STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF RHODE ISLAND STATE LABOR RELATIONS BOARD -AND- STATE OF RHODE ISLAND DEPARTMENT OF ADMINISTRATION	CASE NO: ULP-5689

DECISION AND ORDER

TRAVEL OF CASE

The above entitled matter comes before the Rhode Island State Labor Relations Board (hereinafter "Board") as a Unfair Labor Practice Complaint (hereinafter "Complaint") issued by the Board against the State of Rhode Island, through its Department of Administration (hereinafter "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated September 30, 2003 and filed on October 2, 2003 by the R.I. Council 94, AFSCME, AFL-CIO (hereinafter "Union").

The Charge alleged violations of R.I.G.L. 28-7-13 (6) and (10).

> "The above named employer has violated Title 28, Chapter 7, Sections 13 (6) and (10) of the R.I.G.L. by unilaterally changing the conditions of employment of bargaining unit members; by bypassing the certified collective bargaining representative and communicating on mandatory subjects of bargaining with bargaining unit members; and failing to negotiate mandatory subjects for bargaining with the certified bargaining representative. These changes were effectuated with regard to the pharmacy network available to union members as reflected in the attached correspondence dated September 2003 and September 23, 2003."

Following the filing of the Charge, an informal conference was held on December 9, 2003. The Board issued its Complaint on February 9, 2004. The Employer filed its answer to the complaint on February 13, 2004, denying the allegations therein. A formal hearing was conducted by the Board on March 30, 2004. Representatives from both the Union and the Employer were in

attendance and had full opportunity to present evidence and to examine and cross-examine witnesses. In arriving at the Decision and Order herein, the Board has reviewed and considered the testimony and evidence presented and arguments contained within the post hearing briefs.

SUMMARY OF FACTS & TESTIMONY

At all times relevant hereto, the Employer and the Union were parties to a collective bargaining agreement for the period July 1, 2000 through June 30, 2004. Article 14, "Health and Welfare" of that agreement provides in pertinent part:

> 14.2 On and after January 1, 2002, and for at least three (3) calendar years through December 31, 2004, the State will offer to unionized active state employees a product such as "Blue Cross Healthmate Coast to Coast" and /or "United Health Care's Choice Plus Nationwide)" or a substantially equivalent package of benefits delivered through a PPO. An indemnity plan (i.e.//. Classic Blue) will no longer be offered.
>
> 14.3 Except for the drug co-pay and current charges for office visits, the State will pay the entire cost for such plan.
>
> 14.4 The Employee waiver will be increased from $1,300.00 to $2,000.00 effective January 1, 2002.
>
> 14.5 Employee Drug Co-Pay The employee drug co-pay shall be as follows:

Date	Generic	Formulary	Non-Formulary
Jan 1, 2002	$5.00	$10.00	$20.00
Jan 1, 2003	$5.00	$11.00	$25.00
Jan. 1, 2004	$5.00	$12.00	$30.00

> The State will explore the feasibility of offering a drug mail order program, which will be less expensive for both the State and the employees.

In July 2001, the State issued a Request for Proposals, hereinafter "RFP 12414" for Heath Care Administration for State Employees. (Employer Exhibit #2) John Turano, the Labor Relations Administrator for the Employer, testified that it was his belief that Council 94, through its Executive Board member, Mary Reilly, was aware of the contents of RFP12414, as far back as the

summer of 2001 when RFP 12414 was issued. Mr. Turano testified that he saw Ms. Reilly in the Department of Administration's building and that Ms. Reilly told Mr. Turano she was there to review the RFP 12414.[1]

Sometime in September 2003, Mr. Turano became aware that the Department of Administration was contemplating a change in what's known as an Open National Network to a Preferred National Network. (TR. p. 66) Mr. Turano testified that he asked his secretary to schedule meetings with all of the unions so that he could "confer and discuss the change in the network...and the reasons therefore." (TR. p. 67) Mr. Turano testified that he did not meet with Council 94 because Mr. Furia said that it would not be necessary. Mr. Turano further testified that he told Mr. Furia to "come in" and that he [Turano] had been "briefing everybody that wanted to come in and talk about this." (TR. p. 68) Mr. Turano testified that during this phone conversation, Mr. Furia did not tell Turano that the change was a negotiable item, that it was a violation of the contract or that it required requested negotiations on the subject. (TR. p. 69) Mr. Turano further testified that at no time prior to November 1, 2004 did the Union send in a written request for negotiations.

