I.R. NO. 2004-13

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY SHERIFF'S OFFICE,

Respondent,

-and- Docket No. CO-2004-225

PBA LOCAL NO. 183,

Charging Party.

SYNOPSIS

A Commission Designee denies interim relief where Charging Party alleged that the Respondent violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when, during interest arbitration for a successor collective negotiations agreement, Respondent unilaterally increased the medical visit co-pay. Charging Party Local 183 argues that because Respondent County's action occurred during the interest arbitration process, it created irreparable harm for which Charging Party seeks interim relief.

While the County admits it changed the medical visit co-pay, it argues that the change was not a unilateral change in violation of the Act. The County asserts that the existing agreement does not provide for a $0 co-pay but that the parties' past practice allowed the County to make the disputed change. The County contends the past practice was established through annual roundtable meetings between County representatives and representatives of County employees' negotiations units wherein proposed changes to the County's health insurance plans were discussed and then subsequently implemented by the County.

The Commission Designee determined that the parties' collective negotiations agreement did not specifically address the co-pay matter but that a practice developed of conducting annual roundtable meetings between County and employee organization representatives where the matter of co-pays was discussed, adjustment proposals were made and then later implemented by the County. The Commission Designee noted that the assertion of this practice under the circumstances of this case prevented a determination that Charging Party had established a substantial likelihood of success on the factual and legal allegations of the charge. Accordingly, the requested interim relief was denied.

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Appearances:

For the Respondent,
Genova, Burns & Vernoia, attorneys
(Kenneth A. Rosenberg and Lynn S. Degen, of counsel)

For the Charging Party,
Loccke & Correia, attorneys
(Merrick H. Limsky, of counsel)

INTERLOCUTORY DECISION

On February 3, 2004, the Essex County Sheriff's Officers PBA Local No. 183 filed an unfair practice charge with the Public Employment Relations Commission alleging that Essex County/Essex County Sheriff, Respondent, had violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. More specifically, Charging Party alleges that the Respondent violated sections 5.4a (1), (2), (3), (4), (5), (6) and (7)[1/] of the Act

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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
(continued...)

when, during interest arbitration for a successor to the parties' expired collective negotiations agreement, it unilaterally increased the medical visit co-pay to $5 on January 1, 2004.

The charge was accompanied by an application for interim relief, together with a brief and supporting affidavit, seeking an Order directing the County to reinstate the $0 co-pay that was in effect prior to January 1, 2004.

An Order to Show Cause was executed and made returnable on February 24, 2004. I granted a request to adjourn the Order to Show Cause Hearing, which was rescheduled to March 1, 2004.

The County filed its responsive brief and affidavits on February 26, 2004. Both parties appeared and argued orally on the scheduled return date.

Local 183 contends that the County unilaterally altered terms and conditions of employment during the interest

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1/ (...continued)
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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (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; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (7) Violating any of the rules and regulations established by the commission."

arbitration process by increasing the co-pay for medical visits under one of its health insurance plans from $0 to $5. Local 183 alleges that one of the issues pending before the interest arbitrator is health benefits and that under the existing collective negotiations agreement, unit employees are not required to pay any co-pay for medical visits. Local 183 asserts that health benefits are a mandatorily negotiable term and condition of employment and accordingly, an employer's alteration of such a term and condition without negotiations is a violation of 5.4a (1), (5) and 5.3. Based upon the foregoing, Local 183 argues that it has a substantial likelihood of success on the legal and factual allegations in a final Commission decision. Finally, Local 183 argues that because the County's unilateral actions changing terms and conditions of employment came during the interest arbitration process, it had a chilling effect on the employees' and Local 183's statutory right to freely negotiate concerning such issues. Local 183 contends this action undermines its standing as majority representative during contract negotiations and as such, has created irreparable harm for which it seeks interim relief.

The County admits that it changed the medical visit co-pay for all its employees in the affected plan on January 1, 2004, however, it argues that this alteration was not a unilateral change in violation of the Act. The County asserts that the

existing collective negotiations agreement does not expressly provide for a $0 co-pay for doctor visits and that the issue of doctor visit co-pays was never raised during the current round of contract negotiations, nor had it been raised during any prior contract negotiations, because it has been governed by the parties' past practice. The County asserts that in November 2003, it invited the representatives of each of its negotiations units to a labor/management roundtable meeting to discuss proposed changes to the County's health insurance plans. The County contends that these roundtable meetings have been held on an annual basis to notify union representatives of proposed changes in health insurance benefits and to ask the representatives if they had any questions or comments they wished to raise. Over the past 12 years, and in November 2003, none of the unions have raised objections to the proposed health plan changes. Although Local 183 attended these roundtable discussions during past years, in November 2003, they did not attend the meeting, despite having had notice of the meeting.

