State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

EXETER PROFESSIONAL FIREFIGHTERS LOCAL 3491, IAFF	:	
Complainant	:	CASE NO. F-0115:3
v.	:	DECISION NO. 96-026
TOWN OF EXETER	:	
Respondent	:	

APPEARANCES

Representing Exeter Professional Firefighters:

Shawn J. Sullivan, Esq.

Representing Town of Exeter:

David C. Engle, Esq.

Also appearing:

George N. Olson, Town of Exeter
Phil Kendrick, Exeter FFA
Ward Byrne, Exeter FFA
Donald R. Matheson, Exeter FFA
John A. Piehler, Exeter FFA
Roy Simpson, Exeter FFA

BACKGROUND

The Exeter Professional Firefighters Association, Local 3491, I.A.F.F. (Union) filed unfair labor practice (ULP) charges against the Town of Exeter (Town) on January 17, 1996 alleging as amended on January 29, 1996 violations of RSA 273-A:5 I (e) and (h) relative to a breach of contract because the Town permitted bargaining unit employees to enroll in a health plan other than

that provided for in the collective bargaining agreement (CBA). The Town filed its answer on February 2, 1996. After an intervening continuance sought by and granted to the parties for February 15, 1996, the PELRB heard this matter on March 14, 1996.

FINDINGS OF FACT

1. The Town of Exeter is a "public employer" of firefighters and other personnel within the meaning of RSA 273-A:1 X.

2. The Exeter Professional Firefighters Association, Local 3491, IAFF, AFL-CIO is the duly certified bargaining agent for firefighters employed by the Town.

3. The Union and the Town are parties to a CBA which remains in effect until December 31, 1996 and is in effect all times pertinent to these proceedings. Article 15.1 thereof provides, "As soon as possible after the effective date of this agreement is executed employees shall be provided with Major Medical Health and Hospitalization insurance for themselves and dependents. The level of benefits shall be comparable to those provided by Blue Cross/Blue Shield plan 'J-W.'" (Joint Exhibit No. 1.) According to testimony from Town Manager George Olson, Section 14.2 of the Town's Personnel Plan, which pertains to non-organized employees, utilizes essentially the same language and provides essentially the same benefits to its non-union employees. (Town Exhibit No. 1.)

4. According to testimony for Lt. Norman Byrne, a member of the negotiating team, bargaining for the current CBA occurred over a span of two and a half years. During that time the health maintenance organization (HMO) identified as "Healthsource" was not suggested by either the Union or the Town as either a primary or alternate carrier for major medical and hospitalization insurance nor did the parties ever negotiate or reach agreement involving or mentioning Healthsource or any other HMO. Notwithstanding this, Byrne said that the Town permitted a bargaining unit employee to enroll in Healthsource in January of 1996 for his health insurance coverage entitlement under Article 15.1 of the CBA.

5. Article 18.1 of the CBA provides for a contract grievance procedure in order to adjust "grievances arising from an alleged violation, misinterpretation or misapplication with respect to one or more unit employees, or any provision of this Agreement." Both Byrne and local president Donald Matheson testified that the Union elected to process this matter as a ULP rather than as a grievance because Healthsource was not mentioned in or a part of the CBA.

6. The Union cited two statutory provisions in support of its contention that the Town committed an unfair labor practice when it permitted a unit employee to enroll in Healthsource, to wit:

RSA 420-B:24 I

> Each employer, public or private, in this state which offers its employees a health benefit plan and employs at least 25 employees, and each employee benefit fund in this state which offers its members any form of health benefit, shall make available to and inform its employees or members of the option to enroll in at least one health maintenance organization holding a valid certificate of authority which provides health care services in the geographic areas in which a substantial number of such employees or members reside; provided, however, that such employer or employee benefit fund shall not be required to make available or inform its employees or members about such option if no health maintenance organization is available to such employer or employee benefit plan. Where there is a prevailing collective bargaining agreement, the selection of the available health maintenance organizations shall be made pursuant to the agreement. (Emphasis added)

42 USC § 300e-9 (a)(A)(2)

> If any of the employees of an employer or State or political subdivision thereof described in paragraph (1) are represented by a collective bargaining representative or

> other employee representative designated or selected under any law, offer of membership in a qualified health maintenance organization required by paragraph (1) to be made in a health benefits plan offered to such employees (A) shall first be made to such collective bargaining representative or other employee representative, and (B) if such offer is accepted by such representative, shall then be made to each such employee. (Emphasis added)

7. There is no evidence that the parties bargained the issue of exclusivity of the health care provider/ insurer in the CBA (Joint Exhibit No. 1), that they bargained what would be considered "comparable," or that there was either bargaining or discussions at the bargaining table, not rising to the level of bargaining, that the provider would be other then Blue Cross-Blue Shield.

