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MATANUSKA-SUSITNA BOROUGH)
SCHOOL DISTRICT,)
)
Complainant,)
)
v.)
)
MATANUSKA-SUSITNA EDUCATION)
ASSOCIATION, NEA-AK/NEA,)
)
Respondent.)
_____)

Case No. 17-1714-ULP

DECISION AND ORDER NO. 315

We heard this unfair labor practice petition during a one-day hearing on October 29, 2018, in Anchorage. This case was consolidated with case number 17-1715-ULP for hearing, but separate decisions have been issued. The parties subsequently filed written closing arguments. The record closed on December 13, 2018, after completion of final deliberations.

Digest: The unfair labor practice filed by the Matanuska-Susitna Borough School District is granted. Matanuska-Susitna Education Association, NEA-AK/NEA, violated its duty to bargain in good faith for failure to make reasonable effort to obtain the health claims data requested by the District.

Appearances: Saul Friedman, Jermain Dunnagan & Owens, attorney for complainant Matanuska-Susitna Borough School District. Kim Dunn, Landye Bennett Blumstein, LLP, attorney for respondent Matanuska-Susitna Education Association, NEA-AK/NEA.

Board Panel: Lee Holen, Vice Chair; Matthew McSorley and Tyler Andrews, Board Members.

DECISION

I. INTRODUCTION

The parties' dispute arose during bargaining, when Matanuska-Susitna Borough School District (the District) requested health claims data from Matanuska-Susitna Education Association, NEA-AK/NEA, (MSEA). The District asserts that MSEA committed an unfair labor practice by refusing to bargain in good faith when it failed to supply the District with health claims and cost information from its insurer, the Public Education Health Trust (the Trust).

MSEA argues that because it was not in control of the information that the District sought, it was under no obligation to provide the information.

The question the board was asked to resolve is whether MSEA has the authority to obtain the requested healthcare information and whether it is part of their duty to bargain in good faith to obtain the information for the District and to provide it to the District. Because the board determined that MSEA committed an unfair labor practice for its failure to take reasonable steps to obtain the claims data and other information, the board does not answer the question of whether MSEA has a duty to actually obtain and provide the information to the District.

II. FACTS

MSEA and CEA, with the help of their affiliate NEA-Alaska were bargaining over their collective bargaining agreements with the District during the spring of 2017.¹ In preparation for negotiations the District had hired Segal Consulting to conduct a pricing exercise to determine whether the District would pursue self-insuring.² On behalf of the District, Segal requested health claims data from the MSEA and CEA. As the Associations spent time determining how to respond to the request, the District initiated this unfair labor practice to resolve the issues the request presented.

A. Trust Structure

Bargaining unit members of MSEA receive health benefits through the Trust, an IRS-recognized health benefits provider that provides benefits exclusively to government employees.³ The Trust is a Voluntary Employee Benefits Association or “VEBA” overseen by a seven-member board.⁴ Public Education Health Trust and NEA-Alaska are two separate entities.⁵ In 2013, the Trust changed its name from NEA-Alaska Health Plan to Public Education Health Trust to draw that distinction and eliminate confusion.⁶ During the timeframe that these unfair labor practice allegations occurred, NEA-Alaska was the plan sponsor and it had the authority to hire and fire the Plan Administrator.⁷ The plan sponsor is also a fiduciary of the Trust; thus, it must ensure that there are sufficient funds to pay the Trust obligations.⁸

Beginning in 2016, plan sponsorship was transferred from NEA-Alaska to the Public Education Health Trust, effective in 2018.⁹ Rhonda Kitter is the plan administrator and chief financial officer of the Public Education Health Trust.¹⁰ Kitter testified that despite that apparent authority she never reported to NEA-Alaska and it was always distinct from the Trust.¹¹

¹ David Theriault Testimony

² Rhonda Kitter Testimony; Ex. 11.

³ Ex. V.

⁴ Kitter Testimony; Ex. 3 at 3.

⁵ Kitter Testimony

⁶ *Id.*

⁷ Kitter Testimony; Ex. 3 at 15.

⁸ *Id.*

⁹ Kitter Testimony; Ex. V.

¹⁰ Kitter Testimony.