The County notes that changes in co-pay amounts have been a regular topic covered at these annual roundtable meetings; in fact, the County states that, after having had the roundtable meetings, co-pays have been changed five times over the 12 years prior to January 2004. The County contends that the parties' past practice has been to allow the County to change doctor visit

co-pays as needed, subsequent to the annual roundtable meetings, so that health insurance benefits could remain at established levels.

The County argues that by this practice, Local 183 has waived its right to negotiate concerning this issue, and therefore, has failed to establish a substantial likelihood of success before the full Commission on the legal and factual allegations of the charge.

The County also argues that Local 183 has failed to demonstrate that it will suffer irreparable harm if the requested interim relief is not granted. The County asserts that the interest arbitration proceedings had been concluded by the time the new co-pay was implemented and argues that the co-pays themselves, should Local 183 prevail, can be reimbursed to the affected employees by the County.

Further, the County contends that it is in the midst of a dire budget crisis caused by falling revenues and sharply increasing costs. As a result, it laid-off or demoted 209 employees in 2003 and is planning lay-offs of 167 additional employees in 2004. The County asserts that without the cost savings of the $5 co-pay, it "most likely" will result in even greater lay-offs in 2004. The County notes that the loss of additional employees will harm the general public by diminishing the level of service the County is able to provide. Thus, the

County argues that the balancing of the relative harms to the parties -- whether the County is harmed more by the issuance of interim relief than Local 183 is harmed by its denial -- weighs in favor of the County.

For the foregoing reasons, the County argues that the requested interim relief must be denied.

* * * * *

Based upon the record in this matter, these facts appear.

Essex County Sheriff's PBA Local 183 is the statutory majority representative of a collective negotiations unit comprised of all sworn Sheriff's Officers below sergeant rank who are employed by Essex County/Essex County Sheriff. The County and Local 183 have been parties to a series of collective negotiations agreements covering the Sheriff's Officer unit, the most recent of which has a term from January 1, 1992 to December 31, 1994. That Agreement was extended by a series of memoranda and interest arbitration awards, the last of which expired on December 31, 2001. The parties are presently in interest arbitration before Arbitrator Glasson for a successor agreement - - hearings were completed in early Fall 2003, initial briefs were submitted by January 31, 2004 and an arbitration decision is pending. Essex County has contracts with several health insurance companies to provide health insurance to its employees. County employees can choose from among five plans: a traditional

plan, Horizon Blue Choice, Horizon HMO Blue, AETNA and Health Net. Article X, section 1, (Hospitalization ... and Medical Insurance) of the collective negotiations agreement between the County and Local 183 provides:

> Hospitalization and Medical-Surgical (Blue Cross and Blue Shield) and Major Medical Insurance shall be paid for by the County except as set forth below. The insurance and premium payment therefore shall cover the employee, his spouse and any dependent members of this family, under the age of 23 years, living at the employee's home, except as set forth below. The County reserves the right to select the insurance carrier who shall provide such benefits, as long as the benefits are not less than those provided by the County on December 31, 1979. Effective thirty (30) calendar days after ratification of this agreement by the Essex County Board of Chosen Freeholders, the County of Essex shall have the right to implement the following:
>
> (a) Pre Admission Review, as set forth in Schedule B, attached hereto and made a part hereof;
> (b) Second Surgical Opinion, as set forth in Schedule B;
> (c) Twenty (20%) Percent Co-pay for Dependent Coverage only:....

The issue of medical visit co-pays has not been raised during the parties' current negotiations, nor has it been raised during any prior negotiations. Prior to January 1, 2004, unit employees in the Horizon HMO Blue plan paid no co-pay for medical visits. As of January 1, 2004, the County instituted a $5 medical visit co-pay for employees in the HMO Blue Plan.

For several years, the County has held annual labor-management roundtable meetings with most or all of the statutory majority representatives of County employee negotiations units.

In the affidavits of County Director of Human Resources Durkin and Counsel for Labor Relations (and former Director of Labor Relations) Capetola, it was represented that these meetings have been used to notify union representatives of certain proposed changes in health insurance benefits and to explain and discuss those proposed changes. At the end of each of the meetings, County representatives invited questions or comments from the unit representatives; none were forthcoming. Over the last 12 years, among various health insurance benefit changes that have been raised by the County during the roundtable meetings, medical visit co-pays have been discussed and changed on five occasions. None of the representatives of County units has objected to, grieved or filed complains concerning any of the previous changes made to medical visit co-pays.