Mr. Furia testified that he received a call from Mr. Turano about a week before a September negotiating session which had been scheduled solely on the issue of a "wage re-opener clause" contained within the CBA. Mr. Furia testified that Mr. Turano told him that the Department of Administration was notifying all unions that they would be putting a change in the pharmacy network and that Mr. Turano's call was a "courtesy call" and that the state expected to implement by October 1, 2003. (TR. pgs. 46, 48) Mr. Furia indicated that when he spoke with Mr. Turano that although he [Furia] may not have used the exact words that the change in pharmacy benefits was subject to negotiations, he felt that Mr. Turano, as a labor attorney understood. Mr. Furia felt it was clear between the two of them on the phone. Mr. Furia also testified that at the subsequent wage negotiation session, the state spent a great deal of time justifying its decision

[1] Ms. Reilly did not testify in these proceedings.

while the Union spent a great deal of time chastising the State's representatives for the decision to make the change. (TR. p 50)

Sometime in September 2003, Mr. Jerome Williams, in his capacity as Director of the Department of Administration, sent a letter to all State employees and retirees. That letter stated in pertinent part:

> "As the cost of prescription drugs continues to escalate, employers and health insurers everywhere are looking for ways to control those costs without compromising quality or greatly inconveniencing employees. The State of Rhode Island is no exception. As such, ***we have opted to take advantage*** of the National Preferred Network of Pharmacies in lieu of the existing National Open Network. This change will go into effect on November 1, 2003." (Emphasis added herein)

Also in September 2003, Rhode Island Blue Cross and Blue Shield wrote to state employees. This letter apparently accompanied the letter from Mr. Higgins and stated in pertinent part:

> "As explained in the enclosed letter from State of Rhode Island, Department of Administration Director Robert J. Higgins, the ***State has elected to take advantage*** of Blue Cross & Blue Shield of Rhode Island's National Preferred pharmacy network for the state employee prescription drug plan." (Emphasis added herein)

Blue Cross and Blue Shield also apparently prepared another letter in September, 2003 with additional details on the change in the pharmacy network. That letter stated in pertinent part:

> "We would like you to know that the ***State of Rhode Island has chosen to change*** its prescription drug plan pharmacy network form the National Open Network to the National Preferred Network. This change will be effective for prescriptions purchased on or after October 1, 2003.
> (Emphasis added herein)
>
> For your convenience, we have identified some local pharmacies that are participating providers in the current network, but will not be included in the new network:
>
> | | |
> |---|---|
> | Danielson Pharmacy | Shaws Supermarket |
> | Duane Reade, Inc. | Stop & Shop Supermarket Co |
> | K-Mart Corporation | Target Stores |
> | NeighborCare | TheraCom |
> | Pharmerica, Inc. | Walgreens Drug Stores |
>
> Remember: If you have your prescriptions filled on or after October 1, 2003 at one of the pharmacies listed above, your out-of-pocket expenses will be higher. [2]

[2] It is unclear whether Blue Cross issued the letter later on its letterhead, but the Union did have a version that was not on Blue Cross letterhead. The contents of the letter have not been disputed.

DISCUSSION

The complaint charged the Employer with by-passing the certified collective bargaining representative by communicating on mandatory subjects of bargaining with bargaining unit members and with a failure to negotiate mandatory subjects of bargaining with the certified bargaining representative, with regard to the pharmacy network available to union members.

The Employer submits several defenses to the Board's charge that the Employer committed unfair labor practices. First, the Employer argues that the Board lacks jurisdiction over this matter because it was Blue Cross, not the State that implemented the changes and that Blue Cross had a contractual right to do so. This argument is simply not credible based upon the reliable probative evidence as a whole. As previously summarized, there were three pieces of written communications that were generated by *both* the State and Blue Cross in September 2003. These documents all identify the State as having "opted to take advantage", "chosen to take advantage" and "chosen to change" the pharmacy network. Moreover, the Blue Cross letter makes it clear that is being distributed in tandem with the letter from Mr. Higgins.

