STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

DAVENPORT ASSOCIATION OF PROFESSIONAL FIRE FIGHTERS, Complainant, and CITY OF DAVENPORT, Respondent.	)	CASE NO. 102164

DAVENPORT ASSOCIATION OF PROFESSIONAL FIRE FIGHTERS, Complainant, and CITY OF DAVENPORT, Respondent.	)	CASE NO. 102311

DECISION ON APPEAL

This matter is before us on the City's appeal from a proposed decision and order issued by an administrative law judge (ALJ) of the Public Employment Relations Board (Board or PERB) concerning two prohibited practice complaints filed by Davenport Association of Professional Fire Fighters pursuant to Iowa Code section 20.11. The ALJ consolidated the two complaints for hearing and concluded the Association established the City's commission of prohibited practices in violation of Iowa Code section 20.10 and 20.10(2)(*a*), (*e*), and (*f*) when the City made unilateral changes to the prescription benefit plan without fulfilling its bargaining duty to the Association.

Pursuant to Iowa Code section 17A.15(3), in this appeal, the Board possesses all powers it would have possessed had it elected, pursuant to PERB rule 621—2.1, to preside at the evidentiary hearing in place of the ALJ. The Board has heard the case upon the record submitted before the ALJ. On December 15, 2020, both parties' representatives presented oral arguments to the Board, attorneys Charles Gribble and Christopher Stewart for the Association and attorney Brian Heyer for the City.

Based upon its review of the record before the ALJ, and having considered the parties' arguments, the Board concludes the Association established the City's commission of prohibited practices and states as follows:

FINDINGS OF FACT

The ALJ's findings of fact, as set forth in his proposed decision and order, are attached as "Appendix A," and are fully supported by the record. At oral arguments, neither party disputed the ALJ's proposed findings of fact. The Board adopts them as its own with the following additions:

On January 1, 2018, RxBenefits, the City's prescription benefits manager, excluded some brand-name medications from coverage under the City's prescription benefits plan. As the ALJ's findings provide, the record shows one individual whose brand-name medication was excluded from coverage and the generic medication was ineffective. Prior to the January 1 change, this individual had attempted, against her physician's recommendation, a month-long trial of the generic Adderall that was

unsuccessful.[1] As a result of the coverage exclusion of Adderall XR, the medication recommended by her physician, she was required to pay full retail price for the medication.

On January 1, 2019, RxBenefits excluded additional brand-name medications as well as several generic medications from coverage under the City's prescription benefits plan. As a result, the record reflects one example where both the brand-name Nexium and its generic version were excluded. This required one individual to schedule an appointment with his physician to be prescribed an alternative.[2] This individual was required to bear the cost of his physician's visit at ten percent for an in-network provider.

The Cost Containment Committee met for the first time in August 2018. The committee did not make recommendations for formulary changes that would exclude certain medications from coverage in 2019.

The Association president, Ryan Hanghian, was the lead negotiator for the two relevant collective bargaining agreements in effect when the City made changes to the covered prescriptions of the unit's health insurance plan. Hanghian testified the parties' collective bargaining agreements allowed the City to change carriers, but not the level of health insurance benefits. Hanghian further testified the Association did not

[1] *See* transcript pp. 30-32 and Association's Exhibit 7.
[2] *See* transcript pp. 37-39 and Association's Exhibit 11.

agree to changes in prescription drugs available for the parties' health insurance plan and the changes were a decrease in benefits.

CONCLUSIONS OF LAW

The ALJ's conclusions of law, as set out in Appendix A, are correct, and the Board adopts them as its own with the following discussion:

On appeal, the City reasserts its argument that the "City did not act" and it was the third-party prescription benefits manager that made cost containment changes in the "mutual interest" of both parties. The ALJ correctly framed the issues and addressed the City's defense in reaching his conclusions.

First, the City cannot pass its Iowa Code chapter 20 bargaining obligations to a third-party such as RxBenefits. As cited by the ALJ,

> Iowa Code chapter 20 'imposes certain bargaining obligations upon public employers, notwithstanding the possible existence of any other contractual relationships or entanglements in which the employer may be involved.'

See Appendix A at 13 (citing *Mount Pleasant Educ. Ass'n & Mount Pleasant Cmty. Sch. Dist.*, 1999 ALJ 5894). Like the ALJ in *Mount Pleasant*, we cannot subscribe to the proposition that an employer is to be relieved of its bargaining obligation because it has entered into a third-party contract, the operation of which may, under certain circumstances, require the employer to violate its statutory bargaining duty. *See Mount Pleasant Educ. Ass'n*, 1999 ALJ 5894 at 12. Therefore, we agree with the ALJ the City is not relieved of its Iowa Code chapter 20 bargaining obligations by its third-party contract with RxBenefits.

Second, the ALJ correctly concluded the Association did not clearly and unmistakably waive its right to negotiate all changes to "insurance" not expressly listed in section 17.1 of the parties' collective bargaining agreement. While a party may contractually waive its right to bargain about a subject,

> [a] waiver by a union of its statutory bargaining rights will not be readily inferred, and there must be a clear and unmistakable showing that a waiver occurred, or that a union has 'bargained away' its statutory rights to bargaining on a mandatory subject.

