

I.R. No. 2011-7

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF NEPTUNE,

Respondent,

-and-

Docket No. CO-2010-419

NEPTUNE TWP. PBA LOCAL NO. 74,

Charging Party.

SYNOPSIS

A Commission Designee denies a request to restrain the Township of Neptune from entering the State Health Benefits Plan, and from assigning previously off-duty work to on-duty officers. But the Designee restrains the Township from unilaterally establishing pay rates for on-duty and off-duty assignments during interest arbitration.

I.R. No. 2011-7

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF NEPTUNE,

Respondent,

-and-

Docket No. CO-2010-419

NEPTUNE TWP. PBA LOCAL NO. 74,

Charging Party.

Appearances:

For the Respondent, Apruzzese, McDermott, Mastro & Murphy, P.C. (James L. Plosia, Jr., of counsel; Jonathan F. Cohen, on the brief)

For the Charging Party, Loccke, Correia, Schlager, Limsky & Bukosky, attorneys (Marcia J. Tapia, of counsel)

INTERLOCUTORY DECISION

On May 5, 2010, Neptune Twp. PBA Local No. 74 (PBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Township of Neptune (Township) violated 5.4a(1), (2), (3), (5) and (7)^{1/} of the New

^{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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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

(continued...)

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The PBA alleged that the Township undermined the collective negotiations process by passing an ordinance changing the health benefits carrier for employees and by making changes to off duty assignments while the parties were proceeding in interest arbitration. The PBA alleged that no changes in terms and conditions of employment can be made during the pendency of interest arbitration.

The unfair practice charge was accompanied by an application for interim relief. An order to respond to the PBA's application was executed on May 11, 2010. Both parties submitted briefs, certifications and exhibits in support of their respective positions.

The following pertinent facts appear:

The Township and PBA were parties to a collective agreement that expired December 31, 2008 covering patrolmen and detectives.

Article XIII, the Health and Welfare clause in that agreement includes language permitting the Township to change insurance carriers:

The Township shall provide enrollment in the Horizon Blue Cross / Blue Shield Direct Access Health Benefits program for all permanent employees who have been on the

1/ (...continued)
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."

payroll for two (2) months, at the beginning of the third month of employment. If an employee received his permanent appointment after the fifth day of the month, such month shall not be counted as aforesaid. The Township shall pay the full cost of the foregoing program for the employee and his eligible dependents, and shall have the right to change insurance carriers so long as substantially similar benefits are provided to those available under the Horizon Blue Cross / Blue Shield Direct Access Program and that co-payment provisions are similar to those provided by the New Jersey State Health Benefits Program.

The parties engaged in interest arbitration presenting a number of proposals including proposals regarding health benefits and off-duty employment. Briefs were filed with the interest arbitrator by March 26, 2010.

By ordinance passed on April 12, 2010, the Township changed their health insurance carrier from a Horizon Direct Access Plan to the State Health Benefit Plan (SHBP) administered by Horizon to be effective August 1, 2010. A comparison of the plans provided by the Township shows that the SHBP is identical or enhanced as compared to the Direct Access Plan, and the Township's certification provides that the plans are substantially similar in all other respects if not identical.

No certifications were presented demonstrating any significant or egregious differences in the plans. The Township estimates saving \$674,363 on the health plan and \$238,248 on the prescription drug plan by switching carriers.

During interest arbitration proceedings, the PBA presented a proposal regarding payment for off-duty employment. Presumably, off-duty employment had been available for officers represented by the PBA. No evidence was provided, however, showing what, if any, pay rates currently exist for performing off-duty work. On April 26, 2010, the Township passed the following ordinance related to special duty assignments:

RESOLUTION #10-191 - 4/26/10

ESTABLISH RATES FOR SPECIAL DUTY ASSIGNMENTS FOR POLICE OFFICERS
SPECIAL POLICE OFFICERS AND TRAFFIC CONTROL OFFICERS

WHEREAS, the Township Committee adopted ordinance No. 10-12 which establishes procedure and policy for Special Duty Assignments for Police Officers, Special Police Officers and Traffic Control Officers; and,

WHEREAS, the Committee desires to establish the rates for Special Duty Assignments in accordance with said ordinance,

THEREFORE, BE IT RESOLVED, by the Township Committee of the Township of Neptune that the following shall represent the rates for Special Duty Assignments for Police Officers, Special Police officers and Traffic Control Officers for the year 2010:

Traffic/on-duty security assignment - \$75.00 per
hour

Off-duty Assignment (repetitive basis) - \$50.00 per
hour +

Board of Education Assignment - \$30.00 per hour

Off-Duty Assignment - Governmental agency - \$30.00
(Includes non-profit organizations per hour
supported by the municipal budget)

BE IT FURTHER RESOLVED, that a copy of the resolution be forwarded to the Chief of Police, Business Administrator and Chief Financial Officer.