¹¹ *Id.*

At the time of the District's request, the Trust was structured such that the Chair of the Trust was the president of NEA-Alaska's board of directors, the vice president of NEA-Alaska was the secretary and treasurer of the Trust.¹² The president and vice president appointed a third trustee who was required to be either a member or employee of NEA-AK and a participant in one of the Trust's health insurance programs.¹³ The remaining four board members had to be elected by all members of the trust and be an NEA-Alaska member or a participating local bargaining unit member and a participating member of the Trust.¹⁴

The Trust provides data to the school districts by plan design.¹⁵ The Trust contracts out to Employee Benefit Management Services, their third party administrator, who provides the Trust with rate recommendations including recommendations for stop-loss coverage, and it has access to all of the trust's entire claims data, benefit structures, benefit plan designs, census data information, and stop-loss policy limits so that the consultant can make recommendations to the Trust on premium structures for the Trust's clients.¹⁶

Only the trustees and employees of the Trust see information from the consultant.¹⁷ Kitter testified at the hearing that NEA-Alaska does not have access to claims data and she is not aware that the issue of NEA-Alaska accessing the claims data has ever been discussed.¹⁸ Although there is no written policy in place which states whether the information is to be reviewed by NEA-Alaska, it is Kitter's experience, having worked for the Trust for twenty years, that the information is not provided to NEA-Alaska.¹⁹ Subsequent to the District's request for claims data, a written board policy was adopted, memorializing the board's usual practice not to disclose the data.²⁰

Trustees are not HIPAA²¹ or PHI²² authorized, so they only see the minimum amount of information needed to conduct business, including the reports produced by the third-party administrator, and not underlying claims data.²³ Access to protected health information is limited to Kitter and her staff.²⁴ Groups the Trust insures receive only census data specific to their specific group.²⁵ Claims data is distinct from census data; the Trust will not release claims data to anyone, including the group that is insured, if it requests the data.²⁶

Additionally, the Trust will not release aggregate or specific claims experience data, including large claims data that relates to a specific group regardless of whether there is a broker

¹² Kitter Testimony; Ex. 3 at 19-20.

¹³ *Id*

¹⁴ *Id*

¹⁵ Kitter Testimony.

¹⁶ *Id*

¹⁷ *Id*

¹⁸ *Id*

¹⁹ *Id*

²⁰ Kitter Testimony; Ex. 16.

²¹ Health Insurance Portability and Accountability Act.

²² Protected Health Information

²³ Kitter Testimony; Ex. F at 34-39.

²⁴ Kitter Testimony.

²⁵ *Id*

²⁶ *Id*

of record letter.²⁷ This is because the Trust provides pooling ratings and rates are not determined by an individual group's experience.²⁸ Thus a group's premiums are not based on the group's highs and lows, but are pooled with the larger group because they do not individually rate.²⁹ Different and more detailed information is available from groups seeking to join the trust who were previously self-insured; they are able to provide the data because they have carried the full risk of covering their group so they have all of their own data.³⁰

The Trust provides the entirety of information to its stop-loss carrier so it can determine whether it will cover the risks of the Trust.³¹ The stop-loss carrier will make decisions about whether to exclude large claims and if it does, then the risk is the responsibility of the Trust and it must absorb the cost.³² Kitter testified that because the Trust is a separate entity, it does not participate in bargaining and would not have released the data even if it helped the bargaining process.³³ Kitter testified that had NEA-Alaska requested claims data, she would have taken the request to the trustees.³⁴

B. Access to the Trust's information

The District had requested the claims data several times over the last 10 – 15 years, and the Trust consistently denied the request.³⁵ A year after the District's 2017 request, the Trust created a written policy stating that it will not release claims information.³⁶ Kitter explained that the written policy was created to reflect the actual way the Trust operates in practice.³⁷ Though there was no written policy, NEA-Alaska is not entitled to specific or aggregate experience information either and that is how the Trust has always operated as far as Kitter is aware.³⁸ Kitter is not aware that NEA-Alaska has ever made a request for aggregate or specific claims data.³⁹ Glen Bafia, Executive Director for NEA-Alaska testified that it was his understanding that NEA-Alaska had no authority over the Trust and the two entities were distinct.⁴⁰ Bafia became the Executive Director in February 2017, and he is not aware of the Trust ever providing information or reports to the NEA-Alaska board as an oversight or supervisory entity, and he is not aware of NEA-Alaska ever requesting information from the Trust as a supervisory or oversight entity.⁴¹ Bafia testified that NEA-Alaska, as an employer, provides insurance to its employees through the Trust.⁴²

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Kitter Testimony; Ex. 19.

³⁷ Kitter Testimony.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Bafia Testimony.

⁴¹ *Id.*

⁴² Bafia Testimony.

