P.E.R.C. NO. 95-108

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and- Docket No. CO-H-94-164

POLICE SUPERIOR OFFICERS' ASSOCIATION
OF NEWARK, NEW JERSEY, INC.

Charging Party,

-and-

NEWARK FIREMEN'S UNION, IAFF
LOCAL 1846 and NEWARK FIRE OFFICERS
UNION LOCAL 1860,

Intervenors.

SYNOPSIS

The Public Employment Relations Commission finds that the City of Newark violated the New Jersey Employer-Employee Relations Act by reducing the number of hospitals for which employees represented by the Police Superior Officers' Association of Newark, New Jersey, Inc. will receive full coverage and by increasing payroll deductions for health benefit plans during the pendency of interest arbitration proceedings. The Commission finds that when the City declined to retain full coverage at all 85 hospitals, it reduced the level of benefits available to unit employees. Those benefits had been guaranteed by the parties' agreement and were required to be maintained during interest arbitration proceedings. While not bound to follow a grievance arbitrator's contractual interpretation in related cases, the Commission exercises its discretion to do so, especially as here where the arbitrator's award has been confirmed by the Superior Court.

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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NEWARK FIREMEN'S UNION, IAFF
LOCAL 1846 and NEWARK FIRE OFFICERS
UNION LOCAL 1860,

Intervenors.

Appearances:

For the Respondent, Michelle Hollar-Gregory, Corporation Counsel (Phillip Dowdell, Assistant Corporation Counsel)

For the Charging Party, Whipple Ross & Hirsh, attorneys (Lawrence A. Whipple, Jr., of counsel)

For the Intervenor Local 1846, Fox and Fox, attorneys (Dennis J. Alessi, of counsel)

For the Intervenor Local 1860, Zazzali, Zazzali, Fagella & Nowak, attorneys (Paul L. Kleinbaum, of counsel)

DECISION AND ORDER

On November 30, 1993, the Police Superior Officers' Association of Newark, New Jersey, Inc. filed an unfair practice charge against the City of Newark. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and

(5),[1/] by unilaterally changing the level of health insurance benefits during the pendency of interest arbitration proceedings.[2/] Before January 1, 1994, unit employees had their medical costs covered in full at all 85 acute care hospitals in New Jersey. After that date, the City's health insurance carrier, Blue Cross-Blue Shield (BCBS), provided full coverage at 56 hospitals, but paid only $30 per day at the remaining 29. In addition, because the City's costs for traditional health coverage decreased as a result of this change, the employees' costs for HMO coverage increased.

On February 3, 1994, a Complaint and Notice of Hearing issued. The City's Answer contends that the level of benefits in the parties' collective negotiations agreement is determined by its contract with BCBS and that BCBS unilaterally reduced the number of full-coverage hospitals.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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/ N.J.S.A. 34:13A-21 prohibits changes in wages, hours and other conditions of employment during the pendency of interest arbitration proceedings.

On June 8, 1994, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On October 21, 1994, the Hearing Examiner issued his report and recommendations. H.E. No. 95-11, 20 NJPER 446 (¶25230 1994). He found that the City did not violate the Act when BCBS changed the level of hospital benefits. However, he found that the City did violate the Act when it refused to negotiate over its discretion to amend its health insurance contract to retain full coverage at all 85 hospitals. He ordered the City to negotiate, upon request, over whether to reinstate full coverage, but he did not order restoration of full coverage pending negotiations.

On November 4, 1994, the SOA filed exceptions to the Hearing Examiner's failure to recommmend restoration of full coverage pending negotiations. It claims that the Hearing Examiner erred in finding that the reduction in the hospital network to 56 hospitals was the status quo. It argues that the status quo was changed by the City when it agreed to implement the reduced hospital network.

On November 9, 1994, the City filed a reply urging adoption of the Hearing Examiner's recommendations. It further claims that the findings as to the N.J.S.A. 34:13A-21 allegations and the HMO co-pay expense issues have not been excepted to and are waived pursuant to N.J.A.C. 19:14-7.3(b).

On December 1, 1994, the City notified our Chairman that an arbitration award involving similar issues and three other City

unions had been confirmed in the Chancery Division of the Superior Court. The arbitrator had held that the City violated its collective negotiations agreements with those unions when it reduced the number of full-coverage hospitals and doctors and increased payroll deductions for health benefit plans. He ordered the City to restore 100% reimbursement for all 85 acute care hospitals and to make employees whole.

On December 6 and 7, 1994, respectively, the Newark Firemen's Union IAFF, Local 1846 and the Newark Fire Officers Union, Local 1860, both prevailing parties in the arbitration proceedings, moved to intervene in this proceeding to file an amicus curiae brief supporting the SOA's exceptions. The City objected. On January 3, 1995, intervention was granted.

The intervenors claim that the Hearing Examiner erred by not finding that BCBS gave the City the option of which level of benefits to choose and in rejecting the arbitrator's analysis.

The City responds that it sought to have its dispute with all four unions consolidated to avoid the possibility of contradictory opinions, a possibility that has come about. Nevertheless, the City argues that the Hearing Examiner, and not the arbitrator, properly interpreted the relevant contractual provisions.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact with the noted modifications.

Before April 26, 1993, all 85 acute care hospitals in New Jersey were member hospitals as defined by the BCBS contract with

the City of Newark. Employees had full coverage at any hospital. On April 26, BCBS announced that it had formed a new select hospital network of 56 hospitals. Employees using any of the remaining 29 hospitals would be reimbursed only $30 per day unless admitted on an emergency basis. BCBS made the decision to select 56 hospitals for the BCBS network and then informed the City of its decision.3/ The City was given the option of paying an extra premium to retain full coverage at all 85 acute care hospitals. For example, the State Health Benefits Plan, with almost 200,000 covered individuals, opted to maintain full coverage. The City declined that option and selected the 56 hospital network instead.

The Hearing Examiner found that BCBS informed the City that it could retain full coverage at all 85 hospitals by amending its policy with a rider. The arbitrator found that an amendment or rider was necessary if the City wanted to select the smaller 56 hospital network. We accept both the Hearing Examiner's and the arbitrator's findings. It appears that some sort of change, either a rider or amendment, was contemplated regardless of the benefit level the City would choose. In order to maintain full coverage at all 85 hospitals, the City would have had to agree to a rider to its policy. As for the decision to select a 56 hospital network, the City has submitted a certification of a BCBS Account Executive/Director in the State Health Benefits/DDN Division. She

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3/ The record citations in finding 1 do not address whether or not "member hospital" is synonymous with "network hospital."

states that BCBS issued a rider to all contract holders, after establishing the select hospital network, which consolidates the terminology for "participating" and "member" hospital to "network" hospital, and for "non-participating" and "non-member" hospital to "non-network" hospital. It thus appears that BCBS has eliminated the "member" and "non-member" categories and now uses the categories "network" and "non-network."

