I.R. NO. 2006-19

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FRANKLIN TOWNSHIP,

Respondent,

-and- Docket No. CO-2006-239

FRANKLIN TOWNSHIP PBA
LOCAL NO. 188,

Charging Party.

SYNOPSIS

A Commission designee denies, in part and grants, in part, an application for interim relief filed by the Charging Party, Franklin Township PBA Local No. 188.

The PBA's unfair practice charge alleges that Franklin Township violated the New Jersey Employer-Employee Relations Act when it implemented unilateral changes in the health insurance coverage including the choice of physicians available to unit employees. The charge alleges that the change was made without prior notice to, and negotiations with, the PBA and that the Township still refuses to negotiate with the PBA about the change and has not honored the PBA's requests for documents detailing the new health plan and the pre-existing plan.

The Designee concludes that because the parties' collective negotiations agreement allows the Township to change health insurance carriers and benefits or self-insure, "so long as in the aggregate substantially similar benefits are provided," the PBA has not demonstrated that there is a substantial likelihood that it will prevail on the merits of its charge that the changes violated Township's statutory obligation to negotiate.

The designee concludes that the PBA has shown that there is a substantial likelihood that it will prevail on the portion of its charge alleging that Township violated the statutory duty to supply information to the majority representative, pertaining to pre-existing and new health insurance policies and coverage. The Designee orders that the Township provide copies of the documents sought by the PBA.

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Appearances:

For the Respondent, Carter, Van Rensselaer and Caldwell (William J. Caldwell, of counsel)

For the Charging Party, Loccke & Correia, P.A., (Michael A. Bukosky, of counsel and on the brief)

INTERLOCUTORY DECISION

On March 22, 2006, Franklin Township PBA Local No. 188, (PBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that Franklin Township (Township) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3) (5) and (7),[1/] when it unilaterally changed the level of health insurance

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 (continued...)

benefits, including the choice of physicians available to unit members. The charge alleges that the change was made without prior notice to, and negotiations with, the PBA and that the Township still refuses to negotiate with the PBA about the change and has not honored the PBA's requests for documents detailing the new health plan and the pre-existing plan.

The charge was accompanied by an application for interim relief. N.J.A.C. 19:14-9.1 et seq. On March 23, 2006, an order to show cause was executed and a return date was scheduled for April 19, 2006, which was postponed, at the request of the Township, to April 25, 2006. The PBA submitted a brief and the affidavit, with exhibits, of its President. The Respondent filed a responsive certification, with exhibits, from a Township Committee member and submitted an exhibit at the hearing on the return date. After the parties argued orally, I partially granted and partially denied the interim relief application. This opinion contains my analysis.

The Township and the PBA are parties to a collective negotiations agreement dated January 1, 2002 through December 31, 2005. Article XVI(C) provides:

1/ (...continued)
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 or regulations established by the Commission."

> The Township may, at its option, change insurance carriers or plans or self-insure so long as in the aggregate substantially similar benefits are provided.

At the beginning of the term of the most recent agreement, the Township provided a "point of service," plan through Guardian. The Township changed insurance on March 1, 2004, and again on March 1, 2005, when it adopted the plan that was in effect prior to the change that prompted the PBA's charge. The PBA president asserts that unit employees first became aware of the change on March 16, 2006, through a newspaper article and received a letter, four days later, from the carrier notifying them of the change. The provider of both the prior plan and the new plan is Aetna.

According to a certification made by the Township's insurance adviser, the plan that took effect March 1, 2005, was:

> "[A] point of service plan with no referrals. Coverage is provided, subject to deductible and co-insurance, for out of network expenses."

The new plan does not have out of network coverage.