City of Cedar Rapids & Cedar Rapids Ass'n of Fire Fighters, Local 11, 1997 PERB 5129 & 5179 at 6 (citing Gorman, *Labor Law, Unionization and Collective Bargaining*, pp. 467-68 (West 1976)). *See AFSCME/Iowa Council 61 & Louisa Cnty.*, 2011 PERB 8146 at 9; *Mount Pleasant Educ. Ass'n*, 1999 ALJ 5894 at 12 (citing in part *Elizabethtown Water Co.*, 234 NLRB 318, 97 LRRM 1210 (1978); *Office & Professional Employees Local 425 v. NLRB*, 419 F.2d 314, 70 LRRM 3047 (D.C. Cir. 1969)).

> In cases where an employer relies on a contractual provision as a purported waiver which authorizes it to make unilateral changes in matters not contained in the collective agreement, the NLRB requires evidence that the matter was 'fully discussed and consciously explored during negotiations and the Union must have consciously yielded or clearly and unmistakably waived its interest in the matter.'

Mounty Pleasant Educ. Ass'n, 1999 ALJ 5894 (citing *Rockwell International Corp.*, 260 NLRB 1346, 1347, 109 LRRM 1366, 1367 (1982)).

In the present case, we agree with the ALJ that "neither the language cited by the city nor any evidence of the parties' negotiations discloses

such an unmistakable waiver by the Association." *See* Appendix A at 15. Based on the record, the parties did not fully discuss and consciously explore, during negotiations, the Association's waiver of its right to negotiate the prescription medications covered by the health insurance plan.

The City's reliance on the agreements' last paragraph of Article XVII, Section 17.1, is misplaced for several reasons. Within this contractual provision, the parties recognize cost containment as a mutual interest and establish an insurance committee charged with, among other things, reviewing cost containment alternatives. However, the provision clearly provides that the City will only implement recommendations administrative in nature and "[a]ny other recommendations . . . will be negotiated with the Union." This does not reflect a clear and unmistakable showing that the Association waived its right to negotiate substantive insurance changes, including the prescription coverage.

Moreover, the record reflects this committee never met until August 2018, and it never made recommendations on prescription coverage changes. Further, the Association's lead negotiator for both contracts testified the level of insurance benefits was to remain the same or better throughout the contract periods and he viewed the prescription changes as a decrease in benefits. For all these reasons, we agree with the ALJ's conclusion the record does not show a clear and unmistakable showing

that the Association waived its right to bargain the prescription coverage changes that took place on January 1, 2018, and January 1, 2019.

As its final contention, the City seemingly asserts a prohibited unilateral change did not take place by the prescription coverage changes. The City maintains these changes were contemplated by the collective bargaining agreements. The Association disagrees and asserts there was a change to insurance when the prescription coverage changed each January 1.

In unilateral change cases, it is sometimes necessary for PERB to determine whether a change occurred by first identifying the "status quo," of the procedures, policies and practices that were in operation at the time of the alleged change. *See Cedar Rapids Ass'n of Fire Fighters, Local 11*, 1995 PERB 4898 at 11-13; *UE Local 893/Iowa United Prof'ls & State (Dep't of Human Servs.*), 2019 ALJ 100024 at 6; *Greenwald & Muscatine Cmty. Sch. Dist.*, 2012 ALJ 8419 at 6-7; *AFSCME Local 231 & Linn Cnty.*, 2007 ALJ 7148 at 16. This determination cannot be made solely by reference to terms of the collective bargaining agreement. *AFSCME Iowa Council 61 & State (Dep't of Corrs.)*, 2014 ALJ 8693 at 17. In some instances, changes are made to procedures, policies and practices not addressed by the contract or are peripheral to the contract's terms. *Id.*

In the present case, a review of the status quo is helpful in ascertaining whether a change occurred on January 1, 2018 and again on January 1, 2019. Before January 1, 2018, the parties' health insurance

plan included a three-tier prescription plan with a list of covered prescriptions for each tier. Tier I prescriptions, referred to as generic medications, were subject to a $5 copay; Tier II prescriptions, referred to as brand-name medications, were subject to a $15 copay; and Tier III prescriptions, referred to as non-preferred or specialty brand-name medications, were subject to a $30 copay. As of December 31, 2017, each insurance plan member with a physician-prescribed prescription paid the copay corresponding to the medication's listed tier.

On January 1, 2018, RxBenefits sent letters to certain insurance plan members informing them that at least one of their medications would no longer be "covered on [the] drug list." They could pay "full retail price" to refill the prescription or their "doctor can prescribe another effective medication that's included on [the] list." The record shows that one plan member had undergone an unsuccessful trial of a generic medication in the previous year. The member's physician would only recommend the name-brand medication for which this member was now required to pay full retail price.

On January 1, 2019, RxBenefits revised its prescription coverage again to exclude additional brand-name medications as well as several generic medications. The record reflects that both the brand-name and generic medication for one member was excluded from coverage as a result. In response to the Association's questions, the City informed members that they could contact their physician and request a covered

prescription or pay full retail price for the medication. Plan members were responsible for their portion of the costs, in copay and deductibles, associated with the physician's visit to obtain a new prescription.

The City's argument that it merely made formulary changes in prescription coverage on January 1 is not persuasive. Changes to mandatory subjects that place new or substantively different terms on employees are changes that require the employer first fulfill its bargaining obligation. *Cedar Rapid Ass'n of Fire Fighters, Local 11*, 1995 PERB 4898 at 12-13. In this case, the prescription coverage changes required plan members to expend additional time or bear additional expense beyond the status quo of the preceding December 31. This included payment of full retail price of medication or payment for a physician's visit for a covered medication, and time expended in visiting the doctor to obtain a new prescription or undergoing a trial of an alternative medication. These were significant and substantive changes to insurance for the members.