The parties' contract provides that the terms of the contract shall continue during negotiations. All four union contracts provide that the current Blue Cross hospitalization plan will remain in effect during the lifetimes of the agreements.[4/] On May 31, 1994, the arbitrator found that the City violated this provision of its contracts with the two intervenors and PBA Local 3 and ordered the City to restore 100% reimbursement for costs

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4/ The agreements also provide that the City's liability shall be limited to the provisions of the carrier's contract only. Association President Rox testified that he was familiar with this section. He was not asked any other questions about the section. City Labor Relations/Compensation Officer Gregory Franklin testified that he participated in negotiations for the most recent agreement. Many sections of the contract, including the sentence on liability, were carried over from the previous contract without change. Franklin testified that it was his understanding that the liability section was intended to limit the City's liability to the provisions of the BCBS policy. The record, however, does not provide any evidentiary basis for Franklin's understanding or any evidentiary support for finding that this understanding was communicated to or shared by the SOA. Franklin gave a similar interpretation of the liability section at the arbitration, but the arbitrator's decision reports that Franklin was not present when that section was negotiated.

incurred at all 85 acute care hospitals. He also ordered the City to make whole employees who paid higher premiums for health coverage or sustained calculable out-of-pocket losses resulting from the reduction in the number of covered hospitals. In a Superior Court proceeding brought by the intervenors, Local 3, and the SOA, the arbitrator's award was confirmed.

Before we address the remaining contractual dispute involving the SOA, we reiterate our preference for deferring these types of contractual disputes to arbitration when, as here, the parties have chosen that forum for the resolution of grievances. See Township of Pennsauken, P.E.R.C. No. 88-53, 14 NJPER 61 (¶19020 1987); see also Stafford Tp. Bd. of Ed., P.E.R.C. NO. 90-17, 15 NJPER 527 (¶20217 1989) (deferral of disputes over contractual health benefit levels). In its initial response to the unfair practice charge, the City requested that this matter be deferred to arbitration and consolidated with the grievances of the other three unions. The failure to defer this matter to arbitration has created the possibility of conflicting interpretations of similar contract language.

This remaining dispute turns on the same question of contract interpretation that an arbitrator has already answered for the City and three other unions. Was the City contractually obligated to maintain full coverage at 85 hospitals? Based on his interpretation of the relevant contract provisions, the arbitrator has ordered the City to restore full coverage and reimburse

employees for any losses. That award has been confirmed by the Superior Court in an action brought by all four unions, including the charging party.

One reason to have deferred to arbitration is that the parties have mutually agreed to have an arbitrator interpret their agreement and resolve contractual disputes. A second reason to have deferred in this case was to avoid the possibility of conflicting contractual interpretations.

It is not too late to achieve a result that promotes consistency and stability and is compatible with the facts before us. While we are not bound to follow the arbitrator's contractual interpretation, we will exercise our discretion to do so, especially as here where the arbitrator's award has been confirmed. When the City declined to retain full coverage at all 85 hospitals, it reduced the level of benefits available to unit employees. Those benefits had been guaranteed by the parties' agreement and were required to be maintained during interest arbitration proceedings. We therefore conclude that the City violated the Act by reducing health care benefits during the pendency of interest arbitration proceedings. We issue an order consistent with the arbitrator's award as confirmed by the Superior Court.[5/]

5/ N.J.A.C. 19:14-7.3(b) does not eliminate our obligation to review the entire record. See Maywood Bd. of Ed. and Maywood Ed. Ass'n, 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1979).

Even if we were not to defer and instead were to consider the Hearing Examiner's different contract interpretation, we note that the factual predicate for his interpretation has been undermined by a certification submitted by the City and not available to him. The Hearing Examiner assumed that the smaller hospital network could be achieved under the existing contract between the City and BCBS. The certification indicates that BCBS issued a rider to the the City's contract so that the contract would reflect the establishment of network hospitals. Thus, it appears that the smaller hospital network was not contemplated by the hospitalization plan the City had contractually obligated itself to maintain.

ORDER

The City of Newark 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 the Act, particularly by reducing the number of hospitals for which employees represented by the Police Superior Officers' Association of Newark, New Jersey, Inc. will receive full coverage and by increasing payroll deductions for health benefit plans during the pendency of interest arbitration proceedings.

2. Refusing to negotiate in good faith with the Police Superior Officers' Association of Newark, New Jersey, Inc. particularly by reducing the number of hospitals for which unit employees will receive full coverage and by increasing payroll

deductions for health benefit plans during the pendency of interest arbitration proceedings.

B. Take this action:

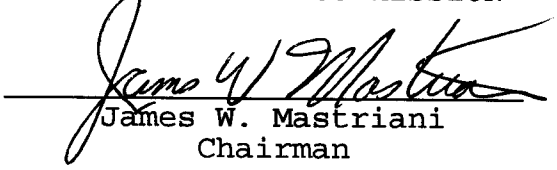
1. Restore 100% reimbursement for, and use of, all the 85 acute care hospitals until interest arbitration proceedings have been concluded.

2. Make whole employees who paid higher premiums for health care coverage; were charged higher costs for health care coverage; or sustained calculable out-of-pocket losses as a result of the reduction of the health care benefit.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice 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.

4. Notify the Chairman 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



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Boose, Buchanan, Finn, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Klagholz was not present.

DATED: May 23, 1995
Trenton, New Jersey
ISSUED: May 24, 1995

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 in the exercise of the rights guaranteed to them by the Act, particularly by reducing the number of hospitals for which employees represented by the Police Superior Officers' Association of Newark, New Jersey, Inc. will receive full coverage and by increasing payroll deductions for health benefit plans during the pendency of interest arbitration proceedings.

WE WILL cease and desist from refusing to negotiate in good faith with the Police Superior Officers' Association of Newark, New Jersey, Inc. particularly by reducing the number of hospitals for which unit employees will receive full coverage and by increasing payroll deductions for health benefit plans during the pendency of interest arbitration proceedings.

