I.R. NO. 2019-5

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF HOBOKEN,

Respondent,

-and- Docket No. CO-2018-222

HOBOKEN MUNICIPAL
EMPLOYEES ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission designee grants an application for interim relief filed by the Hoboken Municipal Employees Association which filed an unfair practice charge against the City of Hoboken, The City unilaterally increased the employees' share of health insurance premiums while the parties were engaged in collective negotiations for a new agreement. The designee found that it was undisputed that during calendar year 2017, premiums were paid at the Tier Four level mandated by P.L. 2011, c. 78. As the most recent CNA expired December 31, 2017, the level of premium shares to be paid in a successor contract were not preempted and were to be set through collective negotiations, not unilateral employer action. The Designee ordered that Hoboken refund to employees amounts collected since February 28, 2018 that exceeded Tier Four levels and maintain those assessments until the parties reached agreement.

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Appearances:

For the Respondent, Scott DeRosa, Esq., Assistant Corporation Counsel

For the Charging Party, Limsky Mitolo, Attorneys (Marcia J. Mitolo, of counsel)

INTERLOCUTORY DECISION

On March 19, 2018, the Hoboken Municipal Employees Association (HMEA) filed an unfair practice charge and a request for interim relief with the Public Employment Relations Commission. The Association alleges that the City of Hoboken, on February 1, 2018, while the parties were engaged in negotiations for a successor collective negotiations agreement, engaged in unfair practices proscribed by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by switching from UMR United Healthcare to CIGNA to be the Third Party Administrator (TPA) of its self-insured health insurance program. The charge alleges that the change increased, effective February 28, 2018,

employee health care premium contributions by as much as 25 per cent higher than prior levels.[1/] These alleged actions by Hoboken were asserted to violate N.J.S.A. 34:13A-5.4a(1),(3), (5) and (7).[2/]

An Order to Show Cause was signed on March 26, 2018, setting a briefing schedule and a hearing date on the interim relief application. The schedule was postponed at the request of the parties. On September 21, 2018, after receiving briefs, the parties argued before me via a telephone conference call. The following pertinent facts appear.

The HMEA represents the City's white collar employees. The last collective negotiations agreement showing all negotiated terms between the City and the HMEA covered the period from July 1, 2002 through June 30, 2005. The parties supplemented this CNA

1/ Part of the charge alleged that the City did not provide the HMEA with CIGNA plan documents. The City asserts that in April 2018 it provided the requested documents.

2/ 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. . . (7) Violating any of the rules and regulations established by the commission."

with a series of Memoranda of Agreement (MOA), which varied in the length of their terms, containing modifications to the preceding CNA/MOA. The most recent CNA/MOA covers January 1, 2015 through December 31, 2017. The HMEA asserts that during the last year of the 2015-2017 CNA/MOA the maximum health care premium contribution level (Tier 4) mandated by L. 2011, c. 78 was reached.[3/] Although the record does not precisely show when each contribution tier was in effect, the City has not disputed

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3/ N.J.S.A. 40A:10-21.2 as amended by L. 2011, c.78, §79 requires that employees covered by CNAs entered into after June 28, 2011, contribute to the cost of health care premiums according to the formulas set forth in N.J.S.A. 52:14-17.28c which shall increase over a four-year period as set forth in N.J.S.A. 52:14-17.28d. The CNA prior to the 2015 to 2017 agreement covered July 1, 2008 through December 31, 2014, but it was not reached until sometime in 2013.

N.J.S.A. 40A:10-21.2 also provides in pertinent part:

> After full implementation, those contribution levels shall become part of the parties' collective negotiations and shall then be subject to collective negotiations in a manner similar to other negotiable items between the parties.