We agree with the ALJ's conclusion that the City was required to obtain the Association's consent prior to excluding medications from the prescription benefits plan. The record shows the City did not fulfill its bargaining obligation and obtain the Association's consent. For all of reasons stated herein and in the ALJ's analysis, the Association met its burden to establish the City committed prohibited practices in violation of Iowa Code sections 20.10(1) and 20.10(2)(*a*), (*e*), and (*f*).

As discussed at oral arguments, the Association did not appeal the ALJ's conclusion that the Association failed to establish the City bypassed the Association and engaged in unlawful individual bargaining in violation of Iowa Code sections 20.10(1) and 20.10(2)(*a*), (*e*), (*f*), and (*g*).

Based on all of the above, we consequently issue the following:

ORDER

The City of Davenport is ordered to cease and desist from further violations of the Act. The City shall post the attached Notice to Employees in places customarily used for the posting of notices to employees for a period of not less than thirty (30) calendar days following final agency action outlined below.

For other specifics of an appropriate remedy, the Board retains jurisdiction of this matter in order to address any remedy-related matters which might hereafter arise and to specify the precise terms of the remedy. In order to prevent further delay in the resolution of this matter, in the event the parties fail to reach agreement, the Board will schedule a hearing to receive evidence and arguments on the precise terms of the remedy within 45 days of the below date. Agency action will not be final until the appropriate remedy is approved or determined by the Board. The Board retains jurisdiction to enter whatever orders may be necessary or appropriate to address any remedy-related matters which may hereafter arise.

The costs of reporting and the agency-requested transcript in the amount of $568.10 remain assessed equally against the Respondent, City of Davenport pursuant to Iowa Code section 20.11(3) and PERB rule 621—3.12(20). The bill of costs will be issued to the Respondent in accordance with PERB subrule 2.12(3).

DATED at Des Moines, Iowa this 30th day of September, 2021.

PUBLIC EMPLOYMENT RELATIONS BOARD

Mary T. Gannon, Board Member

SPECIAL CONCURANCE

I concur in holding the City committed a prohibited practice. I write separately to emphasize my concurrence is limited to the facts and legal arguments raised by the parties in this case only, and should not be broadly interpreted to extend precedence to future cases.

I ultimately concur in finding the City implemented a change, however, I find it necessary to highlight some evidence in the record could lead to the conclusion the January 2018 and January 2019 changes were merely a continuation of the status quo, not a change to the status quo. The City, at all times relevant to these complaints, utilized a third-party prescription plan manager (PBM) to administer prescription benefits. Both PBMs utilized by the City—NPS and RxBenefits—maintained the exclusive right to adjust drug formularies. Both PBMs routinely updated their

formularies, generally on January 1 and July 1. The City did not control specific drug placement on the formulary under either PBM service provider. These facts imply that changes to drug coverage occurred as routine practice prior to January 2018, without complaint from the union, and consequently, the January 2018 and 2019 drug changes could represent a continuation of this practice. However, the record lacks specific evidence to determine whether, how often, and to what extent the prescription coverage changed prior to the PBM's adjustments underlying the complaints. For that reason, I find the record insufficient to support finding the changes underlying the complaints constitute a continuation of the status quo.

Additionally, while I concur in finding the changes involved a mandatory subject, I only do so because the parties agreed on the issue and no arguments to the contrary were presented. The Board is now required to interpret Iowa Code section 20.9 topics "narrowly and restrictively" following the 2017 statutory amendments to the Public Employment Relations Act. 2017 Iowa Acts ch. 2, § 6 (codified at Iowa Code § 20.9(1)(2018)).

The Board recognized the statutory amendments legislatively overruled the Iowa Supreme Court's holding in *Waterloo II* that mandatory subjects of bargaining be given their common and ordinary meaning. *Columbus Cmty. Sch. Dist. and Columbus Educ. Ass'n,* 2017 PERB 100820 at 3 (citing *Waterloo Educ. Ass'n v. Iowa Pub. Emp't Relations Bd.*, 740

N.W.2d 418). The parties' agreement on the matter deprives PERB of the first opportunity to reexamine prior precedent on the definition of insurance in light of the legislative directive to interpret the term narrowly and restrictively. Given the City did not challenge the status of the alleged changes as mandatory in this case, I decline to delve into the scope of bargaining analysis here and instead, for that sole reason, concur with the finding that the alleged changes involved the topic of insurance.

Erik M. Helland, Chair

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STATE OF IOWA
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DAVENPORT ASSOCIATION OF PROFESSIONAL FIRE FIGHTERS, Complainant, and CITY OF DAVENPORT, Respondent.	CASE NO. 102164
DAVENPORT ASSOCIATION OF PROFESSIONAL FIRE FIGHTERS, Complainant, and CITY OF DAVENPORT, Respondent.	CASE NO. 102311

PROPOSED DECISION AND ORDER

On March 29, 2018, in Case No. 102164, and March 12, 2019, in Case No 102311, the Complainant, Davenport Association of Professional Fire Fighters (Association), filed prohibited practice complaints with the Public Employment Relations Board (PERB or Board) pursuant to Iowa Code section 20.11 and PERB rule 621—3.1. In both complaints, the Association alleges the Respondent, City of Davenport (City), committed prohibited practices within the meaning of Iowa Code sections 20.10(1) and 20.10(2)(*a*), (*e*), (*f*), and (*g*) when, during the terms of the 2015—2018 and 2018—2023 collective bargaining agreements (CBA), the City made unilateral changes to the agreements' insurance provisions without providing notice to, negotiating with, nor obtaining the consent of the Association and unlawfully bypassed the Association and bargained directly with bargaining unit members. The City denies its commission of prohibited practices.