WE WILL restore 100% reimbursement for, and use of, all the 85 acute care hospitals until interest arbitration proceedings have been concluded.

WE WILL make whole employees who paid higher premiums for health care coverage; were charged higher costs for health care coverage; or sustained calculable out-of-pocket losses as a result of the reduction of the health care benefit.

Docket No. CO-H-94-164 CITY OF NEWARK
(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, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

d:\percdocs\notice 10/93

H.E. NO. 95-11

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

In the Matter of

CITY OF NEWARK,

Respondent,

-and- Docket No. CO-H-94-164

POLICE SUPERIOR OFFICER'S
ASSOCIATION OF NEWARK,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the City of Newark violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. when it refused to negotiate with the Police Superior Officer's Association of Newark over its discretion to amend the hospitalization portion of its health insurance to include better coverage at several hospitals. The Hearing Examiner recommended that the City be required to negotiate retroactively regarding the issue. The Hearing Examiner also found, however, that the City did not violate subsections 5.4(a)(5) or 13A-21 of the Act when the health insurance carrier implemented a change in the level of health benefits.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 95-11

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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Respondent,

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POLICE SUPERIOR OFFICER'S
ASSOCIATION OF NEWARK,

Charging Party.

Appearances:

For the Respondent, Michelle Hollar-Gregory
Corporation Counsel
(Phillip Dowdell, Assistant Corporation Counsel, of counsel)

For the Charging Party, Whipple Ross & Hirsh, attorneys
(Lawrence A. Whipple, Jr., of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT
AND DECISION

On November 30, 1993, Police Superior Officer's Association of Newark, New Jersey, filed an unfair practice charge with the New Jersey Public Employment Relations Commission alleging that the City of Newark violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/] The

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing 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."

Association alleged that on or about September 28, 1993, the City violated its duty to negotiate over a change in the level of health insurance benefits by unilaterally implementing a plan providing different insurance coverage than previously existed. The Association further alleged that the City violated N.J.S.A. 34:13A-21[2/] by unilaterally changing the level of health benefits during the pendency of interest arbitration proceedings.

A Complaint and Notice of Hearing was issued on February 3, 1994. The City filed an Answer by letter of March 14, 1994, denying it violated the Act and raising certain defenses. The City alleged that it had not acted unilaterally nor had it altered the status quo while engaged in negotiations. The City argued that its health insurance carrier, Blue Cross/Blue Shield of New Jersey (BCBS), changed the benefit levels by moving 29 hospitals from the "member" to the "non-member" category in the insurance policy resulting in greater cost to the employees using those non-member hospitals; that the City was not consulted by BCBS nor exercised control over BCBS; that the City's policy with BCBS distinguishes between member and non-member hospitals; and, that the change in benefit levels is attributable to BCBS, not the City.

2/ N.J.S.A. 34:13A-21 provides: During the pendency of proceedings before the arbitrator, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other, any change in or of the public employer or employee representative notwithstanding; but a party may so consent without prejudice to his rights or position under this supplementary act.

A hearing was held on June 8, 1994.[3/] At hearing, the Association further argued that the City had rejected its demand to negotiate over the hospital change before it was implemented; that as a result of the hospital change there was an increase in the contributions paid by many employees for HMO coverage; that the City be stopped from implementing the hospital change; that employees be made whole for any losses caused by the change; and, that the City be directed to negotiate with the Association regarding this matter. The City, at hearing, partially responded to those arguments saying that there was no reduction in the number of hospitals an employee could use, rather, a redefining of which hospitals were members and which were non-members; and, that the Association was improperly seeking to redefine the formula used to determine the employee co-pay for HMO coverage.

Both parties filed post-hearing briefs which were received on August 26, 1994. The Association argued, in part, that it was inappropriate for the City to acquiesce to BCBS's hospital change without first negotiating with it over the effect of the change; and, it sought a monetary award to remedy the City's implementation of the change during interest arbitration. The Association also posed two "threshold" questions to be resolved:

1) Whether the number and location of facilities where employees can obtain health care services at no cost to them under their existing

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3/ The transcript will be referred to as "T".

health insurance arrangements with their employer is a term and condition of employment? 2) Whether any change in the number of such facilities must be negotiated before implementation? The City, in its brief, argued, in part, that the parties' contract was silent on the number of hospitals that could be member or non-member hospitals; that to amend the BCBS contract to move the 29 hospitals from non-member to member status would have changed the status quo between the parties here; and that no proof was presented that the City improperly determined the employees' co-pay for HMO coverage.

Based upon the entire record I make the following:

FINDINGS OF FACT

1. The City has a contract with Blue Cross-Blue Shield of New Jersey to provide hospital and other health coverage to City employees. That contract (C-2, Exhibit F) distinguishes between how benefits will be provided in member and non-member hospitals as follows:

> **Section II Paragraph 8**
>
> **Hospital Benefits in a Member Hospital**
>
> Blue Cross Payment for eligible Benefit Days hereunder of eligible services rendered to a Covered Person as either an Inpatient or as an Outpatient in a Member Hospital shall (except as otherwise provided in this Exhibit) constitute payment in full. Blue Cross Payment for eligible part Benefit Days hereunder of eligible services in such hospital shall be up to $5.00 per day toward the hospital's regular charges.

Section II Paragraph 9

Hospital Benefits in a Non-Member Hospital

> (a) Blue Cross Payment for eligible Inpatient or Outpatient care rendered to a Covered Person in a Non-Member Hospital, other than a governmental hospital, shall be up to $30.00 per day toward the hospital's regular charges for eligible Benefit Days hereunder, and up to $5.00 per day toward the hospital's regular charges for eligible part Benefit Days hereunder.
>
> (b) Blue Cross Payment for eligible hospital care rendered to a Covered Person as either an Inpatient or an Outpatient in a Non-Member Governmental Hospital shall be the average amount per day actually being collected by such hospital for all patients but not less than $6.00 nor more than $30.00 for each eligible Benefit Day, except that the actual charges for the eligible services rendered shall be paid if such charges are less than $6.00.

Prior to April 26, 1993, all 85 acute care hospitals in New Jersey were member hospitals as defined by the BCBS contract. But in its effort to implement the intent of the Health Care Reform Act of 1992 to reduce medical costs and health premiums, BCBS entered into negotiations with the State's acute care hospitals and announced on April 26 that it had formed a new select hospital network of 56 hospitals (C-2, Exhibits A and B).