The Employer further argues that the R.F.P. which preceded the award to Blue Cross specifically permitted "Blue Cross to make changes to its network as necessary" and that the Board cannot rule on this third party contract without making Blue Cross a party to this proceeding. This argument simply ignores the Employer's own evidence which established that all three letters establish that it was the State that was making the change, not Blue Cross.

The Employer next argues that the change to the pharmacy network is permissible because the health care benefits which were negotiated into the contract are still available to employees, even if not at all the same pharmacies they were previously available. The Employer agued that this case is similar to that presented in BP Amoco Corporation v. N.L.R.B., 217 F.3d 869 (DC Cir 2000). The Employer argues that Amoco was decided on the basis that Amoco's actions were sufficient to allow the company to institute changes to a health plan particularly since the Union had offered no suggestions of its own. The Board

finds this argument to clearly misrepresent the decisional basis of Amoco. In Amoco, the DC Circuit Court reversed a finding of an unfair labor practice on the basis that the collective bargaining agreement expressly incorporated the company benefit plan, which in turn expressly reserved to BP Amoco the right to amend, modify, suspend or terminate the benefit plan at any time. The language contained in the Amoco medical plan contained the following "reservations of rights" provision:

> "The company expects and intends to continue these plans indefinitely. However, the company reserves the right to amend or terminate these plans at any time and for any reason. If any of these plans are amended or terminated, you and other active employees may not receive benefits as described in other sections of this book. You may be entitled to receive different benefits or benefits under different conditions. However, it is possible that you will lose all coverage. This may happen at any time, even after you retire, if the company decides to terminate a plan or your coverage under a plan. In no event will you become entitled to any vested rights under these plans."

Since there was no such "reservation of rights" in the parties' CBA, this case is not even remotely similar to BP Amoco and the Board is not persuaded by the State's arguments to the contrary.

The Employer next argues that the issue of provision of pharmacy services is "covered by" the contract and the contract does not require the State to provide the benefit at any particular pharmacies. The State argues that as long as it continues to insure that there are available medications at the agreed upon co-payment rate, the State has no duty to bargain with regard to the specific pharmacies that provide this benefit. This Board does not agree. If the State's argument was correct, then it could unilaterally decide to limit pharmacy selection to just one location or could offer more, only if it so chose.

The issue of health benefits is clearly a mandatory subject for bargaining and the Employer so acknowledges. The Employer argues that the union, when it reached agreement with the state on the contract, agreed that the State could provide a substantially equivalent package of benefits through a PPO and therefore, the State's action in changing the pharmacy network was permissible. That argument ignores the plain language of section 14.6 which provides that the employee drug co-pay ***shall*** be as follows. Additionally, Section 14.6

contemplated that the State would explore the feasibility of offering a drug mail order program which will be less expensive. The contract did ***not*** state that the co-pay shall be a specific dollar amount, but only at certain pharmacies.

The Employer next argues that the matter presented is one of "contract interpretation" and that the matter should be determined by arbitration. In so arguing the Employer cites the case of Caritas Good Samaritan Medical Center, 340 N.L.R.B. 6 (2003) and stated that the NLRB ruled that since co-pays for services were not set forth in the contract, whether or not the co-pays could be increased was a matter of contract interpretation. Thus, the Employer argues that whether or not the contract requires that the National Open Pharmacy Provider network is maintained is matter of contract interpretation. That argument misconstrues the issue. The only real issue presented by this case is whether or not the change to another pharmacy network inhibits the employee's rights to established co-pays and if so, whether that change was negotiated. There can be no question that the change of the pharmacy network inhibited the employees rights to pay established co-pays and that no bargaining took place.