By order dated May 16, 2019, the undersigned administrative law judge (ALJ) consolidated the cases pursuant to PERB rule 621—2.16(20). All subsequent documentation in the record was electronically filed in PERB Case No. 102311. Pursuant to notice, an evidentiary hearing was held before me in Davenport, Iowa on August 13, 2019. Attorneys Charles Gribble and Christopher Stewart represented the Association and attorney Brian Heyer represented the City of Davenport. Both parties filed post-hearing briefs, the last of which was filed on September 23, 2019.

Based upon the entirety of the record, as well as the parties' arguments, I conclude the Association established the City's commission of prohibited practices.

FINDINGS OF FACT

Background

The material facts in these cases are not in dispute. The Davenport Association of Professional Fire Fighters is an employee organization as defined by Iowa Code section 20.3(4) and the City of Davenport is a public employer as defined by section 20.3(10). PERB has certified the Association as the exclusive bargaining representative for certain employees of the City of Davenport. The Association represents about 125 Fire Department employees in the ranks of firefighter through captain. At least thirty percent of the members of the bargaining unit are "public safety employees" as defined by Iowa Code section 20.3(11)(*e*).

The Association and the City of Davenport have long been, and currently

are, parties to collective bargaining agreements (CBA). At issue in these cases is the City's alleged unilateral change of the insurance provision in two separate collective bargaining agreements. In Case No. 102164, at issue is an alleged unilateral change to the CBA that was in effect from July 1, 2015, to June 30, 2018. In Case No. 102311, at issue is an alleged unilateral change to the parties' current CBA, effective July 1, 2018, through June 30, 2023.

The relevant terms of both CBAs as they relate to the Association's complaints are nearly identical. In both CBAs, section 17.1, titled "Group Insurance," establishes the City and employees' respective contributions to the cost of single employee and dependent health insurance coverage. Concerning prescription drug coverage, Section 17.1(a) states:

> The health insurance plan shall include a Three Tier prescription plan. Tier I prescriptions will be subject to a five dollar ($5) copay, Tier II will be subject to fifteen dollar ($15) copay and Tier III will be subject to a thirty dollar ($30) copay. An optional mail order plan is available for Prescription maintenance drugs – at 2x monthly copay for a 90-day supply. The Cost Containment Committee will assist in the selection of any future changes to a Directed Prescription PPO.

Section 17.1(d) of both CBAs reserves the right of the City to change carriers or to self-insure all or any portion of group insurance benefits, but only if "the level of benefits remains equal to or better than those currently provided."

Although the CBAs do not expressly identify which prescription drugs are included in each "tier," at the hearing, both the Association's president, Ryan Hanghian, and the City's Human Resources Director, Mallory Merritt, testified that it was their understanding Tier I was generic medications, Tier II was brand-

name medications, and Tier III was non-preferred or specialty brand-name medications.

The final paragraph in section 17.1 of both CBAs states:

> The City and this Union will jointly investigate cost containment measures regarding the cost of providing group insurance, including costs of medical, dental, optical and prescription services, to each employee in this Union. Both Parties recognize that it is in their mutual interests to seek to contain health costs. This Union will appoint one member to participate in a City-wide Insurance Committee charged with the responsibility of reviewing the usage, cost, and benefits provided, along with cost containment alternatives. The City shall review the recommendations and implement those that are administrative in nature. Any other recommendations that are made by the Insurance Committee will be negotiated with this Union; no such recommendations will be implemented regarding Union members without the agreement of this Union. Changes made shall not breach any of the provisions of this Union's contract language.

Finally, Article XXII of both CBAs state that the contractual provisions constitute the entire agreement between the parties, but that the agreement may be amended by the mutual written agreement of the parties.

At all times relevant to these cases, the City did not directly administer its group insurance plans. Rather, the City contracted with a third party advisor, SISCO, to oversee and manage the City's group insurance plans. To provide insurance benefits, the City contracted with several third party administrators to provide the employees' health insurance, medical insurance, dental insurance, vision insurance, and prescription drug benefits.

Facts of Case No. 102164

As noted above, on July 1, 2015, the Association and City executed a CBA effective from July 1, 2015, through June 30, 2018. The CBA contained all of the contractual provisions discussed above. To administer it prescription drug benefits in 2017, the City contracted with a third-party prescription benefits manager, National Pharmaceutical Services.

In mid-2017, SISCO expressed concern about the cost of the City's prescription drug benefits program. To lower costs, SISCO posted a request for proposal (RFP) to solicit bids from other prescription benefit managers. In response to the RFP, RxBenefits submitted a bid showing it could reduce the City's annual prescription drug spending by 11-13%, or approximately $250,000 per year. One way RxBenefits could lower the cost of the City's prescription drug benefits was by excluding brand-name medications from coverage under the prescription benefits plan if the drug had a generic equivalent. Employees would be required to either take the generic equivalent or pay the full retail price of the excluded brand-name medication.

