

FINDINGS OF FACT

The County is a public employer within the meaning of Iowa Code section 20.3(10) and is governed by a five-member Board of Supervisors.¹ Local 234 is an employee organization within the meaning of Iowa Code section 20.3(4). PERB certified Local 234, for the purposes of collective bargaining, as the exclusive representative of a bargaining unit of county road department employees. The Teamsters is another employee organization certified to represent other bargaining units of county employees.

Local 234 and the County are parties to a current collective bargaining agreement effective July 1, 2012 to June 30, 2015. The parties executed the current agreement on April 9, 2012. Their agreement provides for insurance as follows:

ARTICLE 21 INSURANCE

Section 21.1 The Employer agrees to pay the entire single premium for the employee towards a Health and Major Medical group insurance program for the 2012-2013 fiscal year. For the 2013-2014 and the 2014-2015 fiscal years the employee will be responsible for Twenty-five dollars (\$25) of the single premium each month. The parties agree that the employer shall be responsible for 75% of the family plan and the employee shall be responsible for 25%.

APPENDIX A INSURANCE COMMITTEE

The parties to this agreement have agreed to the following actions for the 2012-2015 agreement:

1. Each bargaining unit will be allowed one employee to participate during the month of June, July or August. The purpose of the meetings is to keep the union and employees

¹ All references are to the 2011 Code of Iowa.

informed regarding premium increases and possible ways to amend the insurance plan for the benefit of the employees and the County.

The County provides health insurance benefits to its employees through a self-funded plan that is administered on a calendar year basis. Midwest Group Benefits is the agent and third-party administrator. The self-funded plan allows the County to design its own benefits and offer a fourth quarter carryover of an insured's last quarter claims to apply to the insured's deductible for the following year. The County buys stop-loss insurance of \$45,000 so excess claims are paid by a reinsurance carrier. The County also maintains health insurance reserves for "run-out" claims that are incurred at the end of one calendar year, but not processed until the following year. Generally, two and a half months of total claims should be held in reserves.

Annually, the County submits a 509-A report to the Iowa Insurance Division. The report shows the premium cost, reinsurance premium, reinsurance costs, and administrative fees. If reserves are low, the County must also report what steps it will take to restore funding.

The County experienced high claims in 2010 and in 2011, the County increased health insurance premiums 8% due to its diminishing reserves.² In early 2012, the Board of Supervisors became concerned with the County's reserves and potential premium increases after Midwest Group provided its first quarterly report that showed large insurance claims. At the time, Midwest

² The high claims were due in part to two "lasered" insureds whose claims exceeded a set liability (i.e. \$125,000) assumed by the reinsurance company. "Lasered" insureds were an ongoing issue going into 2012.

Group did not know the effect on future premium rates because nine months of claim experience is generally required for those calculations. As reflected in a document dated April 10, 2012, Midwest Group recommended that the County increase the plan's co-pays on July 1 and on January 1, 2013, remove the 4th quarter carry-over, study alternative deductibles, co-insurance, and out of pocket maximums, consider other plans and review the premium structure. The Board of Supervisors' chairman knew that the County would have to negotiate insurance changes with the unions. The chairman instructed the County's labor relations consultant, Jack Lipovac, to set up a meeting with the unions pursuant to Appendix A of the collective bargaining agreement. Thereafter, the Board of Supervisors met with Midwest Group at least monthly.

On May 15, 2012, Lipovac provided a copy of Midwest Group's April 10, 2012 recommendations to the Local 234 representative, Cheryl Arnold. Lipovac told Arnold that the County would meet with Local 234 and the Teamsters' representative, Kevin McCombs, during the summer to go over the recommendations. By email dated August 1, 2012 to Arnold and McCombs, Lipovac attached a copy of Midwest Group's recommendations and informed the union representatives that they would meet on August 21, 2012.³ Midwest Group had recommended that the County implement the changes on January 1, 2013.

³ Midwest Group's recommendations included in part: increases in office co-pay from \$15 to \$30, emergency room co-pay from \$50 to \$150, and mental health office co-pay from \$15 to \$30; an increase in the 3-tier drug card co-pay; removal of 4th quarter carryover; study of alternative deductibles; and consideration of other plans.

On August 21, 2012, the Board of Supervisors, the county auditor, Lipovac, and two Midwest Group representatives met with Arnold, McCombs, and Joe Denner, a Local 234 union representative, to inform them of potential insurance premium increases and contemplated plan changes. At the time, the County did not have insurance plan quotes because there had not yet been nine months of claims to seek the bids. The County provided information on the dwindling reserves and potential for substantial premium increases. The County had \$82,000 in current reserves in comparison to 2008 when the County had \$650,000 in reserves. The County expected at least a 20% premium increase and discussed its contemplated plan changes. McCombs asked the County to look into alternative plan funding and indicated that he would look at the Teamsters' plan.

At the end of the meeting, the County believed McCombs and Arnold would get membership feedback on the changes and contact Lipovac. Arnold left the meeting believing that the County was going to look into other plans then set an October meeting to bargain insurance changes. As of this time, the County had not instituted any changes and had maintained the current insurance plan.