The City was not aware of, nor involved in, the decision to select 56 hospitals for the BCBS network. BCBS had unilaterally made that decision then informed the City that the 56 hospitals would continue as member hospitals, but the remaining 29 (of 85) hospitals would be treated as non-member hospitals as provided for in their agreement (T70, T78, T103). In emergency situations, however, employees would still receive full coverage even in non-member hospitals (T84). When BCBS originally announced the change it did not advise the City of any options regarding the 29

non-member hospitals (T78), and it informed the City that the change would take effect on August 1, 1993, the renewal date of their agreement (C-2, Exhibit C).

On or about May 14, 1993 (see attachment to J-8) BCBS informed the City that it could retain the 29 non-member hospitals as member hospitals by amending the policy with a rider and paying an additional premium (T80).[4/] The City, however, did not do that. While it asked for and received information on the cost of amending its policy to include the other 29 hospitals as member

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4/ On cross-examination, City Director of Personnel, John D'Auria, explained that BCBS told him that to retain the 29 non-member hospitals as member hospitals the City would have to get a rider and amend their policy (T80). There was no contradictory testimony on that issue. D'Auria also knew that the City could not amend the policy without negotiating with the Association over the benefit change (T76). In an arbitration decision (J-6) between the City and three other unions representing City employees regarding the same hospital network issue, the arbitrator discussed the City's argument that it would have to amend its contract to obtain 100% coverage at all 85 hospitals, and concluded at p. 18, that it was the opposite, that if a subscriber sought the select hospital network of 56 hospitals it would be required to convert by amendment or rider to such a plan. But that conclusion was contradicted by the arbitrator's earlier findings of fact on pages 15 and 17. On p. 15 the arbitrator found that a witness conceded that: "if the City had entered into a rider and paid an increased premium, employees of the City would have continued to receive one hundred percent reimbursement for eligible services at the 85 hospitals". At p. 17 the arbitrator found that "The City could have retained the same 85 hospital network by paying increased premiums and amending its contract with BCBS."

Since the arbitrator's decision is contradictory on that point, and since there is no other evidence regarding that matter, I credit D'Auria's explanation that the City could only have moved the 29 non-member hospitals into the member category by amending its policy with BCBS.

hospitals, it did not seek to amend or change its agreement with BCBS, but did request that BCBS delay the implementation of the new hospital network until January 1, 1994 (T80-T81; C-2, Exhibit C).[5/]

By not amending its policy with BCBS to fully cover the 29 (or 27) non-member hospitals the City realized a substantial reduction in its BCBS policy premiums as of January 1, 1994 (T59-T60, T72, T76, T81).

2. The City and Association were parties to a collective agreement (J-1) ratified in September 1990 and effective January 1, 1990 through December 31, 1992. Since the parties had not reached a new agreement by January 1994, the terms of J-1 remained in effect. Article 10 of J-1 provided for health and life insurance.

Section 1 provided for hospitalization, medical surgical, Rider J and major medical coverage as follows:

> The City agrees to continue to provide at its expense (except as otherwise provided herein) the following health insurance coverages during the term of this Agreement for all active employees and their eligible dependents (dependent children are covered to age 23). The current hospitalization plan (Blue Cross Group Comprehensive Plan) shall remain in full force and effect. The Medical-Surgical Plan shall be the Blue Shield P.A.C.E. Plan with Rider J ($250 aggregate limit through March 31, 1988 and increased to $400 effective April 1, 1988 and thereafter) and Emergency Medical Room Rider. The City agrees to continue to provide at its expense major medical coverage with an individual lifetime maximum of $250,000. Effective January 1, 1992, the aforesaid individual lifetime maximum shall be increased to $500,000.00.

5/ The record does not show what the City's cost would have been to amend the BCBS contract. But at some point after January 1, 1994 two of the 29 hospitals were moved into the member category by BCBS.

Article 10, Section 9 provides:

> Any contract of insurance purchased by the City pursuant to this Article shall be administered in accordance with the underwriting rules and regulations of the insurance carrier. The City's liability shall be limited to the provisions of the carrier's contract only.

Article 29, the Fully Bargained clause provides:

Section 1.

> This Agreement represents and incorporates the complete and final understanding and settlement of the parties. During the term of this Agreement, neither party will be required to negotiate with respect to any matter whether or not covered by this Agreement and whether or not within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

Section 2.

> This Agreement shall not be modified in whole or in part by the parties except by an instrument in writing duly executed by both parties.

Association President, Kenneth Rox, admitted he was familiar with Article 10 Section 9, but he did not explain the meaning of that section (T61). City Labor Relations/Compensation Officer, Gregory Franklin, negotiated the language in Article 10, including Section 9. (T86-T88).[6/] Franklin testified that the language in Section 9 was intended to limit the City's liability to

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6/ Franklin testified that he participated in negotiations for all the sections of Article 10, but explained that when J-1 was negotiated some of the sections of Article 10 remained the same as in prior agreements (T87). Based upon that response I am satisfied that at the very least, Franklin was involved in the renegotiation of Section 9 and its eventual placement into J-1.

provide health care to only the provisions of the BCBS policy (T88). I credit that testimony because I find that the language in Section 9, on its face, limits the City's obligation to provide health insurance to the provisions of the BCBS policy.7/

In addition to the medical benefits provided by BCBS, City employees also receive major medical benefits provided by the Prudential Insurance Co. The major medical coverage is used in conjunction with the BCBS benefits. All of the charges not covered by BCBS, such as hospitalization charges, can be submitted to Prudential to be paid at 80% of those charges after an annual $100 deductible. The lifetime maximum under the major medical plan is $500,000 per individual (T47, T89-T90, J-1). Based upon the change in the number of member hospitals, the major medical lifetime

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7/ In J-6, the arbitrator noted that Franklin was asked about Section 10 of one of the fire union contracts and the arbitrator quoted from a transcript that Franklin said:

> Section 10 and other clauses like Section 10 is, as it states, to limit the City's liability with respect to the provisions of the insurance carrier's contract.
> ...contemplated as a limitation on the liability of the City...
>
> The language from Section 10 of the fire union agreement apparently is at least similar to, and may be the same as, Section 9 of Article 10 here. But since the arbitrator found that Franklin was not present when Section 10 of that agreement was negotiated, he did not explain what Section 10 meant or how it applied to the parties. I make no finding regarding what Section 10 said or meant. I find only that I credit Franklin's testimony regarding the facts of this case.

maximum will be used up more quickly for individuals seeking non-emergency hospitalization at the 29 non-member hospitals (T58-T59).

