I.R. No. 2012-10

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF AVALON,

Respondent,

-and- Docket No. CO-2012-034

WILDWOOD PBA LOCAL NO. 59
AVALON UNIT,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief based upon an unfair practice charge alleging that a public employer's unilateral change in health insurance carrier from the State Health Benefits Plan to a Horizon plan would result in immediate employee contributions toward the cost of health insurance benefits under P.L. 2011, Chapter 78.

The Designee determined that the Charging Party had not demonstrated by a substantial likelihood of success that the change violated either the parties collective negotiations agreement, which expires on December 31, 2012, or a provision of Chapter 78 (Section 40e), which would trigger employee contributions immediately rather than their commencing in January 2013, following the expiration of the agreement. The Designee also determined that the Charging Party had not shown by the requisite standard that deductions to employees under the Horizon plan would be greater than those under the SHBP.

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Appearances:

For the Respondent, Gruccio, Pepper, De Santo & Ruth, attorneys (Lawrence A. Pepper, of counsel)

For the Charging Party, Helmer, Paul, Conley & Kasselman, attorneys (Charles E. Schlager, Jr., of counsel)

INTERLOCUTORY DECISION

On August 15, 2011, Wildwood PBA Local No. 59-Avalon Unit (PBA) filed an unfair practice charge against the Borough of Avalon (Borough), together with an application for interim relief, exhibits, a certification and brief. The charge alleges that on July 26, 2011, the Borough notified the PBA that it intends to change the unit employees' health care provider from the State Health Benefits Plan (SHBP) to a non-SHBP provider (Horizon) within 60 days. The charge alleges that the change could result in unit employees' "premature" payments to the State for health care mandated by P.L. 2011, Chapter 78, (Chapter 78) Sect. 40(d), enacted June 28, 2011. The charge also alleges that

under the new statute, employees will incur higher premiums for coverage by a non-SHBP (SHBP) provider than under the SHBP. The Borough's conduct allegedly violates 5.4a(1), (2) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

The application seeks an Order requiring the Borough to delay or rescind its withdrawal from the SHBP until ". . . it is determined" that such action will not cause the "premature implementation" of provisions of Chapter 78. It alternatively seeks the negotiation of a "hold harmless" agreement with the Borough to enable unit employees to maintain the status quo regarding health insurance costs for the duration of the current collective negotiations agreement.

On September 14, 2011, I issued an Order to Show Cause, specifying October 12, 2011 as the return date for argument on the application in a telephone conference call. I also directed the Borough to file an answering brief, together with opposing certification(s) and proof of service upon the PBA by October 3,

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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. (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."

2011. On the return date, the parties argued their cases. The following facts appear.

The Borough and PBA signed a collective negotiations agreement extending from January 1, 2009 through December 31, 2012. Article Sixteen of the agreement, "Insurance, Health and Welfare" provides in pertinent parts:

> J. The Borough may at its option, change any of the existing insurance plans or carriers providing such benefits, so long as the level of benefits provided to employees and their eligible dependents is substantially similar. . . . Prior notice of intent to make the change must be made to the employees [ ] in the above described benefits within 60 days
>
> . . .
>
> M. Effective as of on or about June 1, 2009, the Union agrees that the Borough may in its discretion, elect to provide hospitalization, medical care and prescription drug benefits through a different medical provider. Specifically, the Borough may provide hospitalization insurance which includes traditional coverage, preferred provider organization and health maintenance organization through New Jersey State Health Benefits Plan, as exists or as modified by the State Health Benefits Program (or any other substantially similar health benefit plan) including any changes in co-pays or deductibles that may be implemented by the New Jersey State Health Benefits Program, for all employees and eligible dependents covered by this agreement . . .
>
> Further, the Borough may, at its option, change any of the existing insurance plans or carriers providing such benefits, so long as the level of benefits provided to the employees and their eligible dependents is substantially similar . . . Prior notice of intent to make the change must be made to

> employees [ ] in the above described benefits within 60 days.

