I.R. No. 2010-8

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FRANKLIN LAKES BOARD
OF EDUCATION,

Respondent,

-and- Docket No. CO-2009-475

FRANKLIN LAKES EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee grants an application for interim relief based upon an unfair practice charge filed by the Franklin Lakes Education Association against the Franklin Lakes Board of Education. The charge alleges that on May 28, 2009, during collective negotiations, the Board voted to change health insurance plans from Horizon Direct Access to the School Employees Health Benefits Program. The Board's conduct allegedly violated 5.4a(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

The Designee determined that the change in plans will increase office visit co-pays; out-of-network, out-of-pocket deductibles; and will eliminate wellness care benefits. The Designee found that the standard for granting relief was met and ordered the Board to maintain the level of benefits provided under the Horizon plan by creating a fund for reimbursing or paying those costs imposed upon unit employees, pending the resolution or conclusion of the charge.

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Appearances:

For the Respondent, Fogarty and Hara (Stephen R. Fogarty, of counsel)

For the Charging Party, Oxfeld Cohen, attorneys (Sanford R. Oxfeld, of counsel)

INTERLOCUTORY DECISION

On June 19, 2009, Franklin Lakes Education Association (Association) filed an unfair practice charge against Franklin Lakes Board of Education (Board), together with an application for interim relief, a certification, supporting documents and a brief. The charge alleges that on May 28, 2009, the Board voted to change health care carriers, joining the School Employees Health Benefits Plan. The Board's action occurred during collective negotiations for a successor agreement and when implemented, will diminish the level of health insurance benefits. The Association alleges that the Board's conduct

violates 5.4a(1), (3) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. It also alleges that the Board violated N.J.S.A.34:13A-33.[2/]

The application seeks an Order restraining the Board from changing and diminishing health insurance benefits.

On June 26, 2009, I signed an Order to Show Cause, specifying July 20 as the return date for argument at the Commission's Trenton offices. I also directed the Board to file an answering brief, together with opposing certifications and proof of service upon the Association.

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ Notwithstanding the expiration of a collective negotiations agreement, an impasse in negotiations, an exhaustion of the commission's impasse procedures, or the utilization or completion of the procedures required by this act, and notwithstanding any law or regulation to the contrary, no public employer, its representatives, or its agents shall unilaterally impose, modify, amend, delete or alter any terms and conditions of employment as set forth in the expired or expiring collective negotiations agreement, or unilaterally impose, modify, amend, delete, or alter any other negotiable terms and conditions of employment, without specific agreement of the majority representative.

On July 16, 2009, Board counsel wrote a letter advising that two days earlier the Board voted ". . . to delay implementation of the change to the School Employees Health Benefits Program until December 1, 2009." On July 17, I wrote to the parties, advising that the delay obviated the need for a decision on the application and that the hearing was postponed. I also wrote that the parties must contact the assigned mediator to schedule a mediation session regarding a successor agreement.

A mediation session did not resolve the dispute in this matter and did not result in an agreement for a successor contract. On October 6, 2009, Association counsel filed a letter, advising that the Board intended to implement the contested health benefits plan on December 1 and requesting that the hearing on the application be rescheduled. On October 19, I wrote to the parties, advising of the rescheduled date for argument on the application and, alternatively, a telephone conference on the designated date and time. I also invited the parties to submit letters and documents, updating the relevant circumstances. On November 9, the Board filed a letter. On November 18, 2009, I conducted a telephone conference during which the parties argued their cases. The following facts appear.

The Board and Association signed a collective negotiations agreement extending from July 1, 2006 through June 30, 2009.

Article XX of the agreement, "Health Benefits Program," provides in a pertinent part:

> The Board agrees to pay 100% of the premium costs for all employees and dependents in the Horizon Blue Cross/Blue Shield Direct Access Health Benefits Plan in effect as of September 1, 2006. Any change in the level fo benefits shall not be instituted without negotiations with the Association. Effective October 1, 2006, the attached Schedule C will replace the plan in effect on September 1, 2006.

Article XX also permits unit employees to elect reduced health benefits coverage in exchange for payment(s).