3. Negotiations between the City and the Association for a new collective agreement began in late 1992 and continued through 1993 and into 1994 (T25). During those negotiations prior to July 1993, the City did not seek changes in the administration of the Blue Cross program, but it did seek to increase the deductible for prescriptions, and it made proposals regarding second surgical opinions, and a patient review program (T26). The Association proposed an increase in the lifetime maximum for its major medical plan (T58).

On April 23, 1993, BCBS sent a letter to Governor Florio (C-2, Exhibit B), notifying him of its decision to establish the new hospital network. On April 26, 1993 BCBS issued a press release (C-2, Exhibit A) with the announcement of the new network. On or about May 14, 1993, BCBS sent Gregory Franklin a letter (J-8 attachment p. 12-p.13) informing the City of the new hospital network which included as members 56 of the 85 acute care facilities, but which also contained some language about how to maintain 100% coverage at all 85 hospitals.

On July 21, 1993 the Association filed a petition with the Commission (Docket No. IA-94-009) to initiate interest arbitration for a new agreement. At that time the City had still not advised the Association of the new hospital network policy (T25).

On September 27, 1993, the interest arbitrator sent a letter (J-7) to the City and Association attorneys which were received that same month, notifying them that the interest arbitration hearing was scheduled for October 13, 1993. On September 28, 1993 John D'Auria sent letters (C-2, Exhibit C; J-8) to the different union presidents representing City employees notifying them of the BCBS decision to continue only 56 of 85 hospitals as member hospitals. D'Auria did not offer to negotiate, but did offer to discuss the matter. Rox did not receive his copy of D'Auria's letter (J-8), until the morning of October 13, 1993, the day the interest arbitration hearing began (T27, T42). On or about that same day Rox spoke to D'Auria about J-8 and said he "disagreed with the entire thing", that is, that he disagreed with not having 100% coverage at all 85 hospitals (T43).[8/] The Association sought to maintain the status quo and to engage in negotiations over the number of hospitals included in the BCBS network.

8/ Rox was asked on cross-examination whether he "disagreed" with much of the literal language in J-8. Rox did not disagree that BCBS had made a decision regarding membership for the 85 hospitals, or when it was to take effect (T44-T46). Rox simply testified that he had "disagreed with the entire thing, that we can only go to a certain amount of hospitals" (T43-T44), from which I inferred that what he meant was he disagreed with the situation that was to be implemented where employees would no longer have 100% coverage at all 85 acute care hospitals and he sought negotiations on the subject. He did not necessarily mean he disagreed with the literal language in J-8.

The City did not provide the Association with any information in addition to that which was contained in J-8 (T27-T28). D'Auria admitted that the reduction in member hospitals from 85 to 56 was a "change" (T82). Although he believed that the City could not amend its BCBS policy to include all 85 hospitals as member hospitals without negotiating with the unions (T76), the City did not offer to negotiate with the Association over the hospital issue before J-8 was sent, and was not willing to negotiate with the Association over that matter after J-8 was issued (T28).

The interest arbitration proceeding began on October 13 and there were seven hearings leading up to June 8, 1994 (T28). During that time the City made no proposals regarding the hospital network (T28), and refused to negotiate over the network.

On February 2, 1994, (J-9) BCBS responded to a request for information on the new hospital network filed by one of the five unions. BCBS indicated that the City could choose to provide 100% service at all 85 hospitals.

On May 31, 1994, the arbitrator in J-6 issued his decision finding that the City violated the respective contracts and ordered the City to restore 100% reimbursement for all 85 acute care hospitals. The arbitrator also ordered that the City make individual employees whole where they paid higher premiums for health coverage or sustained calculable out-of-pocket losses resulting from the reduction of member hospitals. The arbitrator retained jurisdiction to determine employee losses.

4. Many employees represented by the Association were adversely affected by the change in the number of member hospitals (T35-T42, T64-T68). Several employees or their dependents had doctors who practiced in hospitals that had been member--but suddenly became--non-member hospitals. Those employees had to either change doctors and drive farther to member hospitals, and/or use the non-member hospitals and submit to Prudential the amount BCBS now would not cover, and pay any amount Prudential rejected.

5. As of May 31, 1994, approximately 26 Association unit members were covered by HMO's and subject to a payroll deduction for their HMO benefit (T29). The City determines the amount of payroll deduction, at least for employees in the Association's unit, by comparing the combined BCBS and Prudential monthly premium for each category (family, parent-child, single) with the monthly premium each particular HMO charges for the same categories. The employee is obligated to pay the difference, if any, between the particular HMO premium for the selected category, and the BCBS/Prudential premium for the same category (T90).

The premium BCBS charges the City is mostly determined by the number of claims that were made during a particular one year period. For the City, the premium period runs from August 1, to the following July 31. If the premium that was collected the previous year does not cover the claims and administration costs, the premium is raised for the following year (T91).

As an alternative to receiving health insurance through BCBS/Prudential, City employees had the option to be covered by one of five HMO plans. In calendar years 1992 and 1993 the five HMO's were Prucare, US Healthcare, Co-Med, HIP-Rutgers, and Aetna. In 1994, the first four HMO choices were the same, but HMO Blue was substituted for Aetna (J-2, J-3, J-5).

City employees in the uniformed units, which included employees represented by the Association, paid bi-weekly co-pays for the particular HMO's as follows:

1992 (J-2)

	Prucare	US Healthcare	Co-Med	HIP	AETNA
Single	7.98	6.62	0	0	7.44
Family	6.78	0	0	0	8.51
Parent/Child	13.21	0	4.07	0	0

1993 (J-3)

	Prucare	US Healthcare	Co-Med	HIP	AETNA
Single	2.64	1.25	0	0	0
Family	0	0	0	0	0
Parent/Child	0	0	0	0	0

1994 (J-5)

	Prucare	US Healthcare	Co-Med	HIP	HMO Blue
Single	11.49	17.20	12.22	16.06	7.89
Family	19.41	36.45	36.63	28.59	15.22
Parent/Child	17.55	6.66	0	0	0

The above rates were the lowest rates paid by any employee group in those respective years.[9/] Employees represented by non-uniformed unions paid significantly higher rates than the uniformed employees in all three years, but particularly in 1994. Since 1992 the most dramatic change in HMO co-pays occurred among nonuniformed employees because the City negotiated with unions representing those employees that newly hired employees represented by them would pay a much higher contribution toward their health benefits (T92).