The insurance consultant prepared a medical benefit comparison for the Township showing the features of the plan in effect prior to the change and other options considered by the Board including the one it chose. The chart projects that the Board would incur an increase of 24.45 per cent in its monthly health insurance costs if it renewed the existing coverage. The

new plan shows a reduction of $40,000 (26.38%) in the monthly cost to the Board of providing health insurance coverage for unit employees and their dependents. It is the only one of the listed options that eliminates the employees' ability to be covered for services by out of network providers.[2/]

The PBA argues that unilateral adoption of the new plan without prior notice to, and negotiations with, the majority representative violates the Act. It asserts that the elimination of out of network providers constitutes irreparable harm that must be remedied immediately because employees and their dependents no longer have access to out of network physicians and providers that they had been using for serious health problems. It maintains that the Township must be ordered to immediately restore the pre-existing coverage or create an indemnity fund to cover employees and dependents who must use out of network providers. The Association's charge also asserts that the Township violated the Act by failing to provide the PBA with copies of the "master plans" for both the existing coverage and the one the Township unilaterally implemented.

2/ One other option that shows an even greater savings to the Board in monthly premiums does allow for out of network coverage. But that plan would have increased the deductibles from $300/$900 (individual/family) to $3,000/$6,000, dropped the coinsurance percentage from 80% to 60%, and would raise the maximum out of pocket payments by employees from $3,000 to $10,000.

The PBA notes that during the course of negotiations and interest arbitration for a successor agreement a public employer is statutorily prohibited from changing terms and conditions of employment. It asserts that the Township has violated that obligation and its action has a chilling effect on the PBA's ability to negotiate on behalf of the employees.

The Township asserts that it discussed the possibility of changing health insurance plans and made a presentation at open public meetings that the PBA representatives or members were free to attend. It notes that the PBA had ample opportunity to seek information and documentation about the predecessor plan that had been in effect since March 2005 and that the terms of the new plan were discussed at public meetings. The Township observes that it made changes in health insurance coverage twice during the term of the 2002-2005 agreement without any assertion from the PBA that the Township had an obligation to negotiate those alterations. It disputes that there are outstanding issues concerning the terms of a successor agreement, asserting that negotiations were concluded in November 2005.[3/] The Township points out that the PBA's demand to negotiate and request for information, as well as its petition for interest arbitration, were filed essentially at the same time with the charge.

3/ See certification of Township Committee member Robert Shockley, ¶s9, 10, 29, 30 31 32 and Exhibit D.

The Township maintains that the alterations in health insurance coverage come within the discretion it has under Article XVI(C) of the 2002-2005 agreement. Noting that the PBA did not seek a change in that article during negotiations, it asserts that its contractual prerogative to change health plans carries over to any period following the expiration of the contract and into the new agreement. Thus it contends that it had the same contractual right in March 2006 to change health coverage as it had in 2004 and 2005. The Township asserts that, in view of the specific contract language, the PBA should be required to seek arbitration if it believes that the new plan does not provide "in the aggregate substantially similar benefits." It represents that, if the PBA files such a grievance, it would not raise procedural defenses to prevent an arbitrator from addressing the merits of the dispute.

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).

A unilateral change in terms and conditions of employment during any stage of the negotiations process has a chilling effect on employee rights guaranteed under the Act and undermines labor stability. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978). The level of health care benefits is mandatorily negotiable. Newark Bd. of Ed., P.E.R.C. No. 94-52, 19 NJPER 588 (¶24282 1993). A change in the identity of the health care carrier sometimes changes the level of benefits and the administration of the health plan. Normally, the public employer must refrain from making unilateral changes and negotiate concerning the level of benefits. Borough of Closter, P.E.R.C. No. 86-95, 12 NJPER 202 (¶17078 1986); City of South Amboy, P.E.R.C. No. 85-16, 10 NJPER 511 (¶15234 1984); Borough of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984). However, language in the collective negotiations agreement may give the employer sufficient flexibility in choosing or changing health care insurance coverage to support a contract defense to an alleged refusal to negotiate. See Union Tp., P.E.R.C. No. 2002-55, 28 NJPER 198, 200 (¶33070 2002).

