I.R. No. 2012-7

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2011-483

NEWTON EDUCATION ASSOCIATION
AND NEWTON SUPPORT STAFF
ASSOCIATION,

Charging Parties.

SYNOPSIS

A Commission Designee denies an application for interim relief seeking to restrain an employer from changing health insurance carriers during negotiations for a successor agreement. The Newton Board of Education raised a contractual defense for its action. The Commission Designee found that arbitration was the appropriate process to determine whether the new health plan was equivalent to the former plan, as required by contract. The Designee found that the Charging Parties had not demonstrated the requisite likelihood of success on the merits element for issuance of interim relief.

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Appearances:

For the Respondent, Schwartz, Simon, Edelstein & Celso LLC, attorneys (Allan P. Dzwilewski, of counsel)

For the Charging Party, Oxfeld Cohen. PC (Randi Doner April, of counsel)

INTERLOCUTORY DECISION

On June 16, 2011, the Newton Education Association (Association) and the Newton Support Staff Association (NSSA) filed an unfair practice charge together with a request for interim relief, a certification, and supporting papers, against the Newton Public Schools (Board). The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4 a(1), (3) and (5),[1/] when it announced a

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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

(continued...)

change in health insurance carriers effective July 1, 2011, thereby unilaterally changing the level of health benefits during negotiations. Specifically, the Association and the NSSA allege that on or about March 3, 2011, the Board announced that it was changing health insurance carriers from Aetna to the School Employees Health Benefit Plan (SEHBP). The application seeks an Order restraining the Board from changing health insurance carriers.

On June 21, 2011 an Order to Respond was signed, requiring the Charging Party to serve the Order on the Board by June 24, 2011, and further requiring the Board to file papers with the Commission in opposition to the charge, together with proof of service upon the Association and the NSSA, by June 29, 2011.

By letter of June 22, 2011, counsel for the Board requested an extension of time until July 11, 2011 to file papers in opposition to the unfair practice charge due to a previously planned absence from the office from June 22, 2011 though July 7, 2011. The requested extension of time was granted.

1/ (...continued)
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."

On June 27, 2011 an Order to Show Cause was signed, specifying July 13, 2011 as the return date for oral argument by telephone conference. I conducted a telephone conference on the scheduled date, and the parties argued their cases.

The following facts appear:

The Association, the NSSA and the Board are parties to a collective negotiations agreement which expired on June 30, 2011.[2/] Negotiations are continuing.

The certification of NJEA Uniserv Representative John Ropars, who is assigned to represent the Association and the NSSA, states that on March 3, 2011 the Board informed the union that it was changing health plans from Aetna to the SEHBP on July 1, 2011. Ropars states that Aetna and the SEHBP have separate and distinct levels of benefits. Specifically, the SEHBP does not provide a traditional plan, and ambulance services, private duty nursing care, and blood services, which were covered at 100% in 1991 in both the traditional plan and the PPO, are only covered at 90% by the SEHBP. Additionally, co-pays are

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2/ In the certification of Dr. G. Kennedy Greene as well as at oral argument, the Board raised the issue of the status of the NSSA, arguing that it had merged into a single unit with the Association. The Association and the NSSA disputed that fact. Submitted to me were two contracts, one between the Board and the Association, for the period of July 1, 2007-June 30, 2008, and July 1, 2008-June 30, 2011 and the other between the Board and the Newton Custodial Association for the term of July 1, 2009-June 30, 2011. Thus, there remains an issue of disputed fact with respect to this aspect of the matter.

different. Ropars states that in 1991, the PPO co-pay "for most services" was $5.00, while in the current SEHBP, the co-pays for the Direct 10 Plan and the Direct 15 Plan are respectively $10 and $15. In the 1991 traditional plan, emergency room visits were covered at 100%, while the same visit requires a $25 co-pay under the SEHPB. Skilled nursing facilities were covered at 100% in the 1991 traditional plan, but are limited to 120 days in the Direct 10 Plan. Supplemental services, which include equipment such as wheelchairs and crutches, were covered at 100% in the 1991 plan, whereas the current SEHBP provides only 90% coverage. Services by out-of-network providers under SEHBP are covered at lower percentages, "typically at 70% or 80%" while the traditional plan provided 100% coverage.