The 26 members of the Association's unit who elected HMO coverage have a significantly higher payroll deduction for that coverage in 1994 than they did in 1993 because of the combined decrease in the BCBS premiums and the simultaneous increase in the particular HMO premiums (T29-T34, T95).

ANALYSIS

The facts of this case lead to a complicated legal analysis. Neither party's approach was entirely correct. There are five primary areas of concern that need to be considered. 1) Who was responsible for the hospital network change and implementation and what did it mean; 2) did the change violate the parties

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9/ In 1993 only, rank and file police officers had a slightly better HMO rate for single employees for Prucare and US Healthcare than did employees in the Association's unit (J-3).

collective agreement; 3) was the City otherwise obligated to negotiate over the hospital network; 4) do the facts support a violation of N.J.S.A. 34:13A-21; and, 5) did the City violate the Act with respect to the amount employees were required to pay for HMO co-pay?

The Hospital Network Change

The record shows that BCBS alone was responsible for both the change to and implementation of the new hospital network. The City had no advanced knowledge of, nor had it participated in, the decision that resulted in the movement of 29 hospitals from the member to the non-member category in the City/BCBS agreement. Although the City successfully convinced BCBS to delay the implementation of the change from August 1, 1993 to January 1, 1994, the City had no authority to prevent the implementation for which BCBS was solely responsible.

The amount of hospitalization coverage that any health insurer provides to plan participants for hospital services, however, is a benefit, and such benefits to employees are terms and conditions of their employment. Since the implementation of the new hospital network resulted in the decrease (by 29) of the number of hospitals for which City employees could receive 100% coverage for hospital services, the new network represented a significant decrease in the employees' hospitalization benefit, thus a change and decrease in their terms and conditions of employment.

In its post-hearing brief the City argued that despite the BCBS action, the employees continue to enjoy the same level of health insurance benefits negotiated and bargained for when the City/Association agreement became effective. That argument is misleading and inaccurate.

While it might be accurate to argue that the general hospitalization benefit level of 100% coverage for member hospitals and $30 per day for non-member hospitals was the same on January 1, 1994 as had been negotiated for J-1, the specific benefit level of coverage for City employees using the 29 hospitals had changed. At the time J-1 became effective on January 1, 1990 and during its life (until December 31, 1992), all 85 acute care facilities were member hospitals under the BCBS/City agreement and, therefore, as a specific benefit level, a plan participant would receive 100% hospitalization coverage at any of those hospitals. That changed on January 1, 1994. The specific benefit level for employees using 29 of the 85 hospitals dropped. It was no longer 100% coverage, it was only $30 per day. That was more than just an administrative maneuver, it was a change in a term and condition of employment, i.e., the level of benefit for employees using those 29 hospitals.

The Collective Agreement

Despite the drop in the hospitalization benefit, the City cannot be found to have violated J-1 because of the change in, and implementation of, the new hospital network. That is, J-1 as a

whole did not obligate the City to elect to amend its BCBS agreement to cover the other 29 hospitals as member hospitals. The interpretation of collective agreements is not the Commission's primary function. In fact, the Commission will not issue a complaint where an allegation is based on a mere breach of contract, State of N.J. Dept. of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Those type of cases should be processed through the parties' grievance procedure. But where a labor organization alleges that an employer has repudiated a collective agreement, or, more particularly, where, as here, an employer raises the contract as a defense, it is appropriate and, in fact, necessary for the Commission to interpret the relevant portions of an agreement. Since a public employer meets its negotiations obligation when it acts pursuant to its collective agreement, Sussex-Wantage Reg. Bd. Ed., P.E.R.C. No. 86-57, 11 NJPER 711 (¶16247 1985); Pascack Valley Bd. Ed., P.E.R.C. No. 81-61, 6 NJPER 554, 555 (¶11280 1980), and since the City relied on the language in J-1 to support its defense, it was necessary to review and interpret the parties' contract.

A close examination of the language in Article 10, Section 1 of J-1 shows that the hospitalization plan that the City agreed to provide was the same hospitalization plan that had been in effect when J-1 was reached (effective January 1, 1990), and that plan was to remain in effect. The "plan" in effect on January 1, 1990 was the BCBS plan discussed above which included language describing the benefits for employees in member and non-member hospitals. That language in the City/BCBS agreement (C-2, Exhibit F) has not changed.

But the heart of the hospitalization plan that was in effect on January 1, 1990 was that all 85 acute care hospitals in New Jersey were member hospitals which meant more extensive coverage for employees. That fact--the number of hospitals in the member category on January 1, 1990--is as much a part of the "plan" that was in effect on January 1, 1990 as the actual language contained in C-2, Exhibit F. Any attempt to eliminate that fact as part of the plan would emasculate the meaning of the member category.

The City's argument that all that happened here was that BCBS gave life to the non-member category of their agreement misses the point. To dramatize the point, the City seems to be arguing that even if BCBS moved 90% of the hospitals to the non-member category it is still providing the same hospitalization plan. Such a move, of course, would destroy the plan that had been in effect when J-1 became effective. Although here it is only about 35% of the hospitals that were actually moved to the non-member category, the effect--though not as dramatic--is the same. The "plan" has changed. Thus, looking <u>only</u> at the language in Article 10, Section 1, the City was obligated to keep in place the same "plan" that was in effect on January 1, 1990, but that language was subject to the language in Article 10 Section 9.

Article 10, Section 9 of J-1 relieves the City of the obligation to automatically provide 85 member hospitals or to amend the BCBS agreement. The language in Section 9 provided that "the City's liability"--and I believe "liability" means its obligation

with respect to Article 10--"shall be limited to the provisions of the carrier's contract only". What that language means is that the City's liability to provide health benefits under Article 10 of J-1 is limited to only the actual provisions of the BCBS contract. Since the BCBS contract or "plan" changed to include only 56 hospitals as member hospitals, then the City was not otherwise obligated by the language in Section 1 of Article 10 of J-1 to amend its BCBS contract to cover all 85 hospitals as member hospitals.[10/] Thus, the City's decision not to amend its BCBS policy did not violate J-1.