SISCO presented the City an analysis of the bids it received and recommended the City switch from National Pharmaceutical Services to RxBenefits beginning January 1, 2018. In late 2017, the City signed an agreement with RxBenefits for it to provide the City's prescription drug benefits beginning January 1, 2018.[1] Prior to changing providers, the City did not meet

[1] RxBenefits entered into a separate agreement with a third-party pharmacy benefit manager, OptumRx, to provide City employees a network of pharmacies and related benefit programs and services. Although OptumRx was involved with providing prescription drug benefits, for narrative

with the Cost Containment Committee nor notify the Association of the change. The Association never agreed to change providers.

In December 2017, RxBenefits sent letters to City employees who were prescribed brand-name medications that would soon be excluded from coverage under RxBenefits' drug coverage formulary. The letters stated, in relevant part:

> A national panel of physicians and pharmacists continually reviews and compares medications to make sure your drug list is comprehensive. However, some medications may not be included when there are similar safe and effective alternatives.
>
> Beginning January 1, 2018, at least one medication you currently take will not be covered on your drug list. This means you will pay the full retail price if you refill this prescription after January 1st.
>
> Your doctor can prescribe another effective medication that's included on your drug list. Please see your personalized list of covered alternatives on the back of this letter...

While RxBenefits sent letters to affected employees, neither the City nor RxBenefits notified the Association that, beginning January 1, 2018, many brand-name medications would be excluded from coverage under the City's prescription benefits plan. The Association's president, Ryan Hanghian, testified that he learned of the change in coverage because his wife received a letter from RxBenefits and several bargaining unit members contacted him inquiring about the letters. The record shows that the City never offered to bargain with the

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clarity, this decision refers only to RxBenefits when discussing the City's third-party prescription benefits managers.

Association about the exclusion of drugs from coverage and the Association never agreed to the exclusion.

On January 1, 2018, RxBenefits replaced National Pharmaceutical Services as the City's prescription benefits manager and RxBenefits implemented its proposed exclusion of many brand-name medications from coverage under the City's prescription benefits plan. As a result, the record shows at least one individual whose brand-name prescription was excluded from coverage tried switching to a generic alternative, however, the generic medication was ineffective. For this reason, she switched back to the brand-name medication and paid its full retail price.

On March 29, 2018, the Association filed the instant prohibited practice complaint in Case No 102164 alleging the City made a unilateral change to a mandatory subject of bargaining contained in the collective bargaining agreement.

Facts of Case No. 102311

On July 1, 2018, the Association and City executed a CBA effective July 1, 2018, through June 30, 2023. The new CBA contained the same contractual provisions concerning group insurance discussed above. At all times relevant to this complaint, RxBenefits administered City's prescription benefits program.[2]

In August 2018, the City met with the Cost Containment Committee to discuss options for reducing insurance costs. The record shows that the

[2] As noted above, RxBenefits contracted with OptumRx to provide the City's prescription drug benefits. References to RxBenefits include OptumRx.

committee did not reach an agreement concerning changes to the drug coverage formulary for 2019.

On January 1, 2019, RxBenefits revised its drug coverage formulary to exclude additional brand-name medications as well as several generic medications from coverage under the City's prescription benefits plan. The same day, RxBenefits sent letters to affected employees informing them that one of their prescriptions was no longer covered under the prescription benefits plan. Neither the City nor RxBenefits notified the Association about the exclusion of additional medications from coverage under the plan.

On January 22, 2019, the Association's president, Ryan Hanghian, sent an email to its members asking who had been affected by the changes to the prescription plan. In response to Hanghian's email, the City's Human Resources Director, Mallory Merritt, sent an email to the employees stating, in relevant part:

> Good afternoon, everyone:
>
> As indicated by President Hanghian's email to you below, I have been made aware of prescription issues. Twice per calendar year (typically January and July), OptumRx updates prescription formularies and releases any new plan exclusions. Attached to this email is the most recent release of exclusions that became effective on January 1, 2019.
>
> If you are currently taking one of the prescriptions listed in the excluded medications column (middle column), you have two options:
>
> 1. You can contact your physician's office and request a new prescription for one of the medications listed in the preferred alternative column (far right column). *NOTE: If you are unable

to be seen by your physician or quickly obtain a new prescription for an alternative, please contact Stacy, and a one-month override may be granted.

2. You can pay full price for the medication, and it will not be processed through our insurance.

The excluded brand-name medications on the last page of the attached document have, for the most part, remained unchanged. Although you are not able to access the name brand of these medications, you can still access the generic equivalencies.

The record shows that for employees who required an office visit with their physician in order to change prescriptions, the employee was responsible for paying the cost of the office visit. Specifically, in an email response to an employee, the City's Benefits and Training Manager wrote:

> If a doctor requires a patient to be seen in lieu of calling in a new prescription based on the information provided by OPTUM, it has been our practice that the doctor's appointment is processed as a regular office visit through your health insurance benefit. The City does not pay for the office visit nor waive any normal deductible or copay to obtain a new prescription.

In response to the January 1, 2019, exclusion of medications from the City's prescription benefits plan, on March 12, 2019, the Association filed the instant prohibited practice complaint in Case No 102311 alleging the City made a unilateral change to a mandatory subject of bargaining contained in the collective bargaining agreement.

