

I.R. No. 2009-25

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF BURLINGTON,

Respondent,

-and-

Docket No. CO-2009-317

POLICEMAN'S BENEVOLENT ASSOCIATION,
LOCAL 249,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief seeking to restrain the County of Burlington from discontinuing the health benefit coverage for a particular employee. The employee had been suspended after a hearing that determined she was not physically able to perform the duties of a corrections officer. The County terminated coverage because the employee was not working and had used all available leave time. The PBA argued the County's action was a unilateral change in terms and conditions and violated the parties' agreement. The County disputed the unilateral change argument and relied on its interpretation of contractual clauses and eligibility language in the health benefits plan. The Commission Designee concluded that the PBA did not establish a substantial likelihood of success on the merits of the case.

While the County was not restrained from discontinuing coverage for the employee, the Commission Designee required the County to continue the benefits until the effective date established by the County in a reasonable advanced written notification of termination which also provided the employee with her COBRA rights.

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Appearances:

For the Respondent, Capehart & Scatchard, attorneys
(Alan Schmoll, of counsel)

For the Charging Party, Mets, Schiro & McGovern, LLP,
attorneys (Kevin McGovern, of counsel)

INTERLOCUTORY DECISION

On March 10, 2009, Policeman's Benevolent Association, Local 249 (PBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the County of Burlington (County) violated the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.4a(1), (3) and (5).^{1/} The PBA alleged that the County unilaterally

^{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...)

implemented a proposal the PBA rejected to terminate health benefits for employees in a suspension or unpaid status for more than 10 days in a month by terminating the benefits of corrections officer Jennifer Michinski after the expiration of the parties' collective agreement and during negotiations for a successor agreement.

The charge was accompanied by an application for interim relief seeking an order directing the County to restore Michinski's benefits and negotiate over related terms and conditions of employment. An Order to Show Cause was signed on March 10, 2009 scheduling a return date for April 6, 2009 which was rescheduled based upon the County's request and the PBA's consent for April 28, 2009. Both parties submitted briefs, affidavits and exhibits in support of their respective positions and argued orally on the return date.

The County opposed the application raising articles in the parties' contract and provisions in the health benefits plan document as a defense, and denied unilaterally implementing a negotiations proposal.

The following pertinent facts appear:

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."

Michinski was injured in July 2007 resulting in her receipt of temporary disability benefits pursuant to workers compensation law until June 12, 2008. Because Michinski was still unable to perform her corrections officer duties, she applied for a six-month unpaid leave of absence which the County granted effective June 12, 2008 until December 12, 2008.

In September 2008, Michinski was notified that her County provided health benefits would be discontinued effective October 1, 2008 pursuant to Article IV Section B of the parties January 1, 2005 - December 31, 2008 collective agreement. Her benefits were terminated effective October 1, 2008.

That provision provides:

The County will extend to a maximum of ninety (90) days the health insurance coverage of eligible employees and their covered dependants upon exhaustion of such employee's accumulated sick leave and who are granted approved sick leave without pay, with the County paying the cost in accordance with paragraph A above.

In those instances where the leave of absence (or an extension of such leave) without pay is for a period of more than ninety (90) calendar days, the employee's coverage shall be terminated effective the first of the month following the ninetieth day. Said employee shall then be eligible for coverage under the COBRA regulations. Upon returning to work, coverage will be reinstated effective the first of the month following the date of return.

In early December 2008, but prior to December 12, Michinski requested to return to work at the conclusion of her leave. In

order to determine her fitness for duty, the County sent Michinski to Dr. Nathaniel Evans for an examination which occurred on December 18, 2008. During the examination, Michinski was asked if she could lift 50 pounds. She responded: "I thought I could." Apparently, without considering Michinski's entire functional capacity evaluation, Dr. Evans told Michinski he would notify the County that she could immediately return to full duty. He then notified Daniel Hornickel, the County Director of Human Resources, that Michinski could return to work.

On December 22, 2008, Michinski was notified to return to work on December 23, 2008. She did. Subsequent to December 25, 2008, Dr. Evans notified Hornickel that after reviewing Michinski's functional capacity evaluation, he concluded she was not physically fit to return to her corrections officer position. Hornickel asked Evans to send him the report.

On January 1, 2009, the County reinstated Michinski's health benefits coverage based upon her December 23 return to work. Hornickel received Dr. Evan's report on January 2, and Michinski was placed on light duty from January 2 to January 12 and then was suspended due to the medical report.

On January 16, 2009, Michinski attended a Loudermill hearing regarding her fitness to return to work which resulted in her suspension without pay for not being physically able to perform the duties of a corrections officer. By letter of February 23,

2009 from the County, Michinski was notified that her benefits terminated effective January 31, 2009 due to her reduction in work hours. That letter also advised her of rights under COBRA.

At a negotiations meeting between the parties on February 25, 2009, the County submitted a number of proposals including the following proposal to terminate employee health coverage:

5. When an employee is in a suspension or W status for more than 10 days in a month, her/her benefits will expire at the end of that month. Benefits shall be restored the first of the month after the employee has resumed working an average of 30 hours per week over the course of a month (provided that completed enrollment forms are returned to the Benefits Office within the required time frames).

The PBA rejected that proposal.

Article III of the County's health benefits plan document is entitled "Eligibility and Termination Provisions for Coverage" certain pertinent language in that article provides:

Eligibility for Coverage

Each Employee (a non-temporary employee working 30 or more hours per week) is eligible for coverage when the employment waiting period shown in the Schedule of Benefits is completed.

