I.R. NO. 2023-6

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Respondent,

-and-

Docket No. CO-2023-064

JERSEY CITY INTERNATIONAL ASSOCIATION
OF FIREFIGHTERS LOCAL 1066,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief based on an unfair practice charge filed by Jersey City International Association of Firefighters Local 1066 (IAFF) against the City of Jersey City (City). The charge alleged that City violated sections 5.4a(1), (2), (3), (4), (5), (6), and (7) of the Act by unilaterally eliminating automatic payroll deductions for a series of voluntary benefit plans and subsequently automatically enrolling employees in newly established voluntary benefit plans. The Designee concludes that IAFF does not have a substantial likelihood of success on the merits as it is unclear whether a change in a working condition has occurred. Further, the Designee concludes that IAFF has failed to demonstrate irreparable harm as there are questions of fact regarding whether a change in working conditions has occurred and whether the parties are currently in contract negotiations.

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Appearances:

For the Respondent, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys
(Arthur R. Thibault, of counsel)

For the Charging Party, Loccke, Correia & Bukosky, attorneys
(Michael Bukosky, of counsel)

INTERLOCUTORY DECISION

On October 20, 2022, the Uniformed Fire Fighters Association of Jersey City, I.A.F.F., Local 1066 (IAFF or Union) filed an unfair practice charge, together with an application for interim relief, against the City of Jersey City (the City). The charge alleges that on or about October 1, 2022, the City violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1),(2),(3),(4),(5),(6) and (7),[1/2/3/] when it unilaterally eliminated automatic

1/ While the charge as originally filed identified every 5.4(a) subsection, the facts only implicate a 5.4a(1) and (5)
(continued...)

payroll deductions for a series of voluntary benefit plans, including disability and life insurance plans, and subsequently automatically enrolled employees in newly established voluntary benefit plans. IAFF's application for interim relief requests the following relief pending the disposition of the underlying unfair practice charge, including temporary restraints:

Enjoining the City from:

-terminating the provision of the following benefits plan through ordinary payroll deduction: AFLAC, short term disability, life insurance, legal protection and Colonial and Allstate disability plans;

1/ (...continued) violation. Therefore, I will only address the a(1) and (5) claims. 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" and "(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/ On October 20, 2022, the Director wrote to IAFF, advising that the alleged a(3) portion of the charge failed to satisfy the pleading standards set forth in N.J.A.C. 19:14-1.3. IAFF was provided seven (7) days to withdraw or amend the charge to comply with the pleadings standards. IAFF was further advised failure to amend or withdraw the a(3) portion of the charge would result in dismissal of the a(3) allegations. IAFF did not amend or withdraw the charge within the required seven (7) days. Therefore, the 5.4a(3) allegation has been dismissed.

-automatically enrolling employees in new plans; and

-from failing to negotiate the changes in insurance plans prior to changing or eliminating the benefit of direct payroll deductions.

PROCEDURAL HISTORY

On October 20, 2022, I signed an Order to Show Cause denying temporary restraints to the extent that unit employees had already been automatically enrolled in the new voluntary benefit plans and payroll deductions had already been taken. In the event that the City had not already automatically enrolled unit employees in the new voluntary benefit plans, the City was temporarily restrained from said automatic enrollment. Further, I also specified that the City could move for dissolution or modification of the temporary restraints on two days' notice or on such other notice as may be ordered; directed the City to file any opposition by October 27; directed IAFF to file any reply by November 1; and set November 2 as the return date for oral argument.

In support of its application for interim relief, IAFF filed a brief, exhibits and the certification of IAFF President Joseph W. Krajnik (Krajnik Cert.). In opposition, the City filed a brief and exhibits (City Brief). IAFF also filed a reply brief.

FINDINGS OF FACT

IAFF is the exclusive majority representative for all non-supervisory fire fighters employed by the City. (Krajnik Cert., Para. 2). The parties have been the parties to a series of Collective Negotiations Agreements (CNA) through the years. (Krajnik Cert., Para. 3). On June 16, 2016, the parties entered into a Memorandum of Agreement ("MOA") extending the prior Agreement, with the agreed to amendments, from January 1, 2016 through December 31, 2019. (City Brief, Exhibit A). On September 5, 2017, the parties entered into a second MOA, extending the parties' Agreement for one additional year, covering the time period of January 1, 2020 through December 31, 2020. (City Brief, Exhibit B).

The September 5, 2017 MOA included modifications to Article 2, Maintenance and Modification of Work Rules, of the Agreement. The modification provides:

> D. Add new paragraph to D: Past practice may be used by either party for the purposes of interpreting the language of this contract. Past practice shall not be used for the establishment of a term and condition of employment not based upon contractual language. (Id.).