On June 28, 2011, the Legislature enacted Chapter 78, mandating specified contributions from public employees to defray the cost of health insurance benefits. Chapter 78 provides in several pertinent parts:

> 40. (New section) a. Notwithstanding the provisions of any other law to the contrary, public employees of the State and employers other than the State shall contribute, through the withholding of the contribution from the pay, salary, or other compensation, toward the cost of health care benefits coverage for the employee and any dependent provided under the State Health Benefits Program or the School Employees' Health Benefits Program in an amount that shall be determined in accordance with section 39 [of this bill] . . .
>
> 42. (New section) a. Notwithstanding the provisions of any other law to the contrary, public employees, as specified herein, of a local unit or agency thereof, herein referred to as an employer, shall contribute, through the withholding of the contribution from the pay, salary, or other compensation, toward the cost of health care benefits coverage for the employee and any dependent . . .
>
> c. A local unit may enter into a contract or contracts to provide health care benefits, as may be required to implement a duly executed collective negotiations agreement, and may provide through such agreement for an amount of employee or retiree contribution as a cost share or premium share that is other than the percentage required under subsection a. or b., or both, of this section, if the total aggregate savings during the term of that agreement from such contributions or plan design, or both . . . equals or exceeds the annual savings that would have resulted had

> those employees made the contributions required under subsection a. or b., or both, of this section plus the annual savings resulting to the plans within the State Health Benefits Program . . .
>
> d. The contribution under subsection a. of this section shall commence:
>
> (2) upon the expiration of any applicable binding collective negotiations agreement in force on that effective date for employees covered by that agreement . . .
>
> e. Any extension, alteration, re-opening, amendment or other adjustment to a collective negotiations agreement in force on the effective date of [this bill] or to an agreement that is expired on that effective date, shall be considered a new collective negotiations agreement entered into after that effective date for the purposes of this section.

Section 39 prescribes the amounts of employee contribution and provides in a pertinent part:

> . . . As used in this section, 'cost of coverage' means the premium or periodic charges for medical and prescription drug plan coverage, but not for dental, vision, or other health care, provided under the [SHBP] . . . or the premium or periodic charges for health care, prescription drug, dental, and vision benefits, and for any other health care benefit, . . . when the employer is not a participant in the [SHBP].

In August, 2011, Marc Pfieffer, Deputy Director of the State Division of Local Government Services, issued a document entitled, "Keys to Pension and Health Benefit Reforms (Chapter 78)." In a section entitled, "Other Health Benefit Related Elements," he wrote in a pertinent part:

> [Q]: What happens when the employer switches from SHBP to a non-SHBP provider?
>
> [A]: If management has the right to change the provider while maintaining equal coverage, it can be done without the contract being opened, adjusted, etc. Management is merely executing the contract, not modifying it.
>
> But, you might wind up in PERC anyway.

On or about June 17, 2011, the Borough received a health insurance proposal from Horizon Blue Cross/Blue Shield of New Jersey, together with its written assurance that the benefits would be "equal to or better than" those of the Borough's then-current provider, the SHBP. On or about July 25, 2011, representatives of the Borough, PBA, and other employee organzations met to discuss the intended change of health care provider, effective November 1, 2011. The PBA requested that the Borough sign a "hold harmless" agreement by which unit employees would be insulated from costs, ". . . should the State require that health benefit contributions begin with the change." The Borough declined. Also in the meeting, the Horizon BC/BS representative advised that the benefits under the Horizon plan would be "equal to or better than" the benefits provided under the SHBP.

On July 26, 2011, Counsel for the Borough wrote to PBA Counsel, confirming the previous day's meeting and, referencing Article Sixteen of the collective negotiations agreement, wrote

that the letter fulfilled the sixty-day notice requirement, as set forth in that agreement.

James Craft is CFO of the Borough. He certifies that the Borough will save "up to $234,000" by the change from the SHBP to the Horizon plan and that employees will be required to contribute less money for coverage under the Horizon plan than under the SHBP. An attached comparative chart shows modest savings provided to all four insurable groups (single, husband/wife, family, parent/child) under the Horizon Plan, compared with SHBP.

