I.R. No. 2012-8

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OXFORD TOWNSHIP BOARD
OF EDUCATION,

Respondent,

-and-

Docket No. CO-2011-489

OXFORD EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Oxford Education Association filed an unfair practice charge, accompanied by an application for interim relief, alleging that the Oxford Township Board of Education unilaterally altered terms and conditions of employment by changing health insurance carriers, resulting in a different level of benefits. Contract language required that any new plan be equivalent to the plan specified in the collective negotiations agreement. The Board admitted changing carriers, but argued that fiscal concerns, including a significant premium increase by the current carrier, would have resulted in layoffs if the change in carriers had not been effectuated.

The Commission Designee denied interim relief on the grounds that arbitration was the appropriate process to determine whether the new health plan was equivalent to the former plan, as required by contract, and therefore the Charging Party had not established the requisite likelihood of success element for issuance of interim relief.

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Appearances:

For the Respondent, Courter, Kobert & Cohen , P.C. (Howard A. Vex, of counsel)

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

INTERLOCUTORY DECISION

On June 21, 2011, Oxford Education Association (Association) filed an Unfair Practice Charge with the Public Employment Relations Commission (Commission) alleging that the Oxford Board of Education (Board) violated 5.4a(1,)(3) and (5)[1/] of the New

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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 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."

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The Association claims that the Board violated the Act by unilaterally altering the level of health insurance benefits during negotiations for a successor collective agreement. The Board notified the Association that it would change plans from Blue Cross/Blue Shield Direct Access (Direct) to the School Employee Health Benefit Plan (SEHBP) effective September 1, 2011.

The Unfair Practice Charge included an application for interim relief seeking to restrain the Board from changing health insurance carriers on September 1, 2011. An Order to Show Cause was executed on June 28, 2011, scheduling a return date for July 19, 2011. The parties submitted briefs, certifications and supporting papers and argued orally in a telephone conference call on the return date.

The following pertinent facts appear:

The Association and the Board are parties to a collective negotiations agreement for a term which commenced on July 1, 2008 and ended on June 30, 2011. Negotiations began for a one year successor agreement in August 2010 and are continuing.

The Agreement between the Board and the Association provides at Article XI "Insurance Protection", Paragraph D that the "insuring agency shall be the State Plan of New Jersey Blue Cross and Blue Shield or any other agency providing equivalent coverage."

NJEA Uniserv Representative Fred Skirbst, who is assigned to work with the Association, provided a certification concerning the progress of negotiations with respect to health care plan benefits. As early as November 2010, after negotiations had been in progress for several months, the Association proposed a possible change in health benefits plans, provided that the Association had time to evaluate a successor plan. The Board did not enter into discussions about changing plans at that time, but after the school budget was voted down on April 27, 2011 the Chief School Administrator announced that the Board would have to explore a change in health benefit plans. Subsequently the Board announced the change in plans from Direct to SEHBP.

Skirbt further certifies that Article XI, Paragraph D of the collective negotiations agreement states that the "insuring agency shall be the State Plan of New Jersey Blue Cross and Blue Shield or any other agency providing equivalent coverage." He then details the differences between Direct and the SEHBP, including increases in co-payments, as well as increased fees for child services, eye examinations, and male and female medical and supplemental services. Fees would also increase for "out of network" providers under the SEHBP, and there is a limitation on the number of therapeutic manipulation office visits.

Patricia A. Martucci, Business Administrator/Board Secretary, provided a certification which parallels Skirbst's with respect to the history of negotiations between the parties, but adds the additional detail that at a November 9, 2010 negotiation session, the Association proposed a change in health insurance carriers from Direct to the SEHBP, a proposal which was raised a second time on January 31, 2011. On May 3, 2011, following the April 27, 2011 defeat of the school budget, the Board was advised that new rates for their current insurance carrier would increase by 50.9% on July 1, 2011, a monthly increase of $17,936. Martucci states that following the Board's receipt of this news, meetings were held with the Association to discuss the fiscal challenges the Board now faced, due to the budget's failure and the increase in health insurance premiums. She states that the Association refused to attend a final meeting scheduled for May 17, 2011 prior to the Board's monthly meeting.