The Township's certification characterizes that ordinance as:

. . . formally announcing that the Township was exercising its managerial prerogative to discontinue its policy of providing certain off-duty assignments to its Police Officers. [Plosia Certification paragraph 14]

That certification also claimed that the Township will now assign such duties to on-duty officers.

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).

Relying upon 34:13A-21, the PBA's primary argument seems to be that an employer cannot change terms and conditions of employment during interest arbitration. That statute provides:

During the pendency of proceedings before the arbitrator, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other, any change in or of the public

employer or employee representative notwithstanding; but a party may so consent without prejudice to his rights or position under this supplementary act.

The PBA contends that existing terms and conditions of employment must be maintained until negotiations/interest arbitration is completed.

The Health Benefit Change

The language in the interest arbitration statute cited above was not intended to prevent employers from relying upon a managerial prerogative and/or a contractual right to make any change in a term and condition of employment.

The Commission has held that the level of health benefits is mandatorily negotiable and may not be unilaterally changed, Piscataway Tp. Bd. Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975), but that the identity of the insurance carrier was not negotiable for civilian employees, and only permissively - not mandatorily - negotiable for police and fire employees. Twp. of Union, P.E.R.C. No. 2002-55, 28 NJPER 198, 199 (¶33070 2002); City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439, 440 (¶12195 1981).

Where, as here, the employer has asserted a contractual basis for changing carriers, it does not appear to constitute a violation of N.J.S.A. 34:13A-21. The issue in interim relief is whether the carrier change resulted in changing the plan level of benefits. The facts presented shows enhanced benefits, and there is no evidence of any measurable diminution of benefits.

Consequently, the PBA has not demonstrated a substantial likelihood of success on the underlying health benefit issue.

Off-Duty Work Assignments

Although compensation for performing off-duty assignments is a negotiable term and condition of employment, Township of Mine Hill, P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987); Somerset County, P.E.R.C. No. 84-92, 10 NJPER 130 (¶15066 1984); a public employer has the managerial prerogative to eliminate off-duty work or to assign that work to on-duty personnel. City of Salem, P.E.R.C. No. 2006-48, 31 NJPER 405 (¶160 2005); Borough of Belmar, P.E.R.C. No. 2003-52, 29 NJPER 30 (¶10 2003), recon den. P.E.R.C. No. 2003-61, 29 NJPER 102 (¶30 2003); Borough of Atlantic Highlands, D.U.P. No. 2008-6, 34 NJPER 102, 103 (¶44 2008).

While the Township has certified that it is now assigning what had been off-duty work to on-duty personnel, the ordinance it passed suggests it has unilaterally set rates of pay for certain on-duty and off-duty work.

To the extent the Township is assigning previous off-duty work to on-duty officers, the PBA does not have a substantial likelihood of success in establishing that the Township is violating the Act. To the extent the Township has unilaterally established or changed the pay rate for performing on-duty or off-duty work, however, the Township is obligated to reach those pay rates through the negotiations/interest arbitration process.

If pay rates have been unilaterally changed during the interest arbitration process, the PBA would satisfy the interim relief standards and is entitled to an order restraining such implementation because changing terms and conditions of employment during negotiations/interest arbitration is irreparable harm.

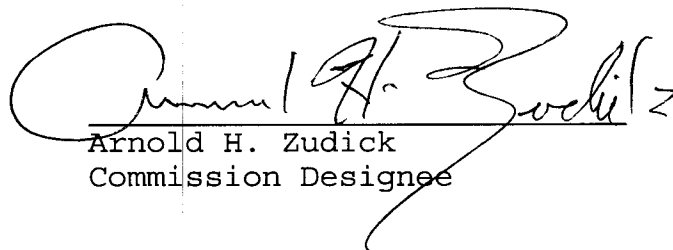
Based upon the above, I issue the following:

ORDER

The PBA's request to restrain the Township from entering the SHBP during interest arbitration is denied.

The PBA's request to restrain the Township from assigning what had been off-duty work to on-duty officers is denied.

The Township is restrained from implementing unilaterally established on-duty or off-duty rates of pay for officers represented by the PBA until the completion of interest arbitration.^{2/}


Arnold H. Zudick
Commission Designee

DATED: July 21, 2010
Trenton, New Jersey

^{2/} If the Township has not implemented the pay rates contained in its ordinance, there is nothing more to be restrained.

This case shall resume normal case processing.