On May 9, 2019, the parties entered into another MOA, extending the parties' Agreement through December 31, 2024. At this time, the three (3) aforementioned MOAs have not been incorporated into a CNA. (Krajnik Cert., Para. 43).

On or about August 10, 2022, the City issued a notice advising employees "you are currently enrolled in one or more of the following voluntary benefit plans[4] which are being discontinued and replaced . . .", and that the plans would no longer be offered through payroll deductions. (Krajnik Cert., Exhibit A). Further, the notice provided that ". . . City of Jersey City is pleased to announce the selection of NEW Enhanced Voluntary Benefits provided by Trustmark and Legal Club effective October 1, 2022." (Id.).

On August 26, 2022, IAFF demanded negotiations over the City's discontinuation of payroll deductions for certain voluntary benefit plans. (Krajnik Cert., Para. 9). IAFF also requested "copies of both the predecessor as well as the successor" plans. (Id.).

In a letter dated September 28, 2022, employees were advised by the City that:

> "[E]ffective October 1, 2022, City of Jersey City will no longer be offering Aflac or Allstate Voluntary Benefit products for enrollment or payroll deduction. You will not have deductions taken out of your October

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4/ The voluntary benefit plans that the City would no longer offer through payroll deduction included, Aflac: short term disability, accident, hospital advantage, critical care, cancer, and term life; New York Life: permanent life; Legal Shield: Legal Protection; Colonial: short term disability, accident, term life, universal life, cancer assist, and critical illness; and Allstate: short term disability, universal life and accident and critical illness.

> paycheck for Short Term Disability or Accident Insurance."

(Krajnik Cert., Exhibit B). The letter further advised that Trustmark would be the new provider effective November 1, 2022 and that if no action was taken by "FRIDAY, OCTOBER 21, 2022," the employee would be automatically enrolled in Trustmark coverage for Short Term Disability and Accident Insurance. (Id.).

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. DeGioia, 90 N.J. 126, 132-134 (1982); Whitmeyer 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 scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981). Under Paterson the steps for determining whether a proposal is mandatorily negotiable are:

> First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable.
>
> [87 N.J. at 92-93; citations omitted]

The Commission has held that both disability insurance benefits and payroll deduction procedures for employee benefits are mandatorily negotiable. Berkeley Tp., P.E.R.C. No. 2023-7, 49 NJPER 181 (¶42 2022),

N.J.S.A. 34:13A:5.3 entitles a majority representative to negotiate on behalf of unit employee over their terms and conditions of employment. Section 5.3 defines an employer’s duty to negotiate before changing working conditions:

> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

See also Gallowway Tp, Bd. Of Ed. v. Galloway Tp. Ed. Ass’n., 78 N.J. 25, 48 (1978).

In Middletown Tp., PERC No. 98-77, 24 NJPER 28 (¶29016 1997), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000), the Commission elaborated on this standard in this way:

> The Commission has generally seen three types of cases involving allegations that an employment condition has been changed: (1) cases where the majority representative claims an express or implied contractual right to prevent a change; (2) where an existing working condition is changed and neither party claims an express or implied right to prevent or impose that change; and (3) cases where the employer alleges that the representative has waived any right to negotiate, usually by expressly or impliedly giving the employer a right to impose a change.
>
> In the second type of case, an existing working condition is changed and the majority representative does not claim an express or implied contractual right to prevent that change while the employer does not claim, or cannot prove, an express or implied right to impose the change without negotiations. Such a change triggers the duty to negotiate under section 5.3. The representative need not show an actual contractual entailment or binding past practice. To prove a violation, absent an applicable defense, the representative need show only the employer changed an existing employment condition without first negotiating.

The City argues that the September 5, 2017 MOA modified Article 2 "specifically eliminates the ability, of either party to reply upon past practice to establish a term and condition of employment." Therefore, the City asserts, because IAFF is relying on the past practice of automatic payroll deductions for

voluntary benefit plans, IAFF cannot establish a likelihood of success on the merits.

In response, IAFF argues that automatic payroll deductions for specific voluntary benefit plans was a working condition that cannot be changed without negotiation. Further, IAFF asserts that it does not need to show an "actual contractual obligation or a binding past practice" in order to establish a working condition.