The Employer next argues that the complaint must be dismissed because the Union, after having notice of the intended change, waived any right it might have had to bargain because it failed to request bargaining after having been notified of the Employer's intent. The Employer argues that the NLRB has found that even two days notice is sufficient time for a union to demand to bargain over a proposed mid-contract change. Once notice is given, the question of whether the notice has provided the union with a meaningful opportunity to bargain is essentially a question of fact, dependent upon the circumstances of the case. NLRA Law & Practice 12.04 (9) at 12-95 citing AT&T Corp, 337 NLRB 105 (2002) and Oklahoma Fixture Company, 79 F.3d 1030 (10th Cir. 1996). There is no bright line rule or fixed timeframe by which a union must request bargaining after learning about a proposed change and a union's failure to raise an issue does not constitute waiver of its right to bargain if the Union is led to believe that an attempt to bargain over the issue would be futile. National Car Rental System, Inc. 672 F.2d 1182, 1189 (3rd Cir 1982) Presentation of a change as a *fait*

accompli prevents finding that a failure to request bargaining is a waiver. Pontiac Osteopathic Hospital 336 NLRB 1021 (2001) If notice is too short a time before implementation *or the employer has no intention if changing its mind,* then the notice is nothing more than a fait accompli. CibaGeigy Pharmaceutical Division, 264 NLRB 1013, 1017 (1982) (Emphasis added)

In this case, the Board finds that the evidence in this case taken as a whole, supports a finding that that the State had no intention of changing its decision on the switch from the National Open Network to the Preferred Provider Network. Although Mr. Furia and Mr. Turano differ somewhat on the details of their conversations, Mr. Turano did testify that he was "briefing everyone that wanted to come in and talk about this." This is very different than calling the unions and notifying of a proposed change. Although the state argues in its brief the fact that the implementation date was changed from October 1, 2003 to November 1, 2003, is evidence that bargaining was not futile, there was no testimony from any witness that the delay had anything to do with the response from the Unions. In fact, the only testimony on this subject was from Mr. Furia who stated that he believed the implementation date was moved to November 1 because "they had problems with the transition." [3]

Most compelling however, is the documentary evidence. All three communications support a finding that the State "opted to take advantage", "chosen to take advantage" and had "chosen to change" the pharmacy network. This Board is convinced that the State had no intention to change its mind about the pharmacy network because it was intent on saving the State's taxpayers approximately $820,000.00. We have previously stated in other decisions that tax saving is a laudable goal and a highly favored result. However, Employers cannot simply drive over its public sector unions and throw its employees under the bus to achieve the goal. The presentation to both the unions and the individual employees via the written communications at essentially the same time is evidence of a *fait accompli* that excuses the union from making a futile request for bargaining.

[3] The Board is not making any finding as to the reason for the delay because that information was simply not presented to it.

Finally, the Employer argues that the change to the pharmacy network created such a minimal impact to the state's employees, that the State had no duty to bargain over the changes. As support for this argument, the State focuses on the overall changes nationwide and mocks the Union's argument about the employee's relationship with their pharmacist by intertwining it with the union's complaint that changes were made in the nationwide network. This argument is simply shameful. The evidence in the record indicated that a dozen Rhode Island pharmacy companies (including some with multiple locations) were eliminated from the network at which the employees could receive their prescription drugs at the contractually agreed upon rate. Two of those companies are also two of the state's largest grocery store chains, Stop & Shop Supermarket and Shaws Supermarket. It seems to this Board that that the Supermarket changes alone would have been significant to a large part of the state employee population. Another issue is the medical relationship that people have forged with their pharmacist. [4]

The Employer also argues that the increase in the cost per prescription at the non network pharmacies of approximately $1.00 to $2.00 per prescription was de minimis. The Board rejects that argument outright because the collective bargaining agreement provided for particular dollar amounts. To change that dollar amount without bargaining is an unfair labor practice and this Board so finds.

FINDINGS OF FACT

1) The Respondent is an "Employer" within the meaning of the Rhode Island State Labor Relations Act.
2) The Union is a labor organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with employers in grievances or other mutual aid or protection; and, as such, is a "Labor Organization" within the meaning of the Rhode Island State Labor Relations Act.

[4] In addition, the Union did present the testimony of James Larisa, as a representative sample of the types of problems encountered by employees as a result of this change.

3) The Employer and the Union were parties to a collective bargaining agreement for the period July 1, 2000 through June 30, 2004 which contained the following prescription drug benefit.