At their May 19, 2011 meeting, the Board was informed of the increases to health insurance premiums. The Board passed an emergent resolution to change health insurance carriers by moving out of Direct and into the SEHBP. Martucci certifies that the change to the SEHBP required at least 60 days notice, and that every additional month of delay after July 1, 2011 would cost the Board an additional $17,936 in Direct premiums. Further delay in changing carriers, she states, would have guaranteed the need for

layoffs. Martucci further certifies that after the Board voted to change carriers, NJEA Uniserv Representative Skirbst proposed that the Board allow employees to "buy up" to the Direct, CIGNA, or AETNA plans under the SEHBP at the employees' expense, a proposal to which the Board consented. Additional dialog between the Board and the Uniserv Representative involved the addition of prescription drug cards to the plan.

Following the Board's decision to change carriers, a representative of the SEHBP conducted an enrollment meeting at Oxford Central High School, and according to Martucci, every Association member completed their SEHBP enrollment forms and submitted them in a timely manner by the June 8, 2011 deadline.

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 Board argues that its action in changing health insurance carriers was not unilateral, but rather negotiated, and that the Association waived the right to challenge the change in carriers through silence and acquiescence by the membership. The Board contends that the Association's "silence and acquiescence" is demonstrated by its members' completing SEHBP enrollment forms.

Waiver will be found if the employee representative has expressly agreed to a contractual provision authorizing the change, or it implies acceptance of an established past practice permitting similar actions without prior negotiations. IMO University of Medicine and Dentistry of New Jersey and University of Medicine and Dentistry Council of American Association of University Professors Chapters, H.E. No. 2000-13, 26 NJPER 377 (¶31151 2000), citing In re Maywood Bd. of Ed., 168 N.J.Super.

45, 60 (App. Div. 1979), cert. den. 81 N.J. 292 (1979); South River Bd. of Ed. P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (App. Div. 1987). The actions of the Association's membership in filling out and submitting forms to effectuate the change to the SEHBP merely reflect the need for the district's employees to be assured of continued health coverage while the parties continue negotiations. I find that the Association has not waived negotiations on the facts presented here.

While unilateral health benefit changes during negotiations may violate the Act, unfair practice charges alleging such changes will ordinarily be deferred to binding arbitration because the contract often sets the benefit level and the conditions under which the employer may change those benefits. Stratford Tp. Bd. of Ed., P.E.R.C. No. 90-17, 15 NJPER 527 (¶20217 1988).

In this case, the critical issue is whether the level of benefits provided by the SEHBP is "equivalent" to the Direct plan as required by the collective negotiations agreement. If the Board has acted in accordance with the terms of the agreement, then it has satisfied any negotiations obligation as no change in the terms and conditions of employment has taken place. Camden County College, I.R. No. 2008-18, 34 NJPER 104 (¶45 2008).

The "equivalence" standard requires a detailed evaluation of the particular plan factors of the Direct and SEHBP plans to determine whether the contractual standard has been met. This determination of equivalency is a matter of contract interpretation and is resolvable by an arbitrator after the requisite analysis of the elements of both plans[2/]. Borough of Avalon, I.R. No. 2009-28, 35 NJPER 178 (¶67 2009); Camden County College, I.R. No. 2008-18, 34 NJPER 104 (¶45 2008).

The Association also argues that in effectuating the change in health benefit plans while the parties were engaged in negotiations, despite the legitimate business purposes which the Board advances, the dual motive analysis required by the adoption of the Wright Line standard (citation omitted)in Township of Bridgewater, 95 N.J. 235 (1984) must be performed. Wright Line mandates that once a prima facie showing is established which supports the inference that an employee's protected activity was a motivating or substantial factor in the employer's decision, the burden shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. In order to determine whether or not the affirmative defense has been met, conflicting proofs must be evaluated by a fact finder.

2/ I note that Article III, 6.c., Grievance Procedure, contained in the collective agreement provides for binding arbitration of disputes.

The unfair practice charge contains no allegation implicating a violation of 5.4a(3).

Accordingly, at this juncture of the proceedings, the Association has not demonstrated that they have a substantial likelihood of prevailing on their legal and factual allegations, a requisite element to obtain interim relief. Accordingly, I decline to grant the Association's application for interim relief.

ORDER

The application for interim relief is denied.

Gayl R. Mazuco
Commission Designee

DATED: September 1, 2011
Trenton, New Jersey