CONCLUSIONS OF LAW

The Association alleges that the City committed prohibited practices within the meaning of Iowa Code sections 20.10(1) and 20.10(2)(*a*), (*e*), (*f*), and (*g*) when (1) it unilaterally excluded previously covered prescription drugs from coverage under its prescription benefits plan without providing notice to, negotiating with, nor obtaining the consent of the Association and (2) bargained directly with individual members by sending the members notices informing them their prescriptions were no longer covered. The provisions of section 20.10 relevant to these claims provide:

> **20.10 Prohibited Practices.**
>
> 1. It shall be a prohibited practice for any public employer, public employee, or employee organization to refuse to negotiate in good faith with respect to the scope of negotiations as defined in section 20.9.
>
> 2. It shall be a prohibited practice for a public employer or the employer's designated representative to:
>
> *a.* Interfere with, restrain, or coerce public employees in the exercise of rights granted by this chapter.
>
> *e.* Refuse to negotiate collectively with representatives of certified employee organizations as required in this chapter.
>
> *f.* Deny the rights accompanying certification granted in this chapter.
>
> *g.* Refuse to participate in good faith in any agreed upon impasse procedures or those set forth in this chapter.

In prohibited practice proceedings, the complainant bears the burden of establishing each element of the charge. *Serv. Emp. Int'l Union, Local 199 & Broadlawns Med. Ctr.*, 2005 PERB 6894 at 5; *United Elec. Radio & Mach. Workers of Am. Local 886 & Tama County*, 2005 PERB 6756 at 6-7.

Alleged unilateral change in mandatory subject of bargaining

PERB's case law regarding unilateral change cases is well established. An employer's unilateral change in a mandatory subject of bargaining without first fulfilling its bargaining obligations constitutes a prohibited practice within the meaning of Iowa Code sections 20.10(1) and 20.10(2)(*a*),(*e*), and (*f*). *See AFSCME Local 1068 & Howard Cnty.*, 2001 ALJ 6234 at 4. The Board has consistently adhered to the following statement of the parties' bargaining obligations:

> First, during the life of the contact, neither party has a duty to discuss any proposed modification of any term "contained in" that contract, and the Board has held it a corollary that neither party may lawfully insist on such a discussion. Thus, a mid-term modification of any such "contained in" term may be lawfully made only after the consent of the opposing party has been voluntarily given.
>
> Second, even if not "contained in" the contract, neither party may lawfully during the contract term implement a change in wages or other working conditions unless it has first bargained with the other party, that is, has given notice of the change and an opportunity to negotiate about it to impasse. (Usually the employer will seek to make the change and the union to resist it). In short, the duty not to make unilateral changes on mandatory bargaining subjects subsists during the contract term as well as during negotiations.

Des Moines Educ. Ass'n & Des Moines Indep. Cmty. Sch. Dist., 1978 PERB 1122 (citing Gorman, *Labor Law: Unionization and Collective Bargaining* at 457 (West, 1976)).

In order to prevail in an unlawful unilateral change case, a complainant must show: (1) that the employer implemented a change; (2) the change was to a mandatorily negotiable matter; and (3) the employer did not fulfill its bargaining obligations before making the change. *See AFSCME Iowa Council 61 & City of Clinton*, 2018 PERB 100702 at 15. These elements will be addressed in succession.

The first element in the analysis of a unilateral change case is to identify the alleged change at issue and when it was implemented. The Association acknowledges that the City had the right to change prescription benefit managers and does not argue that the change constituted a prohibited practice. Rather, the Association argues that RxBenefits' unilateral exclusion of previously covered medications from the prescription benefits plan was an impermissible change to a mandatory topic of bargaining contained in the CBAs.

The City acknowledges that changes to the prescription benefits plan occurred, but asserts two alternative defenses. First, the City points out that it has a contractual commitment to RxBenefits and it must follow the rules of that agreement. The City argues that because RxBenefits, not the City, controls the drug coverage formulary and was the impetus for the changes in coverage, the City cannot be deemed responsible for the changes to its prescription benefits plan. The undersigned disagrees with the City's defensive theory.

Iowa Code chapter 20 "imposes certain bargaining obligations upon public employers, notwithstanding the possible existence of any other contractual relationships or entanglements in which the employer may be involved." *Mount Pleasant Educ. Ass'n & Mount Pleasant Cmty. Sch. Dist.*, 1999 ALJ 5894. For instance, when third party insurance providers raise their premiums, even if it is a routine cost increase, PERB has held that those increases fall under the topic of "insurance" and are a mandatory subject of bargaining. *See Teamsters Union Local 238 & Clayton Cnty.*, 2002 ALJ 6386 & 6387 at 5. Therefore, employers cannot "pass on" the routine premium increases to its employees without first notifying the certified employee organization and providing the opportunity to bargain to impasse. *See Id.*

Similarly, in this case, the City cannot "pass on" changes to mandatory subjects of bargaining without fulfilling its bargaining obligations simply because the changes arose from its contractual relationship with a third party insurance provider.[3] For these reasons, I conclude that the City is not relieved of its chapter 20 bargaining obligations simply because the changes arose from its contract with RxBenefits.

