I.R. NO. 2016-4

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PATERSON,

Respondent,

-and- Docket No. CO-2016-060

PATERSON POLICE PBA LOCAL 1 AND
SUPERIOR OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee grants an application for interim relief filed by the Charging Party alleging that the Respondent violated New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") by unilaterally changing the terms and conditions of employment when the Respondent instituted a "medical necessity" standard for the dispensation of brand name drugs prescribed by physicians for police members and their dependents; the Respondent had contracted with a private company to manage the prescription plan. The parties were in negotiations for successor collective negotiations agreements (CNAs), which were effective from August 1, 2008 through July 31, 2012. The CNAs provided that the employee co-pay was $5.00 for generic, and $15.00 for name brands. After the implementation of the medical necessity procedure, if the private company determined that there was a lack of rationale provided for the brand name drug, then the brand name would only be dispensed if the police employee or dependent paid the difference between the cost of the brand name and the generic.

The Respondent asserted that it had the managerial prerogative to determine medical necessity for the name brand prescriptions and compared this issue to sick leave verification by an employer.

The Designee found that the Respondent's unilateral alteration of the status quo regarding the prescription plan during negotiations for a successor agreement constituted a refusal to negotiate in good faith in violation of subsection 5.4(a)(5) of the Act and met the irreparable harm portion of the

interim relief standards because it had a chilling effect on negotiations.

The Designee found that the Charging Party had established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and had established all the required elements to obtain interim relief. The Designee Ordered the Respondent to ensure that Charging Party members and covered dependents received brand name drugs for $15 and to make any of the Charging Party's members or covered dependents whole for any out of pocket expenses where the individual was required to pay the difference between the generic drug and the brand name drug after the implementation of the "medical necessity" policy.

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Appearances:

For the Respondent, Law Office of Steven S. Glickman, LLC, attorneys (Steven S. Glickman, of counsel)

For the Charging Party, Shaw, Perelson, May & Lambert, LLC, attorneys (Mark C. Rushfield, of counsel)

INTERLOCUTORY DECISION

On October 14, 2015, the Paterson Police PBA Local 1 (PBA) and the Superior Officers Association (SOA) (both collectively referred to as Charging Party) filed an unfair practice charge and an application for interim relief alleging that the City of Paterson (City) violated the New Jersey Employer-Employee Relations Act, specifically subsections N.J.S.A. 34:13A-5.4(a)(1)

and (5)[1/] by unilaterally changing the terms and conditions of employment when the City instituted a "medical necessity" standard for the dispensation of brand name drugs prescribed by physicians for police members and their dependents. Both the PBA and SOA are in negotiations for successor collective negotiations agreements (CNAs), which were effective from August 1, 2008 through July 31, 2012. The parties have filed briefs, certifications and exhibits. The parties presented oral argument on the re-scheduled return date.

FINDINGS OF FACT

The PBA is the exclusive representative for all City police officers, and the SOA represents all City superior police officers in the ranks of sergeant through deputy chief. Both CNAs have identical language regarding the prescription plan, "[T]he employee co-pay will be $5.00 for generic, and $15.00 for name brands." Additionally the CNAs provide the following regarding health care coverage, "[S]uch coverage shall not be reduced or diminished in any way..."

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 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."

Pursuant to these CNA provisions, police members and covered dependents who submitted prescriptions to their pharmacy for name brand (non-generic) drugs which were prescribed as "no substitutions" or "DAW" (dispense as written) received their name brand medication at the contractual co-pay of $15.00. and were permitted to use the pharmacy of their choice for specialty medications.

In the late spring or summer of 2015, the City issued a notice that it was implementing a "medical necessity" verification procedure.[2/] Essentially, after the implementation of this procedure, if the private company determined that there was a lack of rationale provided for the brand name drug, then the brand name would only be dispensed if the police employee or dependent paid the difference between the cost of the brand name and the generic. Additionally, the Charging Party asserts that after this implementation, police employees and dependents requiring specialty medications would be required to use a designated specialty pharmacy and not be authorized to use the pharmacy of their choice.

The City asserts that it has the managerial prerogative to determine medical necessity for the name brand prescriptions and compares this issue to sick leave verification by an employer.

2/ The City, which is self-insured, contracted with a private company to manage its prescription drug benefits program starting July 1, 2014.

The City has cited South Brunswick Tp., P.E.R.C. No. 2013-23, 39 NJPER 190 (¶60 2012) and Piscataway Tp. Bd. of Ed. and Piscataway Tp. Ed. Ass'n, P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982) to support this proposition. Additionally, the City cites N.J.S.A. 24:6E-7[3/] asserting that "[T]he medical verification policy

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3/ N.J.S.A. 24:6E-7. Prescriptions; dispensation of lowest cost interchangeable drug product; exceptions; notice of substitution, provides:

> "Every prescription blank shall be imprinted with the words, "substitution permissible" and "do not substitute" and shall contain space for the physician's or other authorized prescriber's initials next to the chosen option. Notwithstanding any other law, unless the physician or other authorized prescriber explicitly states that there shall be no substitution when transmitting an oral prescription or, in the case of a written prescription, indicates that there shall be no substitution by initialing the prescription blank next to "do not substitute," a different brand name or nonbrand name drug product of the same established name shall be dispensed by a pharmacist if such different brand name or nonbrand name drug product shall reflect a lower cost to the consumer and is contained in the latest list of interchangeable drug products published by the council; provided, however, where the prescriber indicates "substitution permissible and requests the pharmacist to notify him of the substitution," the pharmacist shall transmit notice, either orally or by written notice to be mailed no later than the end of the business day, to the prescriber specifying the drug product actually dispensed and the name of the manufacturer thereof. However, no drug interchange shall be made unless a savings to the consumer results, and the pharmacist passes such savings on to the consumer in full by charging no more than the regular and customary retail price for the drug to be substituted. For prescriptions filled other than by mail, the consumer may, if a substitution is indicated and prior to having his prescription filled, request the pharmacist or his agent to inform him of the price savings that would result from substitution. If the consumer is not satisfied with said price savings he may, upon request, be dispensed the drug