When an employer is alleged to have unilaterally changed the level of contractual benefits, an unfair practice charge will normally be deferred to arbitration. Cape May County Sheriff,

P.E.R.C. No. 92-105, 18 NJPER 226 (¶23101 1992); Stafford Tp. Bd. of Ed., P.E.R.C. No. 90-17, 15 NJPER 527 (¶20217 1989); Pennsauken Tp., P.E.R.C. No. 88-53, 14 NJPER 61 (¶19020 1987). Doing so affords the majority representative the chance to assert that the employer violated the agreement and allows the employer to present its defense that it acted within its contractual authority. Deferral allows the determination on the merits to be made in accordance with the parties' agreed-upon, and statutorily preferred, method of dispute resolution. Cf. Red Bank Bd. of Ed. v. Warrington, 138 N.J. Super. 564 (App. Div. 1976).

Applying these principles and precedents, I find that the PBA has not established that it has a substantial likelihood of succeeding on the merits of its charge that the Township violated its statutory obligation to negotiate when it unilaterally changed health insurance coverage. I do not find that the wording of Article XVI(C) precludes the PBA from proving that the changes in health coverage were not "in the aggregate substantially similar" to the preexisting coverage, either in an arbitration or administrative hearing.[4/] But the PBA, in this interim relief proceeding, has not sufficiently established that the Township exceeded its envelope of discretion over health insurance benefits, even though it is clear that employees no

4/ The decision on whether the charge should be deferred to arbitration is made by the Director of Unfair Practices.

longer receive any coverage for using out of network providers. Absent a showing of a substantial likelihood of succeeding on the merits of its charge regarding the health insurance coverage changes, I have no basis to provide an interim remedy.[5/]

I find and conclude that there is a substantial likelihood that the PBA will succeed on the merits of its charge that the Township violated its statutory duty to supply information to the majority representative. The PBA is entitled to copies of pertinent documents pertaining to changes in health insurance coverage, even if such changes may be consistent with the parties negotiated agreement. See Lakewood Bd. of Ed. and Lakewood Ed. Ass'n, I.R. No. 95-22, 21 NJPER 233 (¶26149 1995). While the proposed changes in health insurance coverage may have been discussed at an open public meeting, the absence of any PBA representatives from the audience does not constitute a waiver of the majority representative's right to receive, on request, information that is potentially relevant to its duty to administer the contract and engage in collective negotiations on

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5/ I note, without deciding the issue, that there is a dispute as to whether the change occurred during the course of negotiations for a successor agreement. The Township maintains that negotiations were concluded in November 2005. It has produced correspondence, sent before this dispute arose, from its attorney to the attorney that represented the PBA during negotiations occurring in 2005. The letter refers to prior telephone conversations and requests an update on "the status of the execution of the new Collective Bargaining Agreement." The PBA sought interest arbitration a few days prior to filing its unfair practice charge.

behalf of unit employees. See UMDNJ and CIR, 144 N.J. 511, 530-531 (1996). Cf. W. Windsor Tp. and PERC, 78 N.J. 98, 111-114 (1978) (public employees may present grievances to and negotiate with their employers in addition to their normal access to government as citizens). I will direct that the documents be turned over now because they are sought by the PBA in connection with its prosecution of its unfair practice charge, and may also be relevant to the possible submission of a grievance to binding arbitration pursuant to the parties' agreement.

ORDER

The Township is ORDERED to provide to the PBA copies of the plan documents for the health insurance coverage that took effect on March 1, 2005 and for the coverage that succeeded it in March, 2006. The request for interim relief is otherwise DENIED.

This interim order will remain in effect pending a final Commission order or other disposition of the unfair practice charge. This case will be referred to the Director of Unfair practices for further processing.

BY ORDER OF THE COMMISSION

DON HOROWITZ
Commission Designee

DATED: April 27, 2006
Trenton, New Jersey