

I.R. No. 2009-11

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF BAYONNE,

Respondent,

-and-

Docket No. CO-2009-120

BAYONNE FIREMAN'S MUTUAL BENEVOLENT
ASSOCIATION, LOCAL NO. 211,

Charging Party.

SYNOPSIS

A Commission Designee denies a request to require the City of Bayonne to change its prescription drug plan back to its prior insurance carrier, but issues an Order requiring the City to reimburse employees the difference in prescription co-pays, respond to a request for information regarding the new plan, and negotiate over reimbursement procedures.

I.R. No. 2009-11

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF BAYONNE,

Respondent,

-and-

Docket No. CO-2009-120

BAYONNE FIREMAN'S MUTUAL BENEVOLENT
ASSOCIATION, LOCAL NO. 211,

Charging Party.

Appearances:

For the Respondent, Apruzzese, McDermott, Mastro & Murphy, attorneys (Frederick T. Danser, of counsel)

For the Charging Party, Fox and Fox, LLP (Craig S. Gumpel, of counsel)

INTERLOCUTORY DECISION

On October 8, 2008, Bayonne Fireman's Mutual Benevolent Association Local No. 211 (FMBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the City of Bayonne (City) violated 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The FMBA alleged that the City violated

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. (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."

the Act by unilaterally changing the insurance carrier for its prescription drug program, the co-pay amounts for drugs; and, by unilaterally implementing a reimbursement procedure all while the parties were engaged in negotiations for a new collective agreement.

The unfair practice charge was accompanied by an application for interim relief. An Order to Show Cause was executed on October 16, 2008 scheduling a return date for November 17, 2008. The parties submitted briefs, certifications and exhibits in support of their respective positions and argued orally on the return date.

The FMBA argued that the change in insurance carriers and co-pays should be restrained and the City be ordered to return to the prior carrier and co-pays. The City opposed any restraint, arguing that its change in carriers saved the City a substantial amount of money, it gave assurances that the new plan would not result in any loss of benefits, the same prescriptions would be covered, it volunteered to reimburse employees for the difference in co-pays, and it implemented a reimbursement procedure.

The following facts appear:

The parties 1997 - 6/30/2003 collective agreement specifically provided in Article 6 Section 4 that the City would provide prescription coverage by Restat Prescript Plan, \$0.00 for generic and \$5.00 for brand name drugs. The parties Memorandum

of Agreement covering July 1, 2003 - June 30, 2008 continued the prescription drug plan but did not name a specific carrier. The insurance carrier was the Garden State Pharmacy Owners Providers Service (GSPOPS) administered by Restat. Employees employed before January 1, 2004 paid \$0 for generic, \$5 for brand and \$25 for brand where a generic was available but subject to a \$20 reimbursement based upon a doctors orders. Employees employed after January 1, 2004 paid \$0 for generic, \$10 for brand and \$25 for brand where a generic was available but subject to a \$15 reimbursement.

During negotiations in the spring/summer of 2008, the City proposed changing the prescription benefit program to the plan administered by the State Health Benefits Program (SHBP) to save the City money but still provide the same drug coverage. Without having reached an agreement to change carriers, the City, on or about November 1, 2008, unilaterally implemented a change in prescription drug carriers to the SHBP. That change in carriers saved the City approximately \$3.1 million per year. The City estimates that an order to return to the GSPOPS plan could cost nearly \$5 million.

In late August and early September 2008, upon learning of the City's intent to implement the above change, the FMBA requested information regarding details of the new plan. The City allegedly failed to respond.

Upon implementing the new plan, employees were issued new prescription drug cards and reimbursement forms and assured by the City there would be no loss in benefits, that the same pharmacies and drugs would be available through the new plan.

The co-pays for the new plan affected all employees equally and included \$3 for generic and \$10 for brand with no third category as in the prior GSPOPS plan. Effectively, the difference in the old and new plans was \$3 for generic, and \$5 for brand for only those employees employed prior to January 1, 2004. Those employees employed after January 1, 2004 were already paying \$10 for brand.

Upon implementing the new plan, the City announced it would voluntarily reimburse employees for any additional \$3 or \$5 co-pay they would be required to pay. The City also announced it would use the same reimbursement procedure for the SHBP plan as it did for the third tier reimbursements under the former GSPOPS plan.

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).

The Commission has held that the level of health benefits is mandatorily negotiable and may not be changed unilaterally. Piscataway Tp. Bd. Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975). It has also held that for police and fire employees the identity of insurance carriers is a permissive, not a mandatorily subject of negotiations. Twp. of Union, P.E.R.C. No. 2002-55, 28 NJPER 198, 199 (¶33070 2002) and City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439, 440 (¶12195 1981).

The FMBA seeks an order requiring the City to return to the GSPOPS plan. It must satisfy the above three interim relief standards to accomplish that goal.

Given that the City has conceded it changed carriers and prescription co-pay levels without completing negotiations on those issues there is a substantial likelihood that the FMBA would succeed on proving a unilateral change. Since the change occurred while the parties have been in negotiations/interest arbitration for a new collective agreement, the irreparable harm standard has also been met.

In considering the public interest and the relative hardship to the parties if the City were ordered to return to the GSPOPS plan, however, I find that in evaluating the difference in the affected co-pays versus the cost to return to the prior plan, the public interest would not be served to require the City to bear the substantial cost to change back. The City demonstrated certain financial hardships and given its concession it would reimburse employees with the co-pay difference, I find the FMBA has not met all three interim relief standards. Consequently, the City is not required to return to the GSPOPS plan and the application to that extent is denied.

That does not, however, dispose of the application in its entirety. In Township of Union, a case similar to the instant matter, the Commission adopted a Commission Designee's creation of an interim program to address health benefit changes until negotiations could be completed. Township of Union, I.R. No. 2002-7, 28 NJPER 86 (¶33031 2001). Such a program is appropriate here as well. Even though the City volunteered to reimburse employees with the difference in prescription co-pays, the FMBA is entitled to an order requiring the same action. Borough of Princeton, I.R. No. 2004-15, 30 NJPER 266 (¶92 2004).

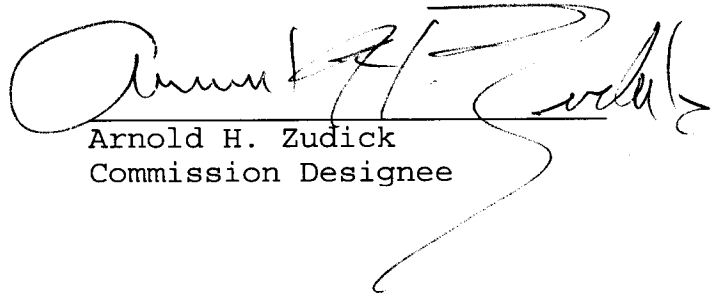
In addition to a reimbursement order, the FMBA is entitled to an order requiring the City to respond to the FMBA's request for information regarding the new plan, and the City is directed

to negotiate on demand with the FMBA regarding procedures for reimbursement. Borough of Princeton.

ORDER

The City shall reimburse employees the difference between the GSPOPS and SHBP prescription co-pays, and pay the cost for any drugs not covered by SHBP that would have been covered under the GSPOPS plan, until a new collective negotiations agreement is reached or one is awarded through interest arbitration. The City shall also respond as quickly as possible to the FMBA's request for information about the State Health Benefit Prescription Plan. The City is also directed to negotiate with the FMBA upon its demand regarding reimbursement procedures.

The FMBA's request to order the City to return to the GSPOPS prescription plan is denied.



Arnold H. Zudick
Commission Designee

DATED: November 20, 2008
Trenton, New Jersey