For an explanation of how that law interfaces with collective negotiations, see Township of Gloucester, P.E.R.C. No. 2019-4, 45 NJPER 82 (¶21 2018). Cf. Ridgefield Park Board of Education, P.E.R.C. No. 2018-14, 44 NJPER 167 (¶49 2017); appeal pending App. Div. Dkt No. A-1694-17; Clementon Bd. of Ed. and Clementon Ed. Ass'n, P.E.R.C. No. 2016-10, 42 NJPER 117 (¶34 2015), appeal dism'd as moot, 43 NJPER 125 (¶38 2016), 2016 N.J. Super. Unpub. LEXIS 2163 (App. Div. Dkt. No. A-0372-15T1). While the last two cases involve school districts, and are governed by Section 78 of that law, its language is identical to Section 79.

the HMEA claim that the statutorily mandated maximum contribution level was satisfied by the end of 2017.

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).

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 HMEA asserts without contradiction that the parties have not yet reached a successor to the CNA/MOA that expired on December 31, 2017.

Many prior interlocutory and final decisions involving alleged changes in health care coverage implemented during the course of collective negotiations involved (1) changes in the level of benefits; or (2) modifications in the administration of

the plan (e.g. the old plan charged employees only the difference between the covered and uncovered portion of the service whereas the new plan required a full "up-front" payment by the employee who would then be reimbursed for the covered amount); or changes in both.[4/]

Here, HMEA does not alleged or shown that there was a change in the level of benefits or method of administration. Instead the focus of its charge was that the City, during the course of collective negotiations, unilaterally implemented substantial increases in health care premium costs. It asserts, citing Galloway, that a change in a term and condition of employment during the course of collective negotiations has a chilling effect on the exercise of employees' statutory right to have such issues negotiated on their behalf by their majority representative.

The City argues that because the switch to CIGNA did not reduce the level of health benefits, it has not made a change in a mandatorily negotiable subject and has not engaged in an unfair practice. It argues that premium rates are governed by Chapter 78 and not collective negotiations and the increases were the result of increased health care claims and rising health care

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4/ See, e.g., Borough of Metuchen., P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984).

costs. It contends that the HMEA is not entitled to interim relief.

I concur that the HMEA has not shown that the switch from UMR United Healthcare to CIGNA changed the level of benefits. Language in the 2002 to 2005 CNA provides that the City agreed that if it changed carriers, it would "maintain medical benefits at levels substantially equivalent to the current benefits."[5/] And there is no claim that the City's self-insurance plan, as administered by CIGNA, changed how employees were billed for and paid for their portion of the cost of medical procedures and services.

However, it is undisputed that beginning February 28, 2018, the City unilaterally increased employees' share of the premiums for health insurance coverage.[6/] The portion of health insurance premiums paid by employees is, absent preemption, a mandatorily negotiable term and condition of employment. See Bridgewater Township, P.E.R.C. No. 95-28, 20 NJPER 399 (¶25202 1994); Borough of Glassboro, P.E.R.C. No. 95-37, 21 NJPER 32 (¶26021 1994).

5/ Article XIII, Section 4 of the 2002 to 2005 CNA.

6/ Exhibit G attached to Hoboken's brief contains tables purporting to show (1) the monthly dollar amount differences between 2017 and 2018 health benefit premium assessments based on the type of coverage and (2) the percentage of premium payments to be made by employees based on the type of coverage and gross annual salary.

The City's assertion that Chapter 78 preempts collective negotiations over the employees' share of premium costs does not apply once Tier Four has been reached in a prior contract as 40A:10-21.2 provides:

> After full implementation, those contribution levels shall become part of the parties' collective negotiations and shall then be subject to collective negotiations in a manner similar to other negotiable items between the parties.

The record does not track the precise periods during which employees contributed at the Tier One, Tier Two, and Tier Three levels. Because the 2008 to 2014 CNA was entered into after June 28, 2011, to be compliant with Chapter 78, those contribution rates would have commenced during the term of that agreement. And, the City does not contradict the HMEA's assertion that employees made Tier Four contributions during calendar year 2017.