(continued...)

simply furthers the public interest fostered by the above referenced statute, and requires physicians to establish the valid reason for requiring the pharmacy to dispense the brand name drug." The City also argues that the statute was enacted to reduce the cost of prescription coverage for municipalities, and to therefore, protect the taxpayer.

Finally, the City argues that the Charging Parties are not entitled to interim relief in this matter because they have not established a substantial likelihood of prevailing in a final Commission decision and this application should be denied.

CONCLUSIONS OF LAW

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[4/] 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.

3/ (...continued)
product prescribed by the physician. The pharmacist shall make a notation of such request upon the prescription blank."

4/ Material facts must not be in dispute in order for the moving party to have a substantial likelihood of success before the Commission.

Doyle, 58 N.J. 25, 35 (1971); Burlington Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009), citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe); 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 Little Egg Harbor Tp., the designee stated:

> [T]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

In this matter, the parties are in negotiations for successor CNAs. N.J.S.A. 34:13A-33, entitled "Terms, conditions of employment under expired agreements," provides:

> Notwithstanding the expiration of a collective negotiations agreement, an impasse in negotiations, an exhaustion of the commission's impasse procedures, or the utilization or completion of the procedures required by this act, and notwithstanding any law or regulation to the contrary, no public employer, its representatives, or its agents shall unilaterally impose, modify, amend, delete or alter any terms and conditions of employment as set forth in the expired or expiring collective negotiations agreement, or unilaterally impose, modify, amend, delete, or alter any other negotiable

> terms and conditions of employment, without specific agreement of the majority representative.

The language regarding the price for prescriptions in the CNAs set forth above is clear and unambiguous. Cf. Ocean Cty. and Ocean Cty. Sheriff, P.E.R.C. No. 2011-6, 36 NJPER 303 (¶115 2010). There is no mention in the CNA provisions regarding "medical necessity" as determined by the employer or a third party private entity.

An employer's unilateral alteration of the status quo during negotiations for a successor agreement constitutes a refusal to negotiate in good faith in violation of subsection 5.4(a)(5) of the Act and meets the irreparable harm portion of the interim relief standards because it has a chilling effect on negotiations. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978); Rutgers, the State University and Rutgers University Coll. Teachers Ass'n, et al., P.E.R.C. No. 80-66, 5 NJPER 539 (¶10278 1979), aff'd as mod. NJPER Supp. 2d 96 (¶79 App. Div. 1981).

In Closter Bor., P.E.R.C. No. 2001-75, 27 NJPER 289 (¶32104 2001), a similar case involving a change to prescription plan benefits, where interim relief had been denied and on a motion for reconsideration, the Commission granted relief finding that the change in prescription benefits could irreparably harm unit employees.[5/]

5/ The Commission held that even a mid-contract repudiation could harm the collective negotiations process.

I do not agree with the City's arguments that this matter is analogous to sick leave verification; the CNA provisions are clear and could have included medical necessity language if the parties so agreed. Additionally, no case law was cited by the parties that supports this argument. I also find that N.J.S.A. 24:6E-7 does not apply in this matter; that statute is for the benefit of consumers and does not reference medical necessity where an employer determines if brand name drugs are necessary for the individual.

I find that the Charging Party has established a substantial likelihood of success of prevailing in a final Commission decision on its legal and factual allegations and will suffer irreparable harm based on the unilateral change to the prescription co-pay policy and the fact that the parties are in negotiations for successor CNAs. Galloway.

Next, in deciding whether to grant interim relief, the relative hardship to the parties must be considered and a determination made that the public interest will not be injured by the interim order. Crowe. I find that the relative hardship to the parties weighs in favor of the Charging Party due to the chilling effect on negotiations. In considering the public interest, I find that it is furthered by adhering to the tenets expressed in the Act which require the parties to engage in collective negotiations prior to changing terms and conditions of

employment. Adhering to the collective negotiations process results in labor stability and promotes the public interest.

The application for interim relief is granted and the City will ensure that police employees and covered dependents receive brand name drugs for $15, as set forth in the CNAs where a valid prescription from a physician indicates "no substitutions" or "DAW" (dispense as written). Additionally, the City will make any of the Charging Party's members or covered dependents whole for any out of pocket expenses where the individual was required to pay the difference between the generic drug and the brand name drug after the implementation of the "medical necessity" policy. Accordingly, this case will be transferred to the Director of Unfair Practices for further processing.

ORDER

The Charging Party's application is granted pending the final decision or further order of the Commission. The City will ensure that Charging Party members and covered dependents receive brand name drugs for $15, as set forth in the CNAs where a valid prescription from a physician indicates "no substitutions" or "DAW" (dispense as written). Additionally, the City will make any of the Charging Party's members or covered dependents whole for any out of pocket expenses where the individual was required

to pay the difference between the generic drug and the brand name drug after the implementation of the "medical necessity" policy.

David N. Gambert
Commission Designee

DATED: January 15, 2016

Trenton, New Jersey