

I.R. No. 2009-4

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

VERONA BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2009-005

VERONA EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission designee denies an application for interim relief on a charge alleging the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by changing health insurance carriers from Horizon to Amerihealth. There was insufficient evidence for the Commission designee to find a likelihood of success on the merits a requisite element for interim relief.

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Appearances:

For the Respondent, Kenney, Gross, Kovats & Parton,
attorneys (Daniel Roberts, on the brief, Michael J.
Gross, argued orally)

For the Charging Party, Oxfeld Cohen, P.C., attorneys
(Randi Doner April, on the brief, Sanford R. Oxfeld,
argued orally)

INTERLOCUTORY DECISION

On July 2, 2008, the Verona Education Association
(Association) filed an amended unfair practice charge with the
Public Employment Relations Commission (Commission) alleging that
the Verona Board of Education (Board) violated 5.4a(1), (3) and
(5) of the New Jersey Employer-Employee Relations Act, N.J.S.A.
34:13A-1 et seq. (Act)^{1/}, when the Board changed 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
(continued...)

carriers from Horizon to Amerihealth without negotiating over alleged changes in the health benefits.

The amended unfair practice charge was accompanied by an application for interim relief seeking to restrain the Board from leaving the Horizon plan; to order the Board to negotiate over any change in benefit levels; and for the establishment of a fund to reimburse unit members for financial losses. An Order to Show Cause was signed on July 14, 2008 setting a return date of August 6, 2008 for oral argument. The parties submitted briefs, certifications and exhibits and argued orally on the scheduled return date. The following pertinent facts appear.

The Board and Association are parties to a collective negotiations agreement that expires on June 30, 2010. This contract was ratified by the parties on January 22, 2008. During negotiations for this contract, the parties agreed that the Board would provide health benefits that are "the same or better than the current plan." The plan in effect at that time was Horizon Blue Cross Blue Shield traditional and direct access.

On or about April 11, 2008, the Board notified the Association that it intended to change health plans from Horizon

1/ (...continued)
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."

to Amerihealth due to a \$400,000 increase in the renewal quote from Horizon. The Association asserts that there are multiple differences between the Horizon and the Amerihealth plans including the size of the network, the geographical location of providers, the out of pocket expenses, the difference in hospital coverage for out of network hospitals and problems with slower prescription drug reimbursement. The Board responds that it sought alternatives to the change in plans including supplemental insurance and a flex spending account but neither were feasible.

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 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.

The Commission has held that the level of health benefits is mandatorily negotiable and may not be changed by an employer unilaterally. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975); Union Tp., P.E.R.C. No. 2002-55, 28 NJPER 198 (¶33070 2002). The identity of an insurance carrier is generally only permissibly negotiable for police and fire employees, and not mandatorily negotiable for civilian employees. City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439, 440 (¶12195 1981). However, when a change in carriers changes the level of benefits, the change is mandatorily negotiable. Borough of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984); Union Tp. In Union Tp. the Commission stated:

A contract clause requiring the employer to maintain the level of health benefits may create additional protections for employees. It 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. [City of South Amboy, 10 NJPER at 512.]

Even though health benefit changes may violate the Act, unfair practice charges alleging unilateral changes in health benefits will ordinarily be deferred to

binding arbitration because the contract often sets the benefit level and the conditions under which the employer may change benefits. Stratford Tp. Bd. of Ed., P.E.R.C. No. 90-17, 15 NJPER 527 (¶20217 1988).

The Association argued that the health benefit change here was not equal to or better than the Horizon plans. In support of its argument, the Association submitted the certification of Association President Coreen Onnembo that provides examples of the alleged differences in the plans and the problems encountered by her members. According to Onnembo: there is unknown coverage provided by the Amerihealth multiplan network for out of state care; there are members with chronic illnesses that will not be provided coverage under Amerihealth that were covered under Horizon even though the doctor did not accept insurance; one chiropractor does not take Amerihealth due to its poor judgment history; an unidentified hospital worker opined that Amerihealth denied claims and shortened hospital stays; there will be a delayed reimbursement in prescription coverage; unit member's doctors are not in the Amerihealth network; the mission statement of Amerihealth states that women's health procedures will be covered only when medically necessary; there was a delay in receiving ID cards; and members were told that their prescriptions were not covered. Onnembo also certifies that in Essex County there are more doctors in Newark than in the suburbs; Bergen County does not have many in-network physicians;

there are over 100 physicians, clinics and facilities in Horizon that are not covered under Amerihealth and that staff members have provided her with testimonials regarding their medical issues and how they would be adversely affected by the new plan.

The Board disputed through the certification of Michael Munoz, vice president of sales for Amerihealth, the majority of the facts submitted by the Association and argued that the Association did not understand the new plan and therefore presumed it to be worse than Horizon. The Board submitted exhibits that it asserts establish that the overall wraparound network of doctors in Amerihealth is larger in Essex and Bergen County than Horizon and larger in New Jersey overall; that the level of benefits is the exact same in the two plans; acknowledging that the first days of the plan required problems to be fixed with prescription reimbursement; and stating that Amerihealth is actively recruiting doctors that are not in the network at the request of the members.

Having considered the parties' submissions and argument, it is apparent that there are material facts in dispute as to whether the Amerihealth plan meets the parties' contractual standard of equal to or better than Horizon. The Association relies on Chatham Bd. of Ed., I.R. No. 2002-5, 28 NJPER 84 (¶33030 2001) where the Commission designee granted the Association's request for interim relief to support its argument

that a delay in prescription reimbursement is a change in the level of benefits requiring a restraint. I find Chatham to be distinguishable from these facts because in Chatham the Commission designee was provided with undisputed evidence of a change in the prescription reimbursement procedure. With the exception of the generalizations asserted in Onnembo's certification, there was insufficient evidence to support the Association's allegations about the size and location of the provider network or the alleged delay in prescription reimbursement. Similarly, there was insufficient evidence to support the Association's irreparable harm argument. Consequently, it is not possible for me to conclude at this stage of the proceeding that the Association has a substantial likelihood of succeeding on the merits of the charge. This case will be forwarded to the Director of Unfair Practices for processing through the normal unfair practice mechanism.

ORDER

The Association's application for interim relief is denied.


Mary E. Hennessy-Shotter
Commission Designee

Dated: August 11, 2008
Trenton, New Jersey