In approximately November 2003, the County Office of Labor Relations invited representatives of each of the County's unions (including PBA Local 183) to attend a roundtable labor-management meeting to discuss, among other issues, proposed changes in health insurance plans. Representatives from nine of the County's units attended the November 6, 2003 meeting; however, no representative from Local 183 attended. During the meeting, the County's Director of Human Resources specifically noted that the County was proposing to increase the medical visit co-pay to $5. At the end of his presentation, the employee representatives were

asked for questions or comments; none of the representatives raised any objections to the proposed co-pay increases.

Subsequent to the roundtable meeting, the County conducted a series of open enrollment meetings for employees at various County work locations to apprise employees of the co-pay change, premium rate changes, and to enroll employees in their chosen health care plan.

* * * * *

To obtain interim relief, a charging party must demonstrate 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. A charging party must also demonstrate that the public interest will not be injured by an interim relief order. Finally, the relative hardship to the parties in granting or denying relief must be considered. Crowe v. DeGioia, 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).

Health insurance -- including the issue of co-pays -- is a mandatorily negotiable term and condition of employment. City of So. Amboy, P.E.R.C. No. 85-16, 10 NJPER 511 (¶15234 1984); and

Borough of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984).

It is undisputed that the medical visit co-pay was changed in this matter. The essential issue here, however, is whether that change was effected unilaterally -- i.e., without negotiations, and therefore, unlawfully -- or whether, based upon the parties' practice and the particular facts and circumstances of this case, the County's actions in making the change were not violative of the Act.

In Burlington Cty, I.R. No. 2001-13, 27 NJPER 263 (¶32093 2001), after the expiration of the parties' collective negotiations agreement and during interest arbitration, the employer stopped paying the contractual clothing allowance. The employer argued that because the clothing allowance provision provided for a fixed amount to be paid to each employee during each year of the contract, the benefit expired when the contract expired. Charging Party argued that the contract language did not specifically terminate the benefit and that the employer had always paid the benefit notwithstanding the contract language. The Commission Designee determined that the contract did not address the issue of the continuation of the benefit but that under the past practice that had developed, the benefit had been paid. Accordingly, the designee ordered the clothing allowance paid.

In City of Woodbury, I.R. No. 2003-1 28 NJPER 301 (¶33112 2002), the employer changed police officers' work shifts from twelve-hour shifts to rotating eight-hour shifts. Employees had worked steady twelve-hour shifts since April 2000; in June 2002, the Chief changed employees' work shifts to rotating eight-hour shifts. The PBA contended that this was a unilateral change in terms and conditions of employment in violation of section 5.4a (5) of the Act. The City contended that it had a contractual right to make the change and that Charging Party had waived its right to negotiate by repeatedly acquiescing to similar schedule changes over the last ten years.

The contract stated, "Except as operational needs dictate, there shall be no change in an employee's work schedule without prior written notice to the employee". Further, an affidavit from the Chief described a ten-year past practice of unilateral changes made in the work schedule -- eight changes made by the Chief over a ten-year period. The Commission Designee noted that a waiver will be found if an employee representative has agreed to a specific contractual provision authorizing the change or, if it impliedly accepted a past practice permitting the same or similar actions without prior negotiations. In re Maywood Bd. of Ed., 168 N.J. Super. 45, 60 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); South River Bd. of Ed., P.E.R.C. No. 86-132, 12

NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987).

The Commission Designee noted that the City's arguable interpretation of the contractual language would permit the work schedule change; coupling the contractual provision with the past practice under which the work schedule was repeatedly changed without negotiations, the Commission Designee concluded that the City had presented "a colorable claim" of waiver. Accordingly, the Commission Designee found no substantial likelihood of success in a final Commission decision and denied the requested interim relief. See also, County of Union, I.R. No. 2002-10, 28 NJPER 232 (¶33084 2002).

In Borough of Fanwood, I.R. No. 85-5, 10 NJPER 606 (¶15284 1984), Charging Party requested an interim order requiring the employer to pay salary increments that had been denied during negotiations for a successor collective negotiations agreement. Finding that the expired contract did not address increments and the issue of whether increments were automatic or discretionary was unclear under the parties' past practice, the Commission Designee denied interim relief. See also, City of Trenton, I.R. No. 2004-10, 30 NJPER ____, (¶____ 2004); Long Hill Bd. of Ed., I.R. No. 95-13, 21 NJPER 30 (¶26019 1994); and Twp. of So. Orange Village, I.R. No. 90-14, 16 NJPER 164 (¶21067 1990).