8. Prior CBA's between the Union and the Town on file with the PELRB contained "comparable" benefits language in 1986-87, 1988-90 and 1990-93. Notwithstanding this and testimony from Town Manager Olson that Healthsource had been an alternate health insurance provider for non-unionized Town employees for ten years, there is no evidence of earlier enrollments of bargaining unit employees with Healthsource or other alternate providers or that such practice had occurred, that it had been noticed to and that it then had been waived by the Union.

DECISION AND ORDER

We find the Town's actions in permitting the enrollment of a bargaining unit member in a non-designated health insurance plan to have been in violation of RSA 273-A:5 I (e) and (h), as a unilateral change in past practice, a breach of contract and as to direct dealing with the employee involved. Both witnesses for the Union testified that they only learned of the enrollment through the "grapevine." Thus, by practice and result, the Town's permitting the enrollment of the employee in Exeter is just as much "direct dealing" in violation of RSA 273-A:5 I (e) as was the School Board's circulation of contracts directly to teachers for signature in Franklin Education Association, 136 N.H. 332 (1992). In both instances the negotiating process was

frustrated and the statute's purpose of requiring collective bargaining was thwarted.

When we look to a long and established bargaining history which spans four CBA's we find no instance(s) where the Town has utilized its unilateral discretion to define "comparable" in such a way as to permit an employee or employees to subscribe to a health care plan other than the one provided in the CBA, i.e., Blue Cross/Blue Shield. Bryne testified that the health insurance language was the same as in the prior CBA and suggested that keeping Blue Cross/Blue Shield was a matter of importance and priority to his bargaining unit. When we match this history to the testimony about how the subject of comparability and identity of carrier/provider was neither bargained nor changed during the bargaining process, we detect a past practice or on-going understanding which endured over four CBA's. To permit the complained of enrollment would be contrary to that history of successful bilateral implementation and application of the health insurance provisions of the CBA.

Without conscious discussion of the identity of the health insurance carrier at the bargaining table and an acquiescence in former positions by one side or the other, we cannot say either (1) that the Union's conduct was equivalent to a waiver such as to permit the Town to change past practice by allowing the complained of enrollment or (2) that the Town's permitting the enrollment was within the contemplation of the agreement. Thus, we conclude that there has been no agreed to change in the parties' interpretation of the definition of "comparable." Likewise, there was no bargaining table waiver or historical waiver by the Union of how the health insurance provider has been identified over the duration of four CBA's. The Town's conduct must be considered to have been a breach of contract and violative of past practice.

By way of information, we found the statutory language referenced in Finding No. 6 helpful, but not necessarily controlling in this forum. Without exhaustive discussion of the interplay of these statutes vis-à-vis RSA 273-A, suffice it to say that both RSA 420-B and 42 USC § 300e point out the strong public policy reasons why actions such as were complained of here should not be taken unilaterally. The parties' bilateral understanding and implementation of the terms of the CBA are what make it work; unilateral and non-cooperative interpretations and implementations do not contribute to the effectiveness of that document.

By way of remedy we direct that the Town CEASE and DESIST from allowing bargaining unit members to enroll in health insurance programs other than those (namely Blue Cross/Blue Shield) contemplated by the CBA and that any further changes involving an alternate health benefits provider which is a HMO be bargaining with the Union before being implemented.

So ordered.

Signed this 25th day of April, 1996.

Jack Buckley

JACK BUCKLEY
Alternate Chairman

By unanimous vote. Alternate Chairman Jack Buckley presiding. Members E. Vincent Hall and William Kidder present and voting.