The Duty to Negotiate

In its defense here the City relied upon the language in J-1, the fact that it never made any changes to its contract, and the Commission decisions in UMDNJ, P.E.R.C. No. 88-120, 14 NJPER 367 (¶19142 1988); and Jersey City Medical Center, P.E.R.C. No. 81-89, 7 NJPER 97 (¶12039 1981) where the Commission found that public employers are not responsible for changes made by third parties. But those defenses lack merit. Neither J-1, nor the decisions relied upon, are sufficient to excuse the City of its obligation to have negotiated with the Association over the effect of the new

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10/ My decision on the meaning of the language in J-1, particularly on the interpretation of the language in Article 10 Section 9, is limited to this case. It is not meant to apply to the arbitrator's decision in J-6. I note that the contracts related to J-6 were not presented to me and I cannot be certain whether the pertinent language is the same.

hospital network change. That change resulted in the reduction of a health benefit level. Although the City was not obligated by J-1 to automatically take any action regarding the new benefit level, since J-1 had expired and the Association had sought negotiations over the hospital network while the parties were still negotiating/ arbitrating over a new agreement, the City was obligated to negotiate with the Association over the effects of the new hospital network change since it created a new term and condition of employment.

The City apparently assumed that J-1 operated as a waiver of any Association right to negotiate over the change in the hospital network. Although the City correctly argued that an employer has met its negotiations obligation when it acts pursuant to its collective agreement, Sussex-Wantage Reg. Bd./Ed.; Pascack Valley Bd./Ed.; an employer may only avail itself of that defense to the extent the contract language and its terms covers the matter at issue. But if the contract language does not operate as a waiver of the union's right to negotiate over that issue, or the terms of the contract no longer allow it to operate as a waiver, the contract will not act as a defense to the employer's refusal to negotiate. Such is the result here.

By the language in Article 10 Section 9 of J-1, the City's liability to provide hospitalization insurance was limited to the provisions of the BCBS contract. That meant that during the life of J-1 the City could not be required to provide a hospitalization

policy which was more than what the BCBS policy provided. Thus, even though the new hospital network changed an existing term and condition of employment by reducing the number of member hospitals thereby decreasing the benefit provided at those hospitals, the language in Article 10, Section 9, from a purely contractual analysis, operated as a waiver of what would have been the Association's contractual right to require the City to abide by the language in Article 10 Section 1 to provide the hospitalization plan that was in effect when J-1 was reached, which included all 85 hospitals as member hospitals. But the waiver language in Article 10 Section 9 did not mean the City could avoid negotiations over the number of hospitals in the network after J-1 expired.

The Association did not allege that the City violated J-1. It alleged that the City refused to negotiate in good faith over the new hospital network. J-1 does not operate as a waiver of the Association's right to engage in such negotiations for two reasons. First, after BCBS created the new network, it informed the City that it could upgrade its health policy to include all 85 hospitals as member hospitals. By giving the City that choice, BCBS actually gave the City the discretion to decide whether or not all hospitals would be member hospitals. To the extent a public employer is vested with discretion that could affect terms and conditions of employment, a labor organization is entitled to negotiate over whether or how that discretion should be exercised. See State v. State Supervisory Ees Assn., 78 N.J. 54, 81-82 (1978); Bethlehem Tp.

Bd./Ed. v Bethlehem Tp Ed. Assn., 91 N.J. 38, 44 (1982). Thus, even if J-1 were still current, there is no language therein that would operate as a waiver of the Association's right to negotiate over how the City should exercise that discretion.

A contract cannot operate as a waiver in New Jersey unless the language clearly and unequivocally waives negotiations over a particular negotiable right. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. Bd. of Ed., 78 N.J. 122, 140 (1978); State of N.J, P.E.R.C. No. 77-40, 3 NJPER 78 (1977); Deptford Bd. Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd App. Div. Dkt. No. A-1818-80T8 (5/24/82). Article 29, the Fully Bargained--or zipper--clause of J-1 contains strong general language that the parties were not required to negotiate over any matter not covered by the contract. But that language is insufficient to operate as a waiver of the Association's right to negotiate over whether or how the City should exercise its newly acquired discretion regarding member hospitals.

Second, and perhaps most important, J-1 cannot operate as a waiver of the Association's negotiable right here because, by its own terms, it expired on December 31, 1992, and the Association did not become aware of the impending hospital network change until October 1993. While the terms and conditions of employment set forth in an expired collective agreement must normally remain in effect while the parties are engaged in negotiations (or arbitration) for a new agreement, Piscataway Twp. Bd. Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975), once the contract has expired the parties

are obligated to negotiate over any term and condition of employment raised by either party whether or not covered by the prior agreement. Fair Lawn Bd. Ed., P.E.R.C. No. 76-7, 1 NJPER 47 (1975). That is precisely what the Association sought to do here.

In Fair Lawn the Commission said:

> All topics which are terms and conditions of employment, regardless of their inclusion in past contracts or policies, are subject to the duty to negotiate if raised by either party during the course of collective negotiations. Id. at 48.

J-1 expired on December 31, 1992. Once the Association became aware in October 1993 of the impending hospital network change, it quickly sought negotiations over the new hospital network, that is, whether or how the City should exercise its discretion to bring the 29 hospitals back to member status. Thus, although J-1 -- in October 1993 -- did not obligate the City to bring all 85 hospitals back into member status, the City at that time was, nevertheless, obligated to negotiate with the Association over the hospital network issue because J-1 had expired. J-1 in October 1993 simply protected the City from being required to take some action regarding the 29 non-member hospitals until after the parties had completed negotiations on the topic.

The City's reliance on the Commission's decisions in Jersey City and UMDNJ is misplaced. Those cases are distinguishable from this matter. In both cases, a third party--not a party to the union/employer collective agreement--took action having an adverse effect on the employees. The Commission found that the respective

public employers were not responsible for the action and had no control over the matter, thus, it dismissed the complaints.

In Jersey City the employees had been parking for free at a lot neither owned nor controlled by the employer. When the owner closed the lot the public employer leased the lot and imposed a $1.00 parking fee per day. The union alleged that the employer violated the Act by unilaterally imposing a fee, and it based its case on the argument that free parking had been a term and condition of employment. The union further argued that since free parking was a term and condition of employment the employer violated the Act by failing to negotiate before implementing the change. But the union never actually sought or demanded negotiations over the parking fee.[11/] The Commission found that since the employer had no control of the prior parking arrangement, parking at the lot (free or otherwise) did not become a term and condition of employment and the Complaint was dismissed. Since the union had not sought negotiations over the fee the employer did not violate the Act by not negotiating over the fee.