On September 6-7, 2012, McCombs acquired plan information from Lipovac and checked into rates of another plan. In October, Midwest Group procured 60 quotes on fully-insured or partially-funded Wellmark plans and eight additional quotes for self-funded plans. For a number of reasons, Midwest Group did not believe many of the plans or bids were appropriate for

the County: 1) the bids for fully-insured and partially-funded plans required the addition of run-out claims that would be paid by the County, 2) many of the fully-insured plans were HMOs, health savings accounts, or high deductible plans, and 3) none of the fully insured plans matched the same benefit design of the County's existing insurance plan. Midwest Group put together a spreadsheet of the quotes for the plans it thought most appropriate for the County, including three fully insured plans with varying co-pays and deductibles, two partially-funded plans, the current self-funded plan and the current self-funded plan with design changes. The County was required to make a determination by November 15th to lock in rates with the reinsurance carrier. Midwest Group gave its spreadsheet of recommended quotes to the Board sometime after the election, but before November 15, 2012.

During this period, an October meeting did not occur and the County did not implement any insurance changes. Arnold did not communicate with the County until Lipovac contacted her and McCombs on October 30, 2012 and indicated that the premium rate for the current insurance plan would increase 40%. Lipovac discussed the County's contemplated insurance changes with Arnold. On October 31, 2012, Lipovac emailed Arnolds and McCombs with the subject, "Possible areas to adjust" and outlined emergency room (ER) and office visit co-pay increases, a deductible increase, a fourth quarter carryover change and a possible change to partial funding. He indicated, "We will need to have this resolved by the 13th." Thereafter, Lipovac contacted Arnold on November 1, 5, 7, 14, and 16, 2012 and on each occasion, discussed the current plan's

rate increase and contemplated changes. Arnold requested a meeting in their conversation on November 1, 2012, but his response at the time is not reflected in the record. On November 5, 2012, when Arnold asked if there would be a meeting, Lipovac replied, "no."

Lipovac emailed additional information on the contemplated insurance changes to Arnold and McCombs on November 5 and 14, 2012. His email on November 14, 2012, contained an attachment that showed the dollar cost of the 40% increase to the employee and to the County. At the bottom, he outlined the recommendations from Midwest Group to be implemented December 1, 2012: increasing office visit and ER co-pays, removing the fourth quarter carryover, and changing to an 80/20 from 90/10 co-pay. Also attached to his email was Midwest Group's spreadsheet of insurance quotes. When Lipovac talked to Arnold again on November 16, 2012, she learned that the previous day, the County had signed a contract to continue its current insurance plan with no changes. Subsequently, Local 234 requested insurance information from the County, which was provided by Lipovac on December 5, 2012. There is no evidence of a counter proposal on insurance made at any time by Local 234. At all times relevant, the County never implemented Midwest Group's recommendations or made any changes to its insurance plan.

CONCLUSIONS OF LAW

Local 234's complaint alleges the County's commission of a prohibited practice within the meaning of Iowa Code sections 20.10(1) and 20.10(2)(e), which 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:

* * *

e. Refuse to negotiate collectively with representatives of certified employee organizations as required by this chapter.

* * *

In prohibited practice proceedings, the complainant bears the burden of establishing each element of the charge. *Mt. Pleasant Education Assn.*, 99 H.O. 5894 at 25; *Chauffeurs, Teamsters & Helpers, Local 238*, 94 H.O. 4954 at 10; *Southeastern Community College Higher Education Assn.*, 85 H.O. 2625 at 11.

Local 234 alleges that the County failed to bargain in good faith after proposing changes to the County health insurance plan. Local 234 claims that the County insisted on its contemplated changes to insurance, failed to provide insurance information to Local 234, placed unreasonable time limits on Local 234's acceptance or rejection of its contemplated changes and did not negotiate with Local 234. Although it is undisputed that the County proposed changes to its current insurance plan, it is also undisputed that the County did not institute any changes and ultimately maintained the current insurance plan. In the absence of an insurance change and corresponding duty to bargain, Local 234 did not establish that the County failed to bargain in good faith.

"Insurance" is a mandatory subject of bargaining within the meaning of Iowa Code section 20.9. The employer's duty to bargain in good faith arises in two contexts as recognized by the Board in *Des Moines Education Assn.*, 75

PERB 516. The first of which is the duty to prospectively bargain a collective bargaining agreement with the certified employee organization pursuant to the impasse procedures set forth in chapter 20. *Id.* at 2. In the second context, the employer's duty to bargain in good faith arises before an employer can implement changes to mandatorily negotiable subjects during the term of an existing collective bargaining agreement.⁴ *Id.* at 6. In this second context, the Board reasoned:

While an employee organization may not utilize statutory impasse procedures to compel improvements in wages and other terms and conditions of employment during the current fiscal year, neither can an employer during that period institute changes in existing working conditions without first having given the employee organization notice and opportunity for bargaining.

Id. In this context, once the employer provides notice of the contemplated mid-term change, the employee organization bears the burden of requesting bargaining on the change. *Teamsters Local Union No. 147*, 00 H.O. 6004 at 11.