Although never actually utilizing the term, the City's second defense amounts to what is essentially a claim of waiver by express agreement. The City

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[3] An Administrative Law Judge reached the same conclusion in *Mount Pleasant Education Association*, stating: "In the absence of persuasive authority to the contrary, I simply do not accept the proposition that an employer is to be relieved of its bargaining obligation because it has entered into a contract with a third party, the operation of which may, under certain circumstances, require the employer to violate its statutory bargaining duty in order to avoid breaching that contract." 1999 ALJ 5894 at 12.

views the final unnumbered paragraph of section 17.1 of the CBAs as contemplating unilateral changes to the prescription drug coverage formulary. The paragraph states, in relevant part:

> This Union will appoint one member to participate in a City-wide Insurance Committee charged with the responsibility of reviewing the usage, cost, and benefits provided, along with cost containment alternatives. The City shall review the recommendations and implement those that are administrative in nature. Any other recommendations that are made by the Insurance Committee will be negotiated with this Union; no such recommendations will be implemented regarding Union members without the agreement of this Union. Changes made shall not breach any of the provisions of this Union's contract language.

Specifically, the City points to the language, "Any other recommendations that are made by the Insurance Committee will be negotiated with this union." This language, the City contends, refers only to changes that would alter the express provisions contained in the contract, *i.e.*, "the City's contribution toward the cost of the insurance plan, the 90/10 within PPO copay and 70/30 outside the PPO copay, the provision of a three tier prescription plan, the office access fee for chiropractic visits, and the deductibles and maximum out of pocket."[4] Therefore, the City argues, this language effectively constitutes the Association's waiver of any right it may have to bargain over mandatory subjects not specifically provided in section 17.1.

While a party may contractually waive its right to bargain about a subject, "Such a waiver by a union of its statutory bargaining rights will not be readily

[4] City of Davenport post-hearing brief, pgs. 6-7.

inferred." *See AFSCME/Iowa Council 61 & Louisa Cnty.*, 2011 PERB 8146 at 9. Rather, "There must be a clear and unmistakable showing that a waiver occurred, or that a union has bargained away its statutory rights to bargain on a mandatory subject. *Id.*, at 9-10.

Here, neither the language cited by the city nor any evidence of the parties' negotiations discloses such an unmistakable waiver by the Association. The most straightforward interpretation of the final paragraph of section 17.1 is that it grants the City the right to implement recommendations concerning insurance usage, cost, and benefits that are *administrative in nature* (emphasis added). Thus, the next line starting "Any other recommendations," presumably refers to all recommendation that are *not* administrative in nature and must be negotiated with the Association. While one could debate the definition and scope of the term "administrative," its very ambiguity compels the conclusion that this language does not show clearly and unmistakably that the Association waived its right to negotiate all changes to "insurance" not expressly listed in section 17.1.

Thus, the record shows that on January 1, 2018, the City changed prescription benefit providers and many previously covered brand-name medications were excluded from coverage under the City's prescription benefits plan. The record further shows that on January 1, 2019, RxBenefits unilaterally excluded additional medications from coverage under the prescription benefits plan. Accordingly, I conclude there is sufficient evidence that on January 1, 2018, and January 1, 2019, changes were made to the City's prescription benefits plan.

The second element in the analysis requires a determination of whether the matter "unilaterally changed" constitutes a mandatory subject of bargaining. Iowa Code section 20.9 provides that "insurance" is a mandatory subject of bargaining. The Board has long held that virtually all aspects of insurance, including benefits, coverage, and insurance plan administration, are within the scope of "insurance." *See AFSCME Local 1068 & Howard Cnty.*, 2001 ALJ 6234 (citing *Sioux City Cmty. Sch. Dist.*, 1980 PERB 1600; *Union Cnty.*, 1984 PERB 2668; *Sioux Center Educ. Ass'n*, 1985 PERB 2550; *Great River AEA 16*, 1983 PERB 2372 & 2384).

The record shows that the changes to the prescription benefits plan reduced the number of medications covered by the plan and significantly increased the cost of medication for employees who chose "excluded" medications. As the changes affected prescription benefits, I conclude the January 1, 2018, and January 1, 2019, changes to the prescription benefits plan directly addressed the mandatory subject of "insurance."

The final element in analyzing a unilateral change case requires a review of the collective bargaining agreement because the nature of the employer's bargaining obligation differs depending upon whether or not the mandatorily negotiable term is "contained in" the collective bargaining agreement. In making such determinations, the Board examines the challenged action and the parties' contract on a case-by-case basis to determine whether, under the circumstances and in light of the substantive nature of the issue at hand, a matter can be fairly said to be one which is "contained in" the contract. *See Cedar Rapids Ass'n of*

Fire Fighters & City of Cedar Rapids, 1995 PERB 4898 at 11, footnote #6.

The relevant section of both collective bargaining agreements is the prescription drug provision in section 17.1(a). Section 17.1(a), quoted above, states, "The health insurance plan shall include a Three Tier prescription plan" and it provides that Tier I prescriptions are subject to a $5 copay, Tier II prescriptions to a $15 copay, and Tier III prescriptions to a $30 copay. Although not explicitly stated in section 17.1(a), at hearing, both parties testified that it was their understanding Tier I was generic medications, Tier II was brand-name medications, and Tier III was non-preferred or specialty brand-name medications.

The City argues that the changes did not affect a term "contained in" the CBAs because the City's prescription benefits plan still contains three tiers with the specified copay for each tier. The City argues that even after excluding many medications from coverage, the plan still fulfills the requirements of section 17.1(a). The undersigned disagrees.

From a review of PERB case law, it does not appear the Board has addressed this precise scenario. However, the National Labor Relations Board (NLRB) addressed a similar issue with a similar contractual prescription drug provision in the case *In Re Caterpillar, Inc.*, 355 NLRB 521 (2010).