On January 26, 2009, in a negotiations session, the Board proposed switching the health benefits plan from Horizon Direct Access to the School Employees Health Benefits Program. The Association rejected the proposal. On February 20, 2009, the Association filed a Notice of Impasse (I-2009-118). The parties met with an assigned mediator on April 9, 2009. No agreement was reached.

On May 13, 2009, the Board learned that the cost of the Horizon plan will rise by almost 42% and that Horizon would agree to a 35% increase in the costs for the 2009-2010 school year, roughly $290,000 more than the Board's budgeted amount. The projected overall savings in changing the provider to the School Employees plan is about $750,000. On May 26, 2009, in another mediation session, the Board apprised the Association of the projected increases in costs, and of the certainty of layoffs and

reductions in programs if the costs were not reduced. The Association did not change its position on health insurance benefits.

On or around June 1, 2009, the Board adopted a resolution to change its health insurance carrier from Horizon to the New Jersey School Employees Health Benefits Program Direct 10 Plan. The Board president issued a written statement to that effect.

Among the differences in the two plans, the in-network co-pay for office visits shall be increased to $10 from $5; the out-of-network, out-of-pocket maximum deductibles for individuals and families shall be increased to $2000/$5000 from $400/$800; wellness care shall be eliminated and the out-of-network deductible for families shall be increased to $250 from $200.

The change of provider is scheduled for December 1, 2009.

ANALYSIS

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State

College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

The level of health benefits is mandatorily negotiable and may not be changed unilaterally. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975). Unilateral changes in health benefits violate the duty to negotiate in good faith. Metuchen Bor., P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984). Any unilateral change in a term and condition of employment during negotiations has a chilling effect and undermines labor stability. Galloway Tp. Bd. of Ed. V. Galloway Tp. Ed. Assn., 78 N.J. 25, 48 (1978). In school districts, such changes occurring after an agreement expires and before a successor is negotiated also contravenes N.J.S.A. 34:13A-33.

In this case, the change of providers and plans will increase co-pays, deductibles, out-of-network costs to individuals and families, and eliminate wellness care benefits. The agreement mandates that "any change" in benefit levels ". . . shall not be instituted without negotiations . . ." I regard this provision to be restrictive upon the employer's flexibility to change health benefit levels. Although the Commission has not regularly restrained employers from making a change in carriers, it has ordered interim relief by requiring them to create a fund to reimburse employees for any differences in benefit levels.

Chatham Bd. of Ed., I.R. No. 2002-5, 28 NJPER 84 (¶33030 2001); Union Tp., P.E.R.C. No. 2002-55, 28 NJPER 198 (¶33070 2002).

I find that the uncontested change in health benefits levels during collective negotiations demonstrates that the Association has a substantial likelihood of succeeding in a final Commission decision on its legal allegations. I also find that irreparable harm will occur if relief is not granted. Galloway Tp. Bd. Of Ed.

The public interest would be harmed if the Board maintained the costly Horizon Direct Access Plan. It has already laid off certain employees, reduced the work hours of others and reduced programs in order to pay for that plan. The public interest will not be harmed by an order requiring the Board to create a fund for reimbursing or paying costs imposed upon unit employees under the School Employees Plan, pending the conclusion of this charge. In considering the relative hardship to the parties, I find that unit employees will pay more for certain coverages in the School Employees Plan. An employer-created fund for timely reimbursement(s) and/or payment of costs will place the parties in an approximate status quo ante during the adjudication of this case.

ORDER

The Association's request for a restraint is granted to the extent that the Board shall maintain the same level of benefits

that were provided under the Horizon Direct Access Plan until a new plan is negotiated or this charge is concluded. The Board shall create a fund available to pay or reimburse costs to unit employees representing the difference, if any, between benefits provided by the School Employees Health Benefits Plan and those that would have been provided under the Horizon Direct Access Plan.

The Board shall notify and provide the Association and its unit employees with the name of an individual or office to whom or which claims may be submitted. Reimbursement claims may be verified and disbursements must be made within a reasonable period from the date of submission.

This order shall remain in effect until the underlying charge is resolved.

Jonathan Roth
Commission Designee

Dated: November 20, 2009
Trenton, New Jersey