DISTRICT OF COLUMBIA GOVERNMENT
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
The Fraternal Order of Police, Metropolitan Police Department Labor Committee, Petitioner,	PERB Case Nos. 84-U-15 85-U-01
and	Opinion No. 94
The International Association of Firefighters, Local 36, Petitioner,	
and	
The District of Columbia Office of Labor Relations and Collective Bargaining, Employer.	

DECISION AND ORDER

These two cases present the question of whether the District of Columbia, as Employer, may cancel, when a collective bargaining agreement expires, employee dental and optical insurance coverage established under the agreement. Case No. 84-U-15 involves the Fraternal Order of Police, Metropolitan Police Labor Committee (FOP); its unfair labor practice charge was filed with the District of Columbia Public Employee Relations Board (Board) on September 26, 1984. The Complainant in Case No. 85-U-01 (complaint filed October 1, 1984) is the International Association of Firefighters, Local 36 (IAFF). A response to the FOP Complaint was filed on October 15, 1984 by the District of Columbia Office of Labor Relations and Collective Bargaining (OLRCB).

In view of the importance and urgency of this matter, which relates to current collective bargaining negotiations, the Board held a special hearing on October 17, 1984. Both unions and the OLRCB were represented. Formal testimony was taken and arguments were presented. Supplemental non-argumentative statements of authority were subsequently filed. The Board's decision was taken at its regularly scheduled meeting on November 6, 1984.

The facts are undisputed. Two-year contracts entered into by the District with the two unions in 1982 included provisions for optical and dental insurance coverage, to be paid for by the District. The contracts have September 30, 1984 expiration dates. Arrangements for the insurance coverage were made with various carriers.

During negotiation of renewal collective bargaining agreements in the summer of 1984, the OLRCB advised the unions that the insurance coverage would be cut off as of September 30, 1984 unless agreement had been reached by that date on new contracts. On September 7, 1984, the OLRCB notifed the optical and dental insurance carriers that "in accordance with the collective bargaining agreements" premium payments would be terminated effective September 29, 1984. Copies of these letters were sent to the unions.

The payments were terminated. No insurance coverage is currently in effect. Negotiations are continuing between the District and the unions regarding renewal of the 1982 collective bargaining agreements. All terms and conditions of the 1982 agreements other than those providing for optical and dental insurance are being continued in effect.

Both unions allege that the Employer's unilateral termination of the insurance coverage constitutes a violation of Section 1-618.4(a) of the D.C. Code:

> (a) The District, its agents and representatives are prohibited from
>
> (1) Interfering, restraining or coercing any employee in the exercise of rights guaranteed by this subchapter:
>
> ....
>
> (5) Refusing to bargain in good faith with the exclusive representative.

The FOP also contends that the Employer's action is in violation of Section 1-618.17 (f)(4) of the D.C. Code. After setting out rules for collective bargaining negotiations, in paragraphs (1), (2) and (3), subsection (f) provides:

> (4) If the procedures set forth in paragraph (1), (2) or (3) of this subsection are implemented, no change in the status quo shall be made pending the completion of mediation and arbitration, or both.

The Employer's response and defense is that the collective bargaining agreement with the IAFF contained a provision (Article 41-A) that the optical insurance coverage was to continue "through September 30, 1984," and that even more specific cut-off provisions are contained in various documents drawn up in connection with the establishment of the FOP optical benefits plan. The OLRCB also relies on advice by FOP officers to the membership in August 1984 that "the optical and dental benefits will expire on September 30, 1984."

The position taken here by the unions has been upheld consistently and without discovered exception by the National Labor Relations Board (applying the terms of Section 8(a)(5) of the National Labor Relations Act, which are virtually identical with those of Section 1-618.4(a)(5) of the D.C. Code), by other public employment boards (also administering similar statutory provisions), by the federal district courts and courts of appeal, and by the Supreme Court of the United States. The conclusion which has been reached is dictated clearly by the letter of the law and equally by the practicalities of responsible collective bargaining.

The Supreme Court spoke definitively to the basic issue presented here in NLRB v. Katz, 369 U.S. 736 (1962). The Employer in Katz unilaterally increased wages and changed sick leave benefits while those matters were under negotiation. The Court affirmed the NLRBs' finding that this was an unfair labor practice. "We hold" the Court stated, "that an Employer's unilateral change in conditions of employment under negotiation is...a violation of Section 8(a)(5) (the Employer's duty to bargain collectively) for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) as much as does a flat refusal."

An extended line of cases applies this same principle to situations, paralleling exactly the facts of the present case, in which the employer canceled insurance plans of one kind or another while negotiations for a new collective bargaining agreement were in progress. The holdings have been, consistently, that such action violates the duty-to-bargain provisions in the National Labor Relations Act and in virtually all state public employment statues. Hinson v. NLRB, 428 F(2d) 133 (8th Circuit, 1970); In re Cumberland School District, 100 LRRM 2059 (Pa. Supreme Ct., 1978); cf. Borden, Inc., v. NLRB, 196 NLRB 172 (1972).