ANALYSIS

A charging party may obtain interim relief in certain cases. 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).

The Commission has held that unilateral changes in the level of health insurance benefits violates the duty to negotiate in good faith. Metuchen Bor., P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984); City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439 (¶12195 1981). In Union Tp., P.E.R.C. No. 2002-55, 28 NJPER 198 (¶33070 2002), the Commission observed that a contract clause requiring an employer to maintain a level of benefits creates "additional protections for employees" and may also,

> . . . provide a contractual defense for the employer to an unfair practice allegation that the employer violated the Act by acting unilaterally. Many contracts permit changes to, for example, 'equivalent' or 'substantially equivalent' benefit plans. An employer satisfies its negotiations obligation when it acts pursuant to the contract. [28 NJPER 200]

The PBA's principal contention is that the Borough's change in health care provider from the SHBP to Horizon ". . . could constitute an alteration or adjustment to the agreement that could trigger these employees to commence their health benefit contribution prematurely" [emphases provided]. More specifically, the PBA is concerned that the change in provider represents ". . . [an] extension, alteration, reopening, amendment or other adjustment to [their] collective negotiations agreement" within the meaning of Chapter 78, §42e, thereby creating a "new collective negotiations agreement," which in turn mandates immediate deductions from employees for health care,

rather than deductions commencing on January 1, 2013, following the expiration of the current agreement. It also argues that under §39 of Chapter 78, those deductions will be larger under Horizon than under the SHBP, which runs afoul of the "substantially similar" standard set forth in Article Sixteen of the parties' agreement. Finally, the PBA contends that under §42c of Chapter 78, the Borough, as a "local unit," is permitted to negotiate regarding the savings in premium over the term of the collective agreement and the Borough's unilateral change deprives it - the majority representative - of a negotiations tool.

The PBA has not demonstrated a substantial likelihood of success on the merits of the case. It alleges only that the Borough's change of carrier "could" constitute an ". . . extension, alternation, reopening, amendment or other adjustment" of the parties' collective negotiations agreement within the meaning of Chapter 78. The PBA cites no authority or opinion suggesting that the change in carrier from SHBP to Horizon (or any other carrier) does or will trigger application of the statutory provision. The absence of a judicial or administrative body's interpretation and/or application of this new statutory provision highlights the difficulty in the PBA's ability to demonstrate a "substantial likelihood of success." For its part, the Borough has provided an opinion from the State Deputy

Director of the Division of Local Government Services that the change in carrier (which maintains the status quo on benefits) would not trigger application of the statute.

The Borough has the right under Article Sixteen to change health insurance carriers so long as the level of benefits remains "substantially similar." The PBA does not contend that the Borough's change specifically violates Article Sixteen. The facts show that the change in carrier will not reduce the contractual level of benefits. The Borough appears to have met its negotiations obligation by ". . . acting pursuant to the contract." Union Tp.

The PBA has also not shown that the percentage of premium employees may have to pay under Chapter 78 is higher under the Horizon plan than under the SHBP. The facts show that the overall premium (from which the percentage is derived) is lower under the Horizon plan than under the SHBP. Also, the PBA has not shown that the Borough is obligated to implement an alternate contribution rate or scheme under Section 40.

Finally, the PBA contends that the parties' agreement establishes only a portion of benefits level, and that the remainder - the contributions by employees - are prescribed by the Legislature. If the change in carrier results in increased costs to unit employees (i.e., contributions greater than they would otherwise have to pay), the PBA may file a grievance to

determine if the change complied with the agreement. Avalon Bor., I.R. No. 2009-28, 35 NJPER 178 (¶67 2009).

ORDER

The application for interim relief is denied. The charge shall be processed in the normal course.

Jonathan Roth
Commission Designee

DATED: October 21, 2011
Trenton, New Jersey