United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 23, 2007

TO : Rosemary Pye, Regional Director
Region 1

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

530-6050-1662
SUBJECT: Health Care & Rehabilitation Services 530-6067-4033-9500
of South Eastern Vermont
Case 1-CA-43673

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) when it unilaterally changed the identity of the administrator of its self-funded health insurance plan. We conclude that the Employer violated the Act by making this unilateral change, which resulted in changed procedures as well as confusion and delay in providing benefits.

FACTS

Charging Party United Nurses & Allied Professionals, Local 5051 has represented a unit of approximately 70 clinicians employed by Respondent Health Care & Rehabilitation Services of South Eastern Vermont since it was certified by the Board in December 2005. The parties are currently engaging in difficult first contract negotiations, which have yet to come to fruition.

In November 2006, the Union learned that the Employer had announced to employees that it had selected a new company, CIGNA HealthCare, to administer its self-funded health insurance plan.[1] The Union demanded bargaining over the change in the identity of the administrator, but the Employer refused. The Employer has insisted that there will be no substantive changes in costs, coverage or providers, despite the change in administrators.

Nevertheless, the change has resulted in new procedures as well as problems in claims processing. Although the Employer has retained its $300 annual benefit for "alternative care" treatments (e.g., acupuncture or massage therapy), the Employer now requires employees to submit claims and supporting documentation directly to its Human Resources department, rather than to the health care

[1] The Employer told an employee that the new administrator would be more cost-effective for the Employer.

administrator.[2] In addition, employees have complained of errors on the part of the new administrator. One employee was charged more for a prescription drug than she had previously paid; after complaining to the Employer she was reimbursed for the difference. Another employee was told by CIGNA that physician visits to assess infertility would no longer be covered, which had not been the case previously. After the Employer interceded, CIGNA retracted this more restrictive interpretation and indicated that it would allow the claim. Furthermore, an information sheet was distributed to employees indicating that naturopathic doctor visits would no longer be directly covered the same as any other physician visit, but would instead be reimbursable only up to the $300 annual limit for alternative care. After complaints, the Employer clarified to employees that naturopathic visits would be considered the same as any other physician visit, which had been the previous rule.

ACTION

We conclude that the Region should issue a Section 8(a)(5) complaint to allege that the Employer's unilateral replacement of its health care administrator, which affected employees' terms and conditions of employment, was unlawful.

Under appropriate circumstances, an employer's replacement of its health insurance administrator may constitute an unlawful unilateral change. As the Board has recognized, the identity of an insurance carrier is "not a minor matter, for … the availability of benefits depends not only on the language of the insurance policy but also upon the manner in which the general language of the policy is construed and administered by the carrier."[3] The Board's recognition is based on its understanding that "the method used in the processing of employee claims under a medical-surgical policy, the practices and procedures of the insurance claims, and the dispatch and efficiency of its personnel in processing such claims are factors connected

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[2] The Employer promised to employees that it would shred any sensitive information after its Human Resources department reviewed their documentation. It also explained during the investigation that, under the previous administrator, it similarly was privy to employees' medical information.

[3] Wisconsin Southern Gas, 173 NLRB 480, 483 (1968) (employer unilaterally changed health insurance benefits and identity of carrier, resulting in "more troublesome" claim procedures).

with a carrier's administration of a health insurance program which … are matters that about which the employees have cause to be greatly concerned."[4] Thus, the Board has held that a new administrator's "handling of claims and related matters is a valid concern for employees and, concomitantly, for their bargaining agent."[5]

Here, the Employer's unilateral replacement of its administrator has resulted in material deviations in the handling of their claims. Thus, employees must now submit claims for alternative health care benefits, including assertedly sensitive documentation of personal problems and treatments, directly to Employer personnel, rather than to a third party. Further, on repeated occasions, employees have been forced to correct misinformation, missteps and mistakes by the new administrator. To do so, the Employer requires employees to appeal CIGNA's decisions directly to the Respondent. Although the Employer has resolved the employees' complaints so far -- complaints that are attributable entirely to the Employer's unilateral change -- there are no assurances that it will consistently do so in the future. Furthermore, the Employer unilaterally announced the procedures under which employees must resolve complaints about the new administrator's handling of their claims. Under all these circumstances, we conclude that the Employer's unilateral replacement of its health insurance administrator was a mandatory subject of bargaining about which the Employer failed to negotiate.[6]

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[4] The Connecticut Light & Power Company, 196 NLRB 967, 969 (1972) (employer unlawfully refused to bargain about identity of insurance carrier; no allegations of specific changes in administration of plan), enf. denied 476 F.2d 1079 (2d Cir. 1973).

[5] Bridon Cordage, Inc., 329 NLRB 258, 333 (1999) (implementation of different carrier from that specified in final offer, unlawful).

[6] Neither the Second Circuit's denial of enforcement of Connecticut Light & Power nor the Board's rejection of complaint allegations in Day Automotive Group, 348 NLRB No. 90 (2006), requires a different conclusion. The Court in Connecticut Light & Power declined to enforce the bargaining violation because the General Counsel failed to proffer evidence that a change in carriers, which had yet to occur, would necessarily adversely affect administration of the plan. 476 F.2d at 1082-83. And in Day Automotive, the employer made a good faith effort to seek a replacement administrator after its prior carrier suddenly withdrew, and it continued to bargain with the union over a permanent replacement. 348 NLRB No. 90, slip op. at 5-6. Here, the

Accordingly, the Region should issue a Section 8(a)(5) complaint, absent settlement, over the Employer's failure to bargain over the decision and the effects of the charge in the plan administrator.[7]

B.J.K.

Employer decided to change administrators apparently as a cost-saving measure and it subsequently has refused to bargain over its decision.

[7] [*FOIA Exemption 5*

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