The second context is applicable here to the extent the parties had concluded their negotiations for a current collective bargaining agreement effective July 1, 2012 to June 30, 2015. The County's contemplated insurance changes, if instituted, would have constituted a mid-term change to a

⁴ The law is well settled that an employer's implementation of a change in a mandatory subject without first fulfilling its bargaining obligation may constitute a prohibited practice. *Waterloo Police Protective Assn.*, 01 PERB 6160 at 3; *Cedar Rapids Assn. of Firefighters*, 93 PERB 4610 at 15; *AFSCME and State of Iowa*, 89 PERB 3499 at 7-8. The employer's bargaining obligation differs depending upon whether the mandatorily negotiable term is "contained in" the collective bargaining agreement or not. Local 234 concedes that the County's contemplated insurance changes were not contained in the parties' collective bargaining agreement. As in this case, if the proposed mid-term change is to a mandatory term not contained in the contract, the change may be lawfully implemented by the employer only after it has given the certified representative notice of the change and the opportunity to negotiate about it to impasse. *City of Cedar Rapids*, 97 PERB 5129 at 14; *Des Moines Indep. Cmty. Sch. Dist.*, 78 PERB 1122 at 4.

mandatory negotiable subject not contained in the parties' current agreement. This would have required the County to provide notice of its contemplated changes to Local 234 and an opportunity to bargain before the County instituted the mid-term insurance changes. However, the County did not institute the insurance changes to require good faith bargaining as a prerequisite. Thus, Local 234 did not establish that the County failed its duty to bargain in good faith.

Despite the County's status quo maintenance of its insurance plan, Local 234 contends that the County was obligated to bargain in good faith once the County proposed insurance changes. Local 234 alleges that it was deprived of meaningful negotiations on the contemplated changes, which Local 234 seemingly suggests, could have prevented the premium rate increase. Even assuming that the County had a duty to bargain in good faith under this theory, the record does not support a finding that the County engaged in bad faith bargaining.

The duty to bargain in "good faith" has been generally characterized as the obligation to participate in deliberations with a present intention to find a basis for agreement and with a sincere effort to reach a common ground. *See, e.g., NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943), *Humboldt County*, 76 H.O. 703 at 5. Because a party's intention or sincerity is a subjective characteristic, it has long been recognized that the presence or absence of "good faith" must be inferred from the circumstantial evidence found in the record as a whole, i.e., the "totality of conduct" must be examined.

See, e.g., General Electric Co., 150 NLRB 192 (1964), *enforced* 418 F.2d 736 (2nd Cir. 1969), *cert. denied* 397 U.S. 965 (1970); *City of Ankeny*, 76 H.O. 675 at 7.

In totality, the County's conduct does not reveal bad faith under the circumstances. The County notified Local 234 of its contemplated changes to the health insurance plan as early as May 15, 2012. At the meeting on August 21, 2012, the County informed Local 234 of the dwindling reserve, potential premium increases for the current plan, and its contemplated insurance changes that had previously been outlined to Local 234 in May. Unfortunately, the parties did not have a meeting of the minds as far as what would happen next in their intended negotiations – each believing the ball was in the other's court. Regardless, when no meeting transpired, Local 234 did not take affirmative steps to request bargaining with the County. In fact, Local 234's representative did not communicate with the County until Lipovac, on the County's behalf, contacted Arnold on October 30, 2012. He subsequently contacted her and provided information on the insurance on October 31, November 1, 5, 7, and 14, 2012. Arnold did not make a request to bargain until November 1, 2012, which was over five months after Local 234 was originally notified of the County's contemplated changes, and over two months after she was informed of the dwindling reserves and possibility of substantial premium increases. Her request was made less than two weeks prior to the County's deadline to lock in reinsurance rates with its present carrier. Additionally, her request for insurance information was made even later in late November.

This case demonstrates the untenable position in which parties are placed when attempting to negotiate insurance without actual rates or in the small window of time when rates are available. Renewal rates and bids for the County were not available until October because of the insurance companies' requirement of having nine months of claims experience for their calculations. Nonetheless, both the County and Local 234 presumably knew of the current insurance plan's effective date and the deadline imposed by its looming expiration.

Local 234 knew that the County contemplated changes to the insurance plan as early as May 2012, but did not request bargaining until November 2012. The County ultimately maintained the status quo on the insurance plan it had previously negotiated with Local 234. Unfortunate as it may be that the parties failed to negotiate changes to reduce the 40% renewal rate, it was not due to bad faith bargaining by the County. Considering the totality of circumstances, Local 234 failed to establish that the County bargained in bad faith.

Consequently, the ALJ proposes entry of the following:

ORDER

The prohibited practice complaint filed herein by International Union of Operating Engineers, Local 234, is DISMISSED.

DATED at Des Moines, Iowa this 24th day of June, 2013.



Diana S. Machir
Administrative Law Judge

Mail copies to: Jay Smith
3209 Ingersoll AVE Suite 104
Des Moines IA 50312

Patrick Wegman
1928 Linn DR
New Hampton IA 50659