Employee Drug Co-Pay the employee drug co-pay shall be as follows:

Date	Generic	Formulary	Non-Formulary
Jan 1, 2002	$5.00	$10.00	$20.00
Jan 1, 2003	$5.00	$11.00	$25.00
Jan. 1, 2004	$5.00	$12.00	$30.00

4) Sometime in September 2003, Mr. John Turano, the Labor Relations Administrator for the State of Rhode Island became aware that the State's Department of Administration was contemplating a change in what's known as an Open National Network to a Preferred National Network.

5) In response to this notification, Mr. Turano had his secretary attempt to schedule meetings with all of the state employee unions so that Mr. Turano could "confer and discuss the change in the network...and the reasons therefore."

6) Council 94 did not meet with Mr. Turano separately on this issue, although they did meet within several days for a previously scheduled wage re-opener bargaining session.

7) Sometime in September 2003, Mr. Jerome Williams, in his capacity as Director of the Department of Administration, sent a letter to all State employees and retirees. That letter stated in pertinent part: "As the cost of prescription drugs continues to escalate, employers and health insurers everywhere are looking for ways to control those costs without compromising quality or greatly inconveniencing employees. The State of Rhode Island is no exception. As such, ***we have opted to take advantage*** of the National Preferred Network of Pharmacies in lieu of the existing National Open Network. This change will go into effect on November 1, 2003." (Emphasis added herein)

8) Also in September 2003, Rhode Island Blue Cross and Blue Shield wrote to state employees. This letter apparently accompanied the letter from Mr. Higgins and stated in pertinent part: "As explained in the enclosed letter from

State of Rhode Island, Department of Administration Director Robert J. Higgins, the ***State has elected to take advantage*** of Blue Cross & Blue Shield of Rhode Island's National Preferred pharmacy network for the state employee prescription drug plan." (Emphasis added herein)

9) Blue Cross and Blue Shield also prepared another letter in September, 2003 with additional details on the change in the pharmacy network. That letter stated in pertinent part: "We would like you to know that the ***State of Rhode Island has chosen to change*** its prescription drug plan pharmacy network from the National Open Network to the National Preferred Network. This change will be effective for prescriptions purchased on or after October 1, 2003.

10) In effectuating the change of pharmacy network, several Rhode Island pharmacies were eliminated as being providers within the co-pays set forth in the collective bargaining agreement. These pharmacies included all of those located within the Stop& Shop Supermarket chain and the Shaws Supermarket chain.

11) In addition, the following pharmacies were also eliminated as providers [at the designated co-pays]: Danielson Pharmacy, Duane Reade, Inc., K-Mart Corporation, Target Stores, NeighborCare, TheraCom, Pharmerica, Inc. and Walgreens Drug Stores.

CONCLUSIONS OF LAW

1) The Union has proven by a fair preponderance of the credible evidence that the Employer has committed a violation of R.I.G.L. 28-7-13 (6).

ORDER

1) The Employer is hereby ordered to cease and desist from unilaterally changing the conditions of employment of bargaining unit members.

2) The Employer is hereby ordered to post a copy of this decision on all employee bulletin boards within three (3) days after the receipt hereof for a period of no less than thirty (30) days.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni, Chairman

Frank Montanaro, Member

Joseph V. Mulvey, Member

Gerald S. Goldstein, Member (Dissent)

Ellen L. Jordan, Member (Dissent)

John R. Capobianco, Member

Elizabeth S. Dolan, Member (Dissent)

Entered as an Order of the
Rhode Island State Labor Relations Board

Dated: 3-14, 2006

By: ROBYN H. GOLDEN RHG
Robyn H. Golden, Administrator

ULP-5689

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF RHODE ISLAND STATE LABOR RELATIONS BOARD -AND- STATE OF RHODE ISLAND DEPARTMENT OF ADMINISTRATION	CASE NO: ULP-5689

NOTICE OF RIGHT TO APPEAL AGENCY DECISION PURSUANT TO R.I.G.L. 42-35-12

Please take note that parties aggrieved by the within decision of the RI State Labor Relations Board, in the matter of ULP No. 5689 dated March 14, 2006, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after March 14, 2006.

Reference is hereby made to the appellate procedures set forth in R.I.G.L. 28-7-31.

Dated: March 14, 2006

By: *Robyn H. Golden* RHG
Robyn H. Golden, Administrator

ULP-5689