When Kitter was asked to identify a situation in which the data would be released, she stated that if de-identified data is requested by a court order, then the Trust would release it and this has never happened.⁴³ Individual participants have access to their own data at all times.⁴⁴ These are the only mandatory releases.⁴⁵

If it were in their interest, and the trustees chose to, the Trust could release de-identified claims data and Kitter would follow that directive.⁴⁶ Thus, it is possible for the Trust to produce the data the District seeks, but the Trust policy prohibits its release.⁴⁷

C. Sequence of Events

In early 2017, the District began bargaining a new contract with the MSEA and Classified Employees' Association (CEA).⁴⁸ Included on the bargaining team for the Associations were David Theriault and Rob Boyer, Uniserve Directors for NEA-Alaska, an affiliate of both CEA and MSEA.⁴⁹ Their role was to act as advisors to the locals during bargaining.⁵⁰ CEA president, Karen Salisbury, was also on the bargaining team.⁵¹

On March 10, 2017, Kitter received a request from Segal Consulting stating that it had been retained by the District to conduct a pricing exercise on behalf of its Medical, Pharmacy, Dental and Vision programs and it sought information from the Trust.⁵² Kitter responded to the request and supplied Segal with benefits summaries and rates, but advised Segal that "Trust policy prohibits the release of group specific claims and utilization data. The Trust claims experience is fully pooled and only reviewed in aggregate when setting plan rates."⁵³

Segal renewed its request on April 17, 2017, for information on the entire Trust.⁵⁴ On April 25, Kitter responded and denied the request for the aggregate data for the entire Trust, as it was her interpretation that Segal only had authority to request information on the District administrative group, which is separate from the units represented by MSEA and CEA.⁵⁵ Segal again requested the data on June 28, 2017.⁵⁶ In response to that request from Noel Cruse at Segal for the release of enrollment information, de-identified large claims, experience, and financials for the Trust, Kitter replied in an email,

Good afternoon Noel

⁴³ Kitter Testimony.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Theriault Testimony.

⁴⁹ Theriault Testimony; Bafia Testimony.

⁵⁰ Theriault Testimony; Bafia Testimony.

⁵¹ Karen Salisbury Testimony.

⁵² Kitter Testimony: Ex. 11.

⁵³ Kitter Testimony: Ex. 12.

⁵⁴ Kitter Testimony: Ex. 13.

⁵⁵ Kitter Testimony: Ex. 14.

⁵⁶ Ex. 16.

The disconnect is that the other employees of the school district for which SEGAL is requesting data are directing the Trust to not release their data. They indicate they bargain dollars from their employer, not benefits nor plan designs and they have not engaged SEGAL to work on their behalf. The Trust has not been provided a broker of record letter from them recognizing SEGAL as their broker.

The Trust has contracts with both of those units. Please submit your requests to them directly as it would not be appropriate for the Trust to release data on our other clients to a third party that they have not approved. The Trust has provided all other data that is available at this time.⁵⁷

In her testimony Kitter explained that she had already provided Segal with the plan descriptions of the different plan designs that the Trust offers, census data for the administrative group of the District employees, those that Segal had provided a broker of record letter for, and specific information regarding stop-loss deductible.⁵⁸ Segal was not provided claims data, because that is never released.⁵⁹ But, Segal wanted census data on the employees of the Associations and Kitter required a broker of record letter from MSEA and CEA, which she did not receive.⁶⁰ Consequently, she refused to release the data for MSEA and CEA employees.⁶¹

When the bargaining team was asked to provide the requested claims data to the District, the team was not sure how to respond to the request, and did not fully understand what information was being sought.⁶² Theriault testified that he remains confused about what would have to be provided if MSEA is required to provide the information.⁶³ The team reached out to Kitter for clarification on the nature of the information the District was requesting.⁶⁴ Theriault testified that he believed the locals could either request the information from the Trust, or choose not to request the information.⁶⁵ In conversations with Kitter, the bargaining team had been told that Kitter would not be able to release the information sought, so the bargaining team weighed whether it should formally make the request to receive a formal answer from the Trust.⁶⁶ If they did request the information, they considered whether there were parts of the information that they should not request.⁶⁷

⁵⁷ Kitter Testimony; Ex. 16.

⁵⁸ Kitter Testimony.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Theriault Testimony.

⁶³ *Id.*

⁶⁴ Theriault Testimony; Salisbury Testimony.

⁶⁵ *Id.*

⁶⁶ Theriault Testimony.