Eligible Employees are those:

- a. Employees who:
 - i. Are in the regular business of, and compensated for services by the Employer during a non-temporary average work week of at least 30 hours, . . .

Termination of Coverage

Employee coverage terminates on the last day of the month when:

1. You terminate employment, or
2. You cease to meet the definition of an eligible employee. . . .

The Order in this case was signed and issued on March 10, 2009. Believing that the Order required the reinstatement of Michinski's health coverage pending the hearing on the return date, the County, sometime after March 10, 2009, reinstated Michinski's coverage. The Order had not required reinstatement. I did not learn of the reinstatement until the hearing on April 28, 2009.

In a bench decision on April 28, the application to restrain the County from discontinuing Michinski's coverage was denied, but the County was required to give Michinski reasonable notice prior to the actual termination of her health coverage.

On May 6, 2009, by telephone conference call, the parties notified me that the County had terminated Michinski's health coverage effective May 1, 2009, that it sent a notice to Michinski on May 1, and that Michinski needed emergency surgery subsequent to May 1, 2009. The PBA requested clarification of my notice requirement and asked that I order the County to reinstate Michinski's coverage. The County argued that having denied the PBA's application, I lacked the authority to order Michinski's benefits reinstated.

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).

In its brief, the PBA primarily argued that the County's termination of Michinski's coverage effective January 31, 2009 was a unilateral change in a term and condition of employment because the continued payment of health care premiums for suspended employees is negotiable. The PBA also argued that the County's action violated Article IV Section B of the parties' contract.

In support of its argument, the PBA asserts that had the County believed it had the right to terminate health coverage for suspended employees, it would not have offered in the February 25, 2009 negotiations session the language in its Article IV Section A.5 proposal cited above. The PBA also relied upon the

interim relief decision in Camden County, I.R. No. 2006-018, 32 NJPER 114 (¶54 2006) to support its case. In Camden, a policy existed giving suspended employees an option to pay the monthly COBRA rate or have the amount deducted from their pay upon their return to work. The County unilaterally eliminated the second option which required employees to pay in advance. The Commission Designee restrained the County's action and required the reinstatement of the two options.^{2/}

The County disputed the PBA's unilateral change argument asserting that it has discontinued medical benefits in the past regarding employees out of work in an unpaid status. It further argued that Michinski was not entitled to health benefit coverage under Article IV Section B; that Michinski was not eligible for benefits pursuant to health plan document Article III; and, that Camden County was distinguishable from the instant facts because here the County had not changed an existing policy.

Having reviewed the facts and legal arguments, I found in a bench decision on April 28 that the PBA had met the irreparable harm standard because the County's action occurred during negotiations for a new collective agreement. I also held that in balancing the hardships to the parties, there was greater harm to

^{2/} In a decision on reconsideration, Camden County, I.R. No. 2006-020, 32 NJPER 182 (¶80 2006), the Designee rejected the County's argument that no irreparable harm existed based upon these facts.

the PBA and Michinski, in particular, rather than the County if the relief was not granted. But noting the dispute over whether the County's action represented a change in the term and condition of employment, and disputes over the interpretation of Article IV Section B and other contractual articles and the dispute over the relevance of Article III of the health benefit plan document, I found I was unable to conclude that there was a substantial likelihood that the PBA would prevail on the merits of the case. Consequently, I denied the application to restrain the County from terminating Michinski's health coverage, but to avoid undue hardship to her and in the interest of fundamental fairness, I directed the County not to abruptly terminate her coverage, but to give her reasonable advance notice of a termination date and her COBRA rights. The notice requirement here was intended to be consistent with the advance written notice the County gave Michinski sometime in September 2008 that her benefits would be discontinued effective October 1, 2008.

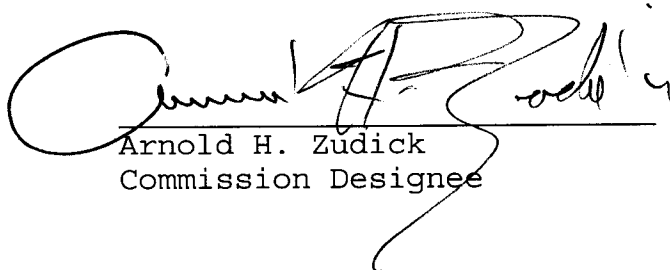
Having learned, by telephone conference call on May 6, 2009, that the County abruptly terminated Michinski's health benefits without reasonable advance written notice effective May 1, 2009, it substantially exacerbated the hardship to both Michinski and the PBA. The advance notice of termination - such as in September 2008 - was intended to avoid greater harm to the employee.

Consistent with my bench decision, the County is not restrained from discontinuing Michinski's coverage, but cannot discontinue that coverage until the effective date set in a reasonable advance written notification of termination it sends to Michinski. The County must take action to continue Michinski's benefits from April 28, 2009 until the date set in its advance written notification of termination.

Accordingly, based upon the above findings and analysis, I issue the following:

ORDER

The PBA's application to restrain the County from discontinuing Michinski's health benefits coverage is denied. However, consistent with the above analysis, the County shall not discontinue Michinski's coverage which was in effect on April 28, 2009, until the effective date established by the County in a reasonable advance written notification of termination which also advises Michinski of her COBRA rights.^{3/}



Arnold H. Zudick
Commission Designee

DATED: May 8, 2009
Trenton, New Jersey

^{3/} This case shall be returned to normal unfair practice processing.