In the instant matter, prior to January 2004, there was no medical visit co-pay for employees in the HMO Blue plan; in January 2004, the employer instituted a $5 medical visit co-pay. Contract Article X describes the various health insurance coverages provided to employees. Although it initially states "... medical insurance shall be paid for by the County ....", it also provides for various co-pays and other employee payments under various circumstances. Article X does not address medical visit co-pays; its language neither provides for medical visit co-pays nor forecloses such co-pays.

Without more, this contractual language would not support the employer's January 2004 institution of the co-pay. However, in its affidavits and brief, the employer sets forth a past practice and argues that under the contract language and the past practice, its conduct was not a unilateral change in terms and conditions of employment that was violative of the Act.

The past practice described here went to an issue -- medical visit co-pays, among others -- which had not been addressed by the parties in their current or prior collective negotiations. The employer asserted, without contradiction, that the parties had not addressed co-pays in negotiations because they had developed a practice to address that issue -- the annual roundtable meetings. At those meetings, the issue of co-pays was discussed and adjustment proposals were made by the County. When

no objections or requests to negotiate were forthcoming from the employee representatives, the County then instituted the proposed changes. The County asserted that the parties developed this practice to allow it the flexibility to adjust co-pays so that health insurance benefits would remain constant and not need to be adjusted annually.

These circumstances -- a contract that does not address the co-pay issue and a past practice which does -- are analogous to those in Woodbury where there was a contract provision that was unclear regarding the employer's ability to change the work shift, but a past practice that appeared to consistently allow the employer's work shift changes. Accordingly, in Woodbury, interim relief was denied as no substantial likelihood of success was established. Cf. Borough of Fanwood, supra, (interim relief was denied where the contract did not address the increment issue and the past practice regarding increments was unclear); See also, Burlington Cty, supra. In the instant matter, the employer argues that the past practice flowing from the annual roundtable meetings allowed it to make the disputed co-pay change.

While there was a past practice set forth here, at this juncture, I cannot determine the precise nature of the practice flowing from the roundtable meetings. However, its assertion in the context of this proceeding raises a significant question about whether the institution of the co-pay was done unilaterally

and hence, unlawfully. And without that conclusion, I cannot determine that Charging Party has established a substantial likelihood of success on the factual and legal allegations of the charge in a final Commission decision.

Here, the parties had developed a past practice of having the annual roundtable meetings where the issue of co-pays was discussed and subsequently, co-pays were adjusted. Local 183 was aware of the practice. Further, based upon the parties' historical relationship and treatment of this issue, the change that was made in this instance was consistent with what had occurred in the past -- with regard to how the change came about (in the context and aftermath of a labor-management roundtable meeting), the nature of the change (a change in a health insurance co-pay) and the extent of the change ($5).

After the 2003 roundtable meeting, the County held a series of open enrollment meetings in various County workplaces to apprise employees of the co-pay change and enroll employees in their chosen healthcare plan.

In this matter, although PBA Local 183 was invited to attend the roundtable discussion that took place on November 6, 2003, they chose not to attend. There is no indication in the record as to why Local 183 did not attend that meeting or regarding whether the County sent a written summary of the meeting to Local 183, or whether Local 183 made any inquiry as to what occurred at

the meeting. However, based upon the history between these parties, I conclude that Local 183 was aware of the meeting in advance and knew that it took place, knew generally what was likely to be discussed and that co-pays could be adjusted as a result of the meeting.

Local 183's non-attendance of the meeting does not change the historical context surrounding the co-pay issue or the parties' practice. For purposes of this interim relief proceeding, the fact that Local 183 did not attend the November 2003 roundtable meeting cannot remove the fact of -- and the potential effect of -- the past practice.

Accordingly, based upon the foregoing, I am unable to conclude that Charging Party has demonstrated that it has a substantial likelihood of success in a final Commission decision on the legal and factual allegations of the charge. This being a requisite element for obtaining interim relief, the Charging Party's application for interim relief is denied.[2/]

2/ Had the Charging Party demonstrated a substantial likelihood of success on the merits -- that Respondent had imposed a unilateral change -- the second standard for interim relief (irreparable harm) would certainly have been met. The Commission has determined that a unilateral change in terms and conditions of employment during negotiations for a successor agreement constitutes an unfair practice which gives rise to irreparable harm.

Charles A. Tadduni
Commission Designee

Dated: March 29, 2004
Trenton, New Jersey