⁶⁷ *Id.*

There was no consensus among the bargaining team, but the team determined that a request for this type of information should come from the MSEA executive board.⁶⁸ In order to prepare to take the request to their executive board, Theriault sent an email to Kitter asking about the Trust's policy regarding releasing the data to the District.⁶⁹ In an email dated September 5, 2017, David Theriault specifically asked Kitter,

In previous conversations, you have said that the Trust does not release claims information. To be able to best advise both the MSEA and CEA bargaining teams, it is helpful to know the basis for the Trust's policy of not releasing this information. It would be particularly helpful if you can direct me to specific language in Trust policy or law that can be shared with both bargaining teams and, possibly, the District. It would also be helpful to know if the Trust's policy is similar to other health insurance providers.⁷⁰

In response, Kitter stated, "Without a broker of record letter from CEA and MSEA, naming Segal as their consultants, the Trust will not provide the claims data to Segal."⁷¹ After that, CEA and MSEA did not follow up with Kitter further to seek the information.⁷²

Kitter testified that she never had a conversation with CEA or MSEA about releasing claims data and that neither union ever told Kitter not to release the data.⁷³ Kitter acknowledged at the hearing that the wording of her email was imprecise.⁷⁴ Kitter clarified that in her response to Theriault, that she did not intend to convey that MSEA and CEA had refused to provide claims data, but that the Trust was not providing the census data because there was no broker of record letter.⁷⁵ She clarified that because Segal only represented the District administrative employees, that she interpreted Cruse's inquiry, and framed her response accordingly, that Cruse only sought aggregate information for the District administrative group.⁷⁶

Theriault did not seek help from his supervisor Mark Jones, or from Bafia to get the information from the Trust.⁷⁷ Uniserve Directors are self-directed and operate fairly independently and because the Trust was a separate entity from NEA-Alaska, it did not occur to Theriault that the information could possibly be obtained.⁷⁸ Bafia testified that if he had received the request from the District he would have sought guidance from Kitter.⁷⁹ If she said the information could not be released then he would not have pursued it.⁸⁰ After receiving the letter from Kitter, it did

⁶⁸ Theriault Testimony.

⁶⁹ Theriault Testimony; Ex. 17.

⁷⁰ Ex. 17.

⁷¹ Kitter Testimony; Ex. 18.

⁷² Kitter Testimony.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Kitter Testimony; Ex. 18.

⁷⁶ Kitter Testimony.

⁷⁷ Theriault Testimony; Bafia Testimony.

⁷⁸ *Id.*

⁷⁹ Bafia Testimony.

⁸⁰ *Id.*

not occur to Theriault to go to his superiors at NEA-Alaska because Kitter was the most credible authority on the Trust's policies so he accepted the 'no' from Kitter.⁸¹ Theriault was not aware of the structure of NEA-Alaska as the plan administrator of the Trust at the time of the request from the District, or that it might appear that NEA-Alaska had any authority over the Trust.⁸² Consequently, MSEA and CEA never made a formal request for the health claims information for the District.⁸³

III. DISCUSSION

As a preliminary matter, the Board denies MSEA's motion to dismiss the complaint. Also, at the hearing the parties raised five different objections during the presentation of evidence. All objections were overruled with discretion for the board to consider them during deliberations. We now confirm that those objections are overruled. Specifically, the District objected to the relevance of Exhibit V, the Trust Agreement effective July 1, 2018, because the document was created after the District's request for claims data took place. Under the Administrative Procedures Act, the rules of evidence are relaxed and,

relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of a common law or statutory rule that makes improper the admission of the evidence over objection in a civil action.⁸⁴

The evidence is relevant because it provided the board panel context in which to understand the events of this case. Consequently, the objection is overruled and the evidence is admitted as part of the evidence in this case.

Regarding the substantive charge of unfair labor practice, the hearing officer found probable cause based on the limited information available to her as a result of her investigation. After hearing all of the evidence, the board makes the following findings.

Unions are obligated to bargain in good faith with public employers.⁸⁵ This Board has repeatedly held that, good faith means "'an open mind and a sincere desire to reach an agreement' and a 'sincere effort ... to reach a common ground.'"⁸⁶ And in determining whether a party has bargained in bad faith, "the Board looks to the totality of the circumstances in which the bargaining took place."⁸⁷ The obligation to bargain in good faith includes the duty to disclose relevant

⁸¹ Theriault Testimony.

⁸² *Id.*

⁸³ Theriault Testimony; Salisbury Testimony; Kitter Testimony.

⁸⁴ AS 44.62.460(d).

⁸⁵ AS 23.40.110(c)(2).

⁸⁶ *Int'l Org. of Masters, Mates & Pilots v. State*, DO 311 at 9 (ALRA April 25, 2017)(internal citations omitted).