Newton Superintendent G. Kennedy Greene provided a certification detailing the history of the alleged merger of the Newton Custodial Association with the Newton Education Association "in or around November 2010." He states that on or about March 9, 2011 the Association filed a grievance alleging that the change in health benefit plans approved by the Board on March 3, 2011 with an effective date of July 1, 2011 was a violation of the existing agreement between the Board and the Association. The Association filed for binding arbitration, a matter which he states is currently docketed with the Commission. He further states that on March 11, 2011 a separate grievance was

filed by the Newton Custodial Association alleging that the health benefit plan change violated their agreement with the Board. The Board disputed the existence of the Newton Custodial Association, however that grievance also was the subject of a request for arbitration, and both grievances were scheduled to be heard an arbitrator on August 1, 2011.

Pursuant to my request at oral argument, copies of the agreements between the Board, the Association, and the NSSA were provided.

The current agreement between the Board and the Association provides at Article X "Insurance Protection and Limitation" that the level of benefits provided "will be at the level substantially similar to that in effect in the 1991-92 school year." Co-pay and deductibles are set out in the agreement. Section C of Article X directs the Superintendent of Schools to investigate other plans, as well as to assess the service offered by the carrier currently under contract and "recommend a change in carrier, if advance notice of at least thirty (30) days is given to the Association and substantially similar coverage is provided. If the Association contends that the proposed coverage is not substantially similar, the dispute shall be resolved by the use of expedited binding arbitration conducted under the rules and procedures of the American Arbitration Association, provided, however, that the arbitrator shall issue a decision and

award no later than August 1 preceding the commencement of the school year during which the proposed coverage is to take effect."

Article IX "Insurance Protection and Limitation" of the agreement between the Board and the Newton Custodial Association establishes that the level of benefits provided will be "at a level equal or better than that in effect in the 1997-98 school year." Paragraph C of Article IX provides virtually identical direction to the Superintendent of Schools as is contained in Article X, "Insurance Protection and Limitation" of the agreement between the Board and the Association. The Board can make a change in carriers with advance notice to the unit and "equal or better coverage is provided." Disputes with respect to the level of coverage are to be referred to binding arbitration.

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 Commission has long held that the level of health benefits is mandatorily negotiable and may not be unilaterally changed by an employer. 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).

The Association and the NSSA presented this case as a matter which involved the unilateral imposition of a change in the level of health insurance benefits" which were not "substantially similar' to the level in effect in the 1991-92 school year as required by the Association's contract, or "equal to or better than" the level in effect in the 1997-98 school year pursuant to the terms of the NSSA contract. The Board disputes that the change in insurance carriers was in violation of the agreements with the Association and the NSSA, and further disagrees that the level of benefits will be changed by virtue of the change in plans.

The Board's responding papers included copies of contractual grievances filed by the Association and the NSSA which alleged violations of Article X Section A of the Association contract and Article III Section D of the NSSA agreement based on the Board's March 3, 2011 action approving a change of insurance carriers. The grievances dispute that the change in carriers will provide a level of health benefit coverage consistent with that required by their respective contracts, and request relief in the form of a return to the plan in effect prior to the announced change. During oral argument, Board Counsel indicated, and Association counsel did not dispute, that the issue of the disputed level of benefits is pending before an arbitrator pursuant to the provisions of the applicable collective negotiations agreements.

Interim relief is an extraordinary remedy which requires a showing that the moving party has a substantial likelihood of success on the merits of the legal and factual allegations of the charge. The parties have negotiated a specific procedure to deal with disputes about whether changes in insurance plans or carriers provide the contractually requisite level of benefits. Deferral to a negotiated grievance procedure which, as is the case here, culminates in binding arbitration is appropriate. See State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984); Hazlet Tp. Bd. Of Ed., P.E.R.C. No. 95-78, 21 NJPER 164 (¶26101 1995); Stafford Tp. Bd. of Ed.,

P.E.R.C. No. 90-17, 15 NJPER 527 (¶20217 1989). This case is similar to our decisions in Buena Regional Bd. of Ed., I.R. No. 2010-7, 35 NJPER 326 (¶111 2009); Borough of Avalon, I.R. No. 2009-28, 35 NJPER 178 (¶67 2009); and Camden County College, I.R. No. 2008-18, 34 NJPER 104 (¶45 2008), recon. denied P.E.R.C. No. 2008-67, 34 NJPER 254 (¶89 2008), where interim relief was denied when contract language provided a defense that could only be reviewed and resolved through the parties arbitration procedure, which will provide an expeditious means of disposing of the dispute with the benefit of the skills and expertise of a neutral.

Based upon the above findings and analysis, the application for interim relief is denied.

ORDER

The application for interim relief is denied.

Gayl R. Mazuco
Commission Designee

DATED: August 15, 2011
Trenton, New Jersey