In addition, if, as the City asserts, 2018 contribution amounts and percentages set by N.J.S.A. 52:14-17.28c and N.J.S.A. 52:14-17.28d still govern premium costs, then it could not have unilaterally raised those statutorily set figures.[7/]

Accordingly I conclude that: (1) the City made a unilateral change in a mandatorily negotiable subject, the amount of health

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7/ N.J.S.A. 40A:10-21.1d permits, after full implementation, changes in premium contribution rates at the discretion of an employer that self-insures where employees are unrepresented or in accordance with a negotiated agreement with a majority representative.

insurance premiums to be paid by employees, an issue that is no longer preempted by statute; and (2) made that change during the course of collective negotiations for a new agreement.

Respectively, these findings demonstrate that (1) the HMEA is substantially likely to prevail on the merits of its unfair practice charge[8/] and (2) the timing of the City's action constitutes irreparable harm requiring an interim relief order.[9/]

The starting point for negotiations over premium contribution rates to be paid by employees beginning January 1, 2018 are the Tier Four amounts and percentages.[10/] A negotiated agreement could maintain those rates, lower them, or raise them.

8/ I reach this conclusion as to the allegation that the City breached its obligation to negotiate in violation of N.J.S.A. 34:13A-5.4a(5) and derivatively, N.J.S.A. 34:13A-5.4a(1).

9/ Where an employer raises a contract defense to a mid-contract change that is alleged to alter health benefits and employees' share of health premiums, the ability of an arbitrator to resolve such a dispute may weigh against granting interim relief. See Camden County College, I.R. No. 2008-18, 34 NJPER 104 (¶45 2008). Cf. Avalon Borough, I.R. No. 2009-28, 35 NJPER 178 (¶67 2009). Here the premiums paid in 2017 were set by statute, not contract language, and the dispute arises during negotiations for a successor CNA.

10/ N.J.S.A. 40A:10-21.2 provides:

> A public employer and employees who are in negotiations for the next collective negotiation agreement to be executed after the employees in that unit have reached full implementation of the premium share . . . shall conduct negotiations concerning contributions for health care benefits as if the full premium share was included in the prior contract.

The remedy I find appropriate to effectuate the purposes of the Act is to order the City to refund to employees the portion of health care premiums paid since February 28, 2018 that exceed the amounts paid in 2017 according to the Tier Four requirements. Going forward, the City shall negotiate in good faith with the HMEA over the employee's share of health insurance premiums. During those negotiations, the amounts and percentages paid by employees during Calendar Year 2017 at Tier Four, as required by N.J.S.A.40A:10-21.2, shall apply unless and until those amounts are altered by agreement retroactively or prospectively.

ORDER

The Hoboken Municipal Employee Association's request for interim relief is granted as to the portions of its unfair practice charge alleging that the City of Hoboken engaged in conduct that violated N.J.S.A. 34:13A-5,4a(5), and derivatively N.J.S.A. 34:13A-5.4a(1) when, during the course of collective negotiations the City unilaterally increased, effective February 28, 2018, the amounts paid by employees represented by HMEA as health insurance premiums. The City of Hoboken is ORDERED to:

A. Reimburse all employees represented by HMEA the difference between the amounts paid as the employee share of health insurance premiums in 2017 according to the Tier Four requirements and the amounts assessed for health insurance premiums from February 28, 2018 to the date of this order.

B. Immediately roll back the amounts paid as the employee share of health insurance premiums to the levels assessed in 2017 according to the Tier Four requirements and maintain those amounts until an agreement is reached with the HMEA to maintain or alter them.

C. Negotiate on demand with the HMEA over the amounts to be paid by employees as their share of health insurance premiums.

D. This order shall remain in effect until further order of the Commission or a Commission officer, or until this unfair practice charge is resolved.

DON HOROWITZ
Commission Designee

ISSUED: September 26, 2018

Trenton, New Jersey