The good sense underlying this uniform body of precedent is plain. If employers were entitled to make unilateral changes in existing wage rates or other terms and conditions of employment where an agreement expires and while a new one is being negotiated, it would invite unrestrained coercive action by the employers and inevitable retaliatory and disruptive action by unions. The statutory prohibition on coercive action and the statutory duty to bargain collectively about changes in established wage rates and other terms and conditions of employment are designed specificallly to prevent this kind of chaos. They have special point in public employment situations, in which strikes or similar employee action are prohibited.

The Employer's contention here that this general rule becomes inapplicable if the contract places a termination date on specific terms of the agreement misconceives the basis of the rule. The obligation to continue the established terms and conditions of employment flows from the statute, not from the terms of the agreement. A number of the administrative and judical precedents on this issue apply the basic rule to situations involving, as these cases do, insurance or similar arrangement with outside parties which include termination dates.

It is also relevant here, though not controlling, that the 1982 contracts did not themselves contain termination dates for the insurance benefits. Articles 33 and 34 of the FOP agreement, establishing the optical and dental insurance obligations say nothing of termination. This is also true of the dental benefits agreed to by the District and the IAFF in Article 41-A of their contract; and the reference in Article 41-B to the optical benefits being "$4.75 per member per month from October 1, 1983 through September 30, 1984" could not reasonably be interpreted as having a termination effect.

The Employer emphasizes two other sets of factual circumstance. When arrangements were completed in June 1983 for the FOP optical benefits plan it was provided in an agreement between the union and the insurer (Mid-Atlantic Vision Service Plan) that the contract would be effective "through September 30, 1984," and that "the D.C. Government shall be under no further obligation for payment beyond 9/30/84" (Employer's Exhibit #1). At the same time, representatives of FOP and OLRCB signed a "Notice of Instructions" (Employers Exhibit #2) which contained a provision that "the optical benefits plan shall be in effect through September 30, 1984."

In August and September 1984, after the Employer had advised the FOP representatives negotiating a renewal wage agreement that the optical and dental benefits were in fact going to be terminated on September 30, unless agreement had been reached, the FOP officers issued a series of instructions to the union membership. On August 10, 1984, the FOP Executive Committee advised the members by memorandum: "The optical and dental benefits will expire on September 30, 1984.... If you plan to use the benefits do so before the September expiration date." (See Employer Exhibit #3-A.) This advice was made more specific by a letter, also dated August 10, from the union president: "Should contract negotiations continue beyond September 30, 1984, the optical and dental benefits will expire until a new contract agreement has been reached." (See Employer Exhibit #3-C.)

The Employer argues from these two sets of facts that the FOP expressly and deliberately waived in June 1983, whatever right of any kind it might otherwise have to continuation of optical benefits after September 30, 1984. The August 1984 communications are relied on as confirming this waiver, and as extending it to cover the dental benefits as well.

Testimony presented at the hearing before the Board refutes the Employer's interpretation of the August communications. The union had been advised of the Employers' intention to terminate the benefits. Its officers gave the membership appropriate and necessary warning of the consequences if this intention was carried out. The record is clear, however, that FOP negotiations were protesting to OLRCB that the termination action was contrary to the law. (FOP Exhibits #1 and #2) In a comparable situation, the National Labor Relations Board held specifically that no waiver of the underlying statutory right could be inferred from a union's advice to its members that the Employer was canceling the insurance benefits or from further advice given regarding alternative forms of coverage the members might want to consider. Crest Beverage Inc., 231 NLRB No. 25 (1977).

The Board has considered carefully the provision in the June, 1983 agreement between FOP and the optical benefits insurer that the Employer "should be under no further obligation for payment beyond September 30, 1984". On close analysis, however, this provision emerges as only a statement of the period of coverage under that particular contract. It cannot properly be taken as a waiver of the statutory right to a continuation of previously established conditions during the collective bargaining renegotiation period. Furthermore, as far as the record shows this statement appears in connection with one of the four benefit plans involved in these two cases.

The case law is clear that a waiver of the statutory obligation involved here must be established by "clear and unmistakeable evidence." Wayne's Olive Knoll Farms, 223 NLRB 260 (1976). The Employer's reliance in this connection on Norris Industries, 231 NLRB 50 (1977) is misplaced. That case involved a distinct different question of the interpretation to be placed on an agreement between a company and a union that insurance coverage would be terminated for employees who took medical leaves of absence; the issue of the employer's obligation to continue existing terms and conditions of employment in effect during a contract renegotiation period was not present.

The waiver issue was explored extensively and thoroughly by the Court of Appeals for the Ninth Circuit in NLRB v. Southern California Edison Co., 646 F. 2d. 1352 (1981), and in Chesapeake and Potomac Telephone Co. v. NLRB, 687 F (2d) 633 (2d Cir. 1982). These precedents were most recently considered and applied to a situation basically indistinguishable from these two cases before the Board in American Distributing Co. v. NLRB, 715 F. 2d 446 (9th Cir. 1983). The courts have considered seriously "the unique question" noted by the Ninth Circuit Court in American Distributing Co. "whether a contractual waiver of a mandatory bargaining subject may ever survive the termination of a contract." Leaving that question unresolved, the NLRB and the courts have consistently refused to infer a waiver from union action going considerably beyond any taken by the FOP or IAFF in the present cases. The Employer's claim of "waiver" finds no basis in either the facts set forth in these cases or in the firm line of administrative and judicial precedents.