Here, too, the City had no control over the initial decision and implementation to change the hospital network. In Jersey City, the employer exercised its discretion to set a parking fee and the union did not seek negotiations thereon. Here, however, the Association quickly sought negotiations over how the City would use its discretion regaridng membership in the hospital network.

11/ Jersey City Medical Center, H.E. No. 81-19, 6 NJPER 600, note 1 at 603 (¶11297 1980).

In UMDNJ the union alleged that the employer violated the Act by terminating free parking for certain employees. The Commission dismissed the complaint. It found that the employer neither owned nor controlled the parking facility; that an independent third party made the change in parking privileges; thus, it concluded that the employer had not changed a term and condition of employment. In UMDNJ the union did not raise the parking issue during negotiations for a new agreement, and the employer was not given the discretion to undo what the third party had done.

This case is the same as UMDNJ only with respect to the implementation of the new hospital network. The City had no control over the BCBS decision to change and implement the hospital network, therefore, the City could not be in violation of the Act merely because the network change was implemented. But here the City was given the ability to undo what BCBS had done, and the Assocition appropriately sought negotiations over that matter. UMDNJ did not restrict such negotiations.12/

In its post-hearing brief, the Association argued that it was inappropriate for the City to acquiesce to the reduced hospital network without first negotiating over the reduction, and that the

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12/ See also Borough of Berlin, P.E.R.C. No. 91-122, 17 NJPER 359 (¶22167 1991); and Hazlet Twp. Bd. Ed., D.U.P. No. 95-2, 20 NJPER _____ (¶_____ 1994) where third partys controlled a change affecting employees for which the public employer was not responsible. Those cases are also distinguishable from the instant case where the City was given the discretion to undo what the third party had done.

City should have negotiated over that matter prior to the implementation of the new network. I reject those arguments. Since the City had no control over when the new network would be implemented it could not have been required to negotiate over the network prior to its implementation. Certainly the City should have engaged in negotiations with the Association before the new network was implemented, and if it had, it is possible that some agreement would have been reached before January 1, 1994. But the City's only obligation was to negotiate in good faith over the topic even if those negotiations continued past January 1. Thus, the City is not required to return to the pre-1994 status quo before engaging in negotiations, it is only obligated to negotiate with the Association retroactive to January 1, 1994.

The N.J.S.A. 34:13A-21 Allegation

N.J.S.A. 34:13A-21 restricts a public employer or employee representative from making changes in terms and conditions of employment during interest arbitration proceedings. But since I found that the City made no such changes here, the change was made and implemented by BCBS, the City cannot be found to have violated that section of the Act.

HMO Co-Pay Expense

The increase in the HMO co-pay was not done in violation of the Act. The City did not change the method used to determine the

co-pay. The co-pay for the Association's unit is the difference between the amount of the BCBS/Prudential premium and the amount of the particular HMO plan premium. The change in the hospital network certainly contributed to the co-pay increase, but the substantial co-pay increase was also partially caused by the actual premium increase for the respective HMO plans. The record, however, does not show how much of the increase was attributable to the lowered BCBS premium, and how much was attributable to the increased cost of the HMO plan premiums.

The issue here is whether the City took any action in violation of the Act to cause the co-pay increase. It did not. The reduction in the BCBS/Prudential premium resulted from BCBS's implementation of the new hospital network. The City was not responsible for that action. Had the City reached an agreement with the Association over the member status of the 29 hospitals prior to January 1, 1994, it is possible that the BCBS/Prudential premium would have been higher, thus reducing the HMO co-pay cost. Although the City was obligated to negotiate with the Association over its discretion to change the 29 hospital member status, it was not required to complete those negotiations prior to BCBS's decision to implement the new network. Thus, even if the City had engaged in negotiations, there is no way to determine if, to what extent, or when the BCBS premium would have been changed to affect the HMO co-pay.

Consequently, I find that the City did not violate the Act by setting the Association HMO co-pays on J-5. I note, however, that since the City and Association must negotiate over the number of hospitals in the network retroactive to January 1, 1994, it would be appropriate for them to consider what effect, if any, a negotiated agreement would have on what the BCBS/Prudential premium would have been.

Accordingly, based upon the above findings and analysis, I make the following:

CONCLUSIONS OF LAW

1. The City violated subsection 5.4(a)(5) and derivatively, (a)(1) of the Act by refusing to negotiate with the Association over whether or to what extent the City should exercise its discretion to return the 29 hospitals to member status.

2. The City did not violate subsection 5.4(a)(5) of the Act when BCBS implemented a change in the hospital network.

3. The City did not violate N.J.S.A. 34:13A-21.

RECOMMENDED ORDER

I recommend the Commission ORDER

A. That the City cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to negotiate with the Association over its discretion to amend the hospital network.

2. Refusing to negotiate in good faith with the Association concerning terms and conditions of employment of employees in its unit, particularly by refusing to negotiate with the Association over its discretion to amend the hospital network.

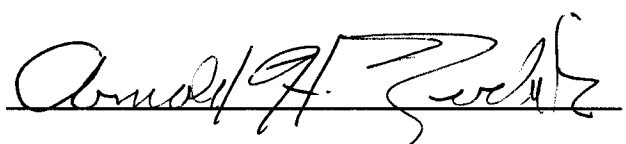
B. That the City take the following action:

1. Negotiate with the Association upon demand retroactive to January 1, 1994, over whether, or to what extent, or when it should amend its agreement with BCBS to include other hospitals in the hospital network.

2. 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. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

C. That the 34:13A-21 allegation, and all other allegations be dismissed.



Arnold H. Zudick
Hearing Examiner

Dated: October 21, 1994
Trenton, New Jersey

Recommended Posting
Appendix "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to negotiate with the Association over our discretion to amend the hospital network.

WE WILL NOT refuse to negotiate in good faith with the Association concerning terms and conditions of employment of employees in its unit, particularly by refusing to negotiate with the Association over our discretion to amend the hospital network.

WE WILL negotiate with the Association upon demand retroactive to January 1, 1994 over whether, or to what extent, or when we should amend our agreement with BCBS to include other hospitals in the hospital network.

Docket No._____ _____
(Public Employer)

Dated_____ By_____
(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.