. The parties are free to negotiate a different payment arrangement for administering the fund.

Any employee included in either Association who had completed the required forms acceptable to the business administrator prior to the May 2010 effective date modifying Title 52 concerning waiver of health benefits must be treated in accordance with the terms of the waiver provision in the respective collective agreements. After May 2010, employees eligible to waive health benefits coverage will be subject to the statutory limitations set forth in N.J.S.A. 52:14-17.31a.c.

Any employee included in either Association who was enrolled in the traditional plan on June 30, 2009 and, pursuant to Board determination was moved into the SEHBP on July 1, 2009, shall, under the terms of the collective negotiations agreement receive a one-time payment equaling 70% of the amount saved by the Board in health insurance premium cost resulting from the change.

WE WILL notify the Commission Chair within twenty (20) days what steps we have taken to comply with this ORDER.

Docket No. CO-2009-454
CO-2009-455

LAKELAND REGIONAL HS 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, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"