⁸⁷ *Id.* (internal citations omitted)

information about matters at issue in bargaining.⁸⁸ “[A] union’s duty to furnish information relevant to the bargaining process is parallel to that of an employer.”⁸⁹

This Board has already held that health benefits are a mandatory subject of bargaining.⁹⁰ “Insurance cost information must be provided ... and the duty to disclose relevant information is contingent upon a request.”⁹¹ A union must make a reasonable effort to obtain requested information that is not under its control.⁹²

Here, the District requested health claims data and other information from MSEA in order to conduct a pricing exercise to explore self-insurance as a potential option while bargaining with MSEA. It is evident from the testimony that MSEA and CEA were unsure how to provide answers to the District. Both Theriault and Salisbury testified that they conferred on more than one occasion with Kitter to discuss and understand the District’s request.⁹³ The bargaining team discussed how to handle the request and they held legitimate concerns about whether the information could be released without jeopardizing confidentiality of members.⁹⁴ The Board finds that MSEA did not control the health claims information. Despite the designation of NEA-Alaska as plan administrator to the Trust, NEA-Alaska nor the Associations operated in a way that asserted any control over the Trust. Additionally, the board finds that MSEA did not direct Kitter to refuse to disclose information to the District.

The Board finds that MSEA’s failure to formally request the sought-after information from the Trust, was a violation of AS 23.40.110(c)(2). Both Salisbury and Theriault testified that a request of this type should be made by the executive boards of the associations, MSEA and CEA.⁹⁵ Yet, neither board was given the opportunity to make a determination. Kitter testified that she would have brought such a request to the trustees if it had been brought to her.⁹⁶ When Theriault asked, Kitter did not provide any written policy or rule by the Trust that existed that would have prevented the release of the information by the Trust.⁹⁷ Consequently, MSEA violated its duty to bargain in good faith by failing to take reasonable steps to respond to the District’s request to provide information to the District during bargaining.

IV. CONCLUSION

After consideration of all of the evidence presented by the parties and the pleadings, we find that MSEA did not meet the Public Employment Relations Act good faith bargaining standard. As the District requested, we require CEA to take appropriate steps, whether through the NEA-

⁸⁸ *Alaska State Emp’s Ass’n/AFSCME Local 52, AFL-CIO, v. State (DOT)*, (ALRA Nov. 17, 1999), at 13 (citing *NLRB v. Truitt Mfg. Co.*, 351 US 149 (1956)).

⁸⁹ *Printing & Graphic Commc’ns Local 13(Detroit)(Oakland Press Co.)*, 233 NLRB 994 (1997), *aff’d*, 598 F.2d 267 (D.C. Cir. 1979).

⁹⁰ *Alaska State Emp’s Ass’n v. State*, D&O 158, 17 (ALRA May 14, 1993).

⁹¹ *Id.* (internal citations omitted).

⁹² *Int’l Broth. Of Firemen and Oilers*, 302 NLRB 1008, 1009 (1991).

⁹³ Theriault Testimony; Salisbury Testimony.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Kitter Testimony.

⁹⁷ *Id.*

Alaska Board of Directors, or directly to the Public Education Health Trust, that would allow the District to present its request to the trustees to obtain the requested information.

ORDER

1. MSEA is ordered to CEASE AND DESIST its refusal to make reasonable effort to obtain the health claims data sought by the district.
2. MSEA is ordered to take appropriate steps, whether through the NEA-Alaska Board of Directors, or directly to the Board of Trustees, that would allow the District to present its request to the trustees to obtain the requested information.
3. The District is ordered to post notice of this decision within 10 days after service in workplaces of union members at locations, such as employee bulletin boards, reasonably chosen to give members actual notice of the decision.

Dated: February 28, 2019

ALASKA LABOR RELATIONS AGENCY

Lee Holen, Vice Chair

Matthew R. McSorley, Board Member

Tyler Andrews, Board Member

APPEAL PROCEDURES

This order is the final decision of this Agency. Judicial review may be obtained by filing an appeal under Appellate Rule 602(a)(2). Any appeal must be taken within 30 days from the date of mailing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of *Matanuska-Susitna Borough School District v. Matanuska-Susitna Education Association, NEA-AK/NEA*, Case No. 17-1714-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 28th day of February, 2019.

Margaret Yadlosky
Human Resource Consultant

This is to certify that on the ____day of February, 2019, a true and correct copy of the foregoing was mailed, postage prepaid to:

Saul Friedman, MSBSD
Kim Dunn, CEA

Signature