The Commission has found that both disability insurance benefits and payroll deduction procedures for employee benefits are mandatorily negotiable. IAFF's charge allges that the City changed an existing employment condition, automatic payroll deductions for specific voluntary benefit plans, without first negotiating. IAFF supports the allegation with a certification from Krajnik who certifies that the City has "unilaterally diminished and or eliminated the benefit of automatic payroll deductions" for the previously provided plans. (Krajnik Cert., Para. 38). However, counsel for IAFF conceded during oral argument that unit members were unable to discern whether the automatic payroll deductions for the previous plans had actually been eliminated or whether the unit members had been automatically enrolled in the new Trustmark[5/]. Therefore, it is

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5/ IAFF also addresses this in its response brief, indicating "[T]he employer does not reveal the degree to which it (continued...)

unclear whether a change in a working condition has actually occurred[6]. The dispute of fact presented by IAFF prevents it from showing by a substantial likelihood of success that the City changed a working condition without negotiations in violation of the Act. Accordingly, IAFF failed to demonstrate a likelihood of success on the merits.

The dispute of fact raised by IAFF regarding whether a change in working conditions has actually occurred also prevents a finding of irreparable harm. Harm becomes irreparable in circumstances where the Commission cannot fashion an adequate remedy which would return the parties to the conditions that existed before the alleged unfair practice at the conclusion of the processing of the charge. City of Newark, I.R. No. 2006-3, 31 NJPER 250 (¶97 2005); City Bd. of Ed., I.R. No. 2003-14, 29 NJPER 305 (¶94 2003); Sussex Cty., I.R. No. 2003-13, 29 NJPER 274 (¶81 2003). "Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-33.

5/ (...continued)
effectuated the elimination of automatic payroll deductions for employees for predecessor plans. It similarly has not revealed the degree to which it effectuated re-enrollment of employees in any of the successor disability plans."

6/ There is no allegation in the charge that IAFF requested from the City any information regarding unit members' enrollment in either the previously provided voluntary benefit plans or in the new voluntary benefit plans.

It is well settled that a public employer's unilateral change to terms and conditions of employment during negotiations for a successor contract has a chilling effect, undermines labor stability, and constitutes irreparable harm warranting interim relief. See Academy Urban Leadership, I.R. No. 2020-9, 46 NJPER 353 (¶86 2020); Twp. of Union, P.E.R.C. No. 2002-55, 28 NJPER 198 (¶33070 2002); Willingboro Bd. of Ed., I.R. No. 86-2, 11 NJPER 675 (¶16231 1985); Jersey City Bd. of Ed., I.R. No. 83-18, 9 NJPER 525 (¶14213 1983).

IAFF argues that a unit member's loss of coverage from October 1, 2022 through November 1, 2022 would cause irreparable harm. First, it is unclear from the facts presented whether there was a gap in coverage, and if there was, how long unit members were without coverage. Additionally, IAFF has not specifically alleged that any unit member was affected by any gap in coverage. IAFF unit members were provided notice in August 2022 that their automatic payroll deductions for Aflac and Allstate voluntary benefit plans were to stop effective October 1, 2022. There was nothing preventing unit members from reaching out directly to the carrier to discuss payment options so that there would be no loss of coverage. Also, as previously discussed, during oral argument counsel for IAFF indicated that unit members were unable to discern whether the automatic payroll deductions for the previous plans had actually been eliminated or whether the unit members

had been automatically enrolled in the new Trustmark plans. Therefore, it is unclear from the facts presented by IAFF, which has the burden in this matter, whether there has been any loss of coverage, whether any unit members were affected by the loss in coverage, and whether any unit member has been automatically enrolled in the new Trustmark plans. Even assuming unit members have been automatically enrolled in the new Trustmark plans, any damage caused by the automatic enrollment of unit members can be remedied by monetary damages.

IAFF also argues that because a successor agreement has yet to be fully negotiated to conclusion, the irreparable harm "flows to the union which is facing changed working conditions in the midst of contract talks." The City argues that the parties are not in negotiations and IAFF has refused to sign the agreement based on disputed language in the 2016 MOA, which is the subject of an unfair practice charge. From the facts presented, it is unclear whether the parties are currently in contract negotiations. The parties have an executed MOA that is in effect until December 31, 2024. While the parties agree that the terms of the most recent MOAs have not been incorporated into a CNA, the parties disagree as to whether terms are still being negotiated. Accordingly, there is a material dispute of fact as to whether the parties are currently in contract negotiations, and therefore, irreparable harm cannot be established.

Accordingly, I find that IAFF has failed to establish irreparable harm.

CONCLUSION

Under these circumstances, I find that IAFF has failed to sustain the heavy burden required for interim relief under the Crowe factors and deny the application pursuant to N.J.A.C. 19:14-9.5(b)3. This case will be transferred to the Director of Unfair Practices for further processing.

ORDER

IAFF's application for interim relief is denied and the temporary restraints issued on October 20, 2022 are dissolved.

/s/ Stephanie R. D'Amico
Stephanie R. D'Amico
Commission Designee

DATED November 17, 2022
Trenton, New Jersey