The Board's detailed consideration of these cases reflects its recognition of the importance of an issue which has been raised here for the first time under the Comprehensive Merit Personnel Act of 1978. The facts of these cases leave no question, however, about the necessary answer here. The Employer's action was patently coercive in violation of Section 1.618.4 (a)(1) of the D.C. Code. Changing the existing employment terms unilaterally during the renegotiation period was plainly a refusal to bargain collectively in good faith under Section 1.618.4(a)(5). It is unnecessary to examine further or determine whether this action was also a violation of the status quo provision of Section 1.618.17(f)(4).

The remaining question of appropriate relief from these unfair labor practices is difficult, for extension of the insurance coverage involves making arrangements with the insurance carriers. The parties are directed to meet within seven days of the date of this Order to discuss this relief issue, to reach agreement regarding it if this is possible, and to report to the Board within ten days regarding the results of this discussion. If agreement has not been reached, the parties will include in the report their specific recommendations as to the form of the relief to be granted.

The Board's Order is not to be considered final until the relief issue is resolved.

O R D E R

The Employer in PERB Case Nos. 84-U-15 and 85-U-01 is found to be in violation of Section 1.618.4(a)(1) of the D.C. Code: "Interfering, restraining or coercing any employee in the exercise of the rights guaranteed by this subchapter;" and Section 1.618(a)(5): "refusing to bargain collectively in good faith with the exclusive representative."

The representatives of the Office of Labor Relations and Collective Bargaining, the Fraternal Order of Police, Metropolitan Police Department Labor Committee and the International Association of Firefighters, Local 36 shall meet within seven (7) days of this Order to work out an appropriate remedy and shall report to the Board within ten (10) days of this Order the results of the discussions.

If agreement has not been reached, the parties will include in the report their specific recommendations as to the form of relief to be granted.

The Board's Order is not to be considered final until the relief issue is resolved.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
November 21, 1984

DISTRICT OF COLUMBIA GOVERNMENT
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: The Fraternal Order of Police, Metropolitan Police Department Labor Committee, Petitioner, and The International Association of Firefighters, Local 36, Petitioner, and The District of Columbia Office of Labor Relations and Collective Bargaining, Employer.	Supplemental Order Opinion No. 94

O R D E R

I. The Office of Labor Relations and Collective Bargaining and the International Associates of Firefighters, Local 36, pursuant to Board Opinion No. 94 have mutually agreed to a remedy in PERB Case No. 85-U-01. The remedy agreed upon and incorporated into the Board's Order is as follows:

1. Effective the pay period beginning December 9, 1984, and continuing until such date as Local 36, IAFF and the Employer shall enter into a new collective bargaining agreement, the Employer shall resume payments of premiums for an optical plan for bargaining unit personnel at the rate of $4.75 per member per month, and shall resume payments of premiums for a dental plan for bargaining unit personnel at the rate of $13.00 for family coverage and $6.50 for single coverage per member per month. Such premiums shall be transmitted by-weekly to the carriers previously selected by Local 36.

2. On or before December 9, 1984, the Employer shall make a lump-sum payment to each of the insurance carriers to whom reference is made in paragraph 1, supra, in the full amount of the premiums that would have been paid to those carriers for the period October 1 through December 8, 1984, had such premiums been paid at the rates specified in paragraph 1, supra.

II. The remedy in PERB Case No. 84-U-15 involving the Office of Labor Relations and Collective Bargaining and the Fraternal Order of Police, Metropolitan Police Department Labor Committee is as follows:

1. Effective the pay period beginning December 9, 1984, and continuing until such date as the Union and the Employer shall enter into a new collective bargaining agreement, the Employer shall resume payments of premiums for an optical plan for bargaining unit personnel at the rate of $4.75 per member per month, and shall resume payments of premiums for a dental plan for bargaining unit personnel at the rate of $13.00 for family coverage and $6.50 for single coverage per member per month. premiums shall be transmitted bi-weekly to the carriers selected by the Union, under the same procedures specified in the Notice of Instructions applicable to the optical plan and similar past practice applicable to the dental plan selected by the Union under the collective bargaining agreement which expired September 30, 1984.

2. On or before December 9, 1984 the Employer shall make a lump-sum payment to the Union's optical insurance carrier in the full amount of the premiums that would have been paid to that carrier for the period October 1 through December 8, 1984 at the rates specified in paragraph 1, supra.

3. For the period of October 1 through December 8, 1984, employees shall be made whole for dental benefits in the following manner:

   a. The Employer shall reimburse employees for any dental expense actually paid which would have been covered by the carrier under the contract which was in effect between the carrier and the Union on September 30, 1984.

   b. Eligibility of employee claims for reimbursement shall be determined by a joint Union/Employer committee to be composed of three (3) members designated by the Employer and three (3) designated by the Union. In the event that the committee cannot agree on the eligibility of a particular claim or claims, the Executive Director of the PERB shall decide the issue.

BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD

December 6, 1984