In *Caterpillar, Inc.*, the parties' CBA required a three-tiered prescription drug plan with copayments of $5 for generic drugs, $20 for preferred brand-name drugs, and $35 for non-preferred drugs. *Id.*, at 521. However, midway through the CBA's term, the employer unilaterally implemented a "generic first"

program, which required employees to use generic drugs when available, otherwise, the employees would have to pay full retail price for the brand-name drug unless a physician specified that the brand-name drug was required. *Id.*

The NLRB concluded that the employer's unilateral implementation of "generic first" constituted a material change to the parties' contract because "the copay amounts for brand-name drugs were specified in the Group Insurance Plans" and "generic first" altered those express terms. *Id.*, at 523. The NLRB held, "the elimination of employee discretion in [being able to choose a brand-name drug without physician approval] and the increase in the cost of brand-name drugs when not specified by a physician constitute material, substantial, and significant changes" in violation of Section 8(a)(5). *Id.*, at 523-24.

The NLRB's holding in *Caterpillar, Inc.* is persuasive and applicable to the facts of this case. Similar to the CBA provision at issue in *Caterpiller, Inc.*, section 17.1(a) expressly establishes the copay amounts for drugs in each tier of the prescription benefits plan. Moreover, like the "generic first" program in *Caterpiller, Inc.*, the City's changes excluded many—primarily brand-name—drugs from coverage under its prescription benefits plan and required employees to switch to a generic alternative or pay full retail price for the excluded medication. Therefore, because section 17.1(a) specifies the copay for drugs in each tier and because the City's changes increased the cost of "excluded" medications above the specified copay, I conclude the unilateral changes were to matters "contained in" the collective bargaining agreements. Therefore, the City was required to obtain the Association's consent prior to excluding medications

from the prescription benefits plan.

Finally, the record shows that the City did not obtain the Association's consent prior to implementing the changes to the prescription benefits plan. The Board has previously found that failure to obtain a certified employee organization's consent prior to implementing a unilateral change in a mandatory topic of bargaining contained in a contract to be a violation of Iowa Code sections 20.10(1) as a refusal to negotiate in good faith, 20.10(2)(*a*) as interference, restraint, or coercion of public employees in the exercise of chapter 20 rights, 20.10(2)(*e*) as a refusal to negotiate with representatives of certified employee organizations, and 20.10(2)(*f*) as a denial of rights accompanying certification. *See AFSCME/Iowa Council 61 & State of Iowa (Dept. of Corr.)*, 2014 ALJ 8693 at 14; *See also AFSCME/Iowa Council 61 & Louisa Cnty.*, 2011 PERB 8146 at 10-11. Accordingly, the Association has met its burden to establish the City has committed prohibited practices in violation of Iowa Code sections 20.10(1) and 20.10(2)(*a*), (*e*), and (*f*).

Alleged bypassing of the certified employee organization

The Association argues that the City engaged in unlawful individual bargaining when it sent notices to members informing them that one of their prescriptions was no longer covered. PERB's case law establishes that "while the polling or solicitation of employees' opinions, or direct negotiations with individual employees constitutes unlawful individual bargaining, the mere transmission of information to employees does not." *Area Educ. Agency 7 Educ. Ass'n & Area Educ. Agency 7*, 1991 PERB 4252 at 9 (citing *Area Educ. Agency 6,*

1982 PERB 1989).

In this case, the notices merely informed employees of a change to their prescription drug benefits. The notices did not solicit the employees' opinions nor offer to negotiate with the employees about the change. For these reasons, I conclude the Association has not met its burden to establish the City bypassed the association and engaged in unlawful individual bargaining in violation of Iowa Code sections 20.10(1) and 20.10(2)(*a*), (*e*), (*f*), and (*g*).

Based on all of the above, I consequently propose entry of the following:

ORDER

The administrative law judge retains jurisdiction of the matter. The parties are ordered to meet with a representative of the Public Employment Relations Board within 20 days of the date below for the purpose of formulating appropriate remedies for the prohibited practices committed.

The parties shall execute and file in this case any such agreement not later than July 13, 2020. If approved by the administrative law judge, the retained jurisdiction will be reasserted and a proposed remedial order will subsequently issue that will constitute the ALJ's final action on the matter and will become the final decision of the agency unless appealed to the Board or reviewed on the Board's own motion pursuant to Iowa Code section 17A.15(3) and PERB rule 621—9.1(17A,20).

Should the parties fail to execute and file their agreement on or before July 13, 2020, the ALJ will reassert the retained jurisdiction and preside at a hearing concerning the appropriate remedy by telephone conference call on Thursday,

July 16, 2020, at 10:00 a.m. The proposed remedial order issued subsequent to the conclusion of the hearing will constitute the ALJ's final action on the matter and will become the final decision of the agency unless appealed to the Board or reviewed on the Board's own motion pursuant to Iowa Code section 17A.15(3) and PERB rule 621—9.1(17A,20).

The costs of reporting and of the agency-requested transcript, in the amount of $568.10, are assessed against the Respondent, City of Davenport, pursuant to Iowa Code section 20.11(3) and PERB rule 621—3.12(20). A bill of costs will be issued to the Respondent in accordance with PERB subrule 3.12(3).

DATED at Des Moines, Iowa this 22nd day of June, 2020.

Patrick B. Thomas
Administrative Law Judge

Filed electronically.
Parties served via eFlex.