

I.R. No. 2009-27

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ORANGE TOWNSHIP,

Respondent,

-and-

Docket No. CO-2009-380

ORANGE FIRE OFFICERS ASSOCIATION,
Local 210 (FOA); FIREMEN'S MUTUAL
BENEVOLENT ASSOCIATION, FMBA Local 10 (FMBA);
ORANGE MUNICIPAL EMPLOYEES BENEVOLENT
ASSOCIATION COUNCIL 1 (OMEBA);
ORANGE POLICE SUPERIOR OFFICERS'
ASSOCIATION (SOA); ORANGE POLICEMEN'S
BENEVOLENT ASSOCIATION (PBA),

Charging Parties.

SYNOPSIS

A Commission Designee denies a request to restrain the City of Orange Township from entering the State Health Benefits Program, but issues an order requiring the City to do what it committed to do: implement an insurance panel, make funds available and establish procedures to reimburse employees for any benefit differences between the plan provided by the State Program and its existing health insurance plan. The City shall also negotiate with the Charging Parties upon their demand over procedural issues related to reimbursement.

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BENEVOLENT ASSOCIATION (PBA),

Charging Parties.

Appearances:

For the Respondent
Joseph M. Wenzel, of counsel

For the Charging Parties
Fox and Fox, attorneys
(Craig Gumpel, of counsel)

INTERLOCUTORY DECISION

On March 16, 2009, the Orange Fire Officers Association Local 210 (FOA), Firemen's Mutual Benevolent Association Local 10 (FMBA), Orange Municipal Employees Benevolent Association Council 1 (OMEBA), Orange Police Superior Officers (SOA), and Orange Police Benevolent Association (PBA) (Charging Parties) filed an unfair practice charge with the Public Employment Relations Commission (Commission) against the City of Orange Township

(City). The FOA represents all fire officers employed by the City; the FMBA represents all fire fighters; OMEBA represents all blue-collar and white-collar employees; the SOA represents all police superior officers and the PBA represents all police officers employed by the City. The Charging Parties allege that the City violated sections 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), when it announced that it will change health insurance carriers on June 1, 2009. Charging Parties also assert that the City has repudiated a December 12, 2007 arbitrator's award regarding a 2005 change in health insurance carriers to Horizon.

The charge was accompanied by an application for interim relief. An Order to Show Cause was executed on April 20, 2009, scheduling a return date for May 8, 2009. The parties submitted briefs, affidavits and exhibits in support of their respective positions and argued orally on the return date.

The Charging Parties seek to restrain the City from changing health benefit carriers from a Horizon private plan to the State Health Benefits Program (SHBP), arguing that the change reduces

^{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 level of benefits provided in their respective collective negotiations agreements and harms the collective negotiations process during a time when three of the units are collectively negotiating for successor agreements.

The City opposes the request for restraint. It argues that if the new plan provides different and, in some cases, a lower level of benefits than are provided in the collective agreements, it intends to maintain the levels of benefits by creating an insurance review panel to compensate those employees who demonstrate that they have received lower levels of benefits. The City also argues that the SOA has agreed to accept the SHBP and the charge, with respect to the SOA, should be dismissed.

The following facts appear:

The City and the Charging Parties are parties to five separate collective negotiations agreements.

The agreement between the City and the SOA, effective from January 1, 2008 through December 31, 2011, provides for health insurance coverage equal to or better than that provided under the SHBP. The agreement was signed on January 16, 2009, and subsequently ratified by both parties. Further, it authorizes the City, without further approval, to enroll in the SHBP.

Article XVI, Section 6 of the SOA agreement states:

The City shall provide employees covered under the agreement with health benefits that are equal to or better then [sic] the coverage provided under the State Health

Benefits Program ("SHBP"). The parties agree that the health benefits provided to employees shall be equal to the State Health Benefits in terms of coverage, co-pays, and premium sharing for the term of this Agreement and subsequent agreements unless negotiated. The SOA agrees to accept any change the City [makes] from the present Health Benefits Program to a different health benefits program or to a self-funded benefits program so long as the benefits are equal to or better than those provided by the SHBP at the time of the change. The City retains the option at its discretion to enroll in the SHBP without the need to have such enrollment approved by this bargaining unit. [Emphasis added]

The agreements between the City and the other four units contain similar language regarding the standards to be met should the City decide to change health insurance carriers. The most recent agreement between the City and the FOA was effective from January 1, 2005 through December 31, 2008. The most recent agreement between the City and the FMBA was effective through 2005. Both agreements provide:

The Township shall have the right to change health insurance and dental insurance carriers or providers or self-fund same, so long as benefits which are substantially equivalent to those in effect as of December 1, 1984 are maintained. [Emphasis added]

The City and OMEBA are parties to an agreement that expired on June 30, 2008. Article 32, Section 3 of the OMEBA agreement provides:

The Township may, from time to time, change insurance carriers or self fund, its insurance benefits if it elects to do so

providing benefits are substantially equal or better. The Township shall notify the Association prior to any change in carrier. [Emphasis added]

The agreement between the City and PBA will expire on December 31, 2009. Article XVI Section 6 of the PBA agreement provides:

Notwithstanding the foregoing, the City may from time to time change insurance carriers or self-fund its insurance benefits as long as benefits are provided which are substantially equal to those which were in effect as of December 1, 1984. The City shall notify the union prior to any change in carrier. [Emphasis added]

In 2005, the City changed insurance carriers from the SHBP to Horizon. The Charging Parties filed a grievance over the change, alleging that the City violated their respective agreements. An arbitrator sustained the grievance and determined that the City had violated the agreements because the new plan did not provide coverage that was substantially equal to, or equal to or better than the coverage previously provided. He ordered the City to create a meaningful appeal procedure and use a neutral insurance broker to review disputed claims of reduced benefits.

City employees are currently enrolled in one of two plans offered by Horizon - Direct Access or Traditional. Direct Access requires enrollees to pay a \$5.00 co-pay for each visit with a medical provider. There are about 250 employees enrolled in

Direct Access. The Traditional plan has no co-pay but the enrollee is first required to pay up to a set deductible each year and, thereafter, is provided a percentage of the cost of each covered service and is responsible for the balance. There are 55 employees enrolled in Horizon's Traditional plan.

The SHBP offers SHBP Direct 10, a program similar to Horizon's Direct Access, except that the SHBP requires a co-pay of \$10.00 for medical visits, an increase of \$5.00 over the Horizon Direct Access co-pay. It is anticipated that the 250 Direct Access enrollees will enroll in Direct 10. The SHBP offers no traditional plan. All of the City's 55 Horizon Traditional plan enrollees will be moved to SHBP Direct 10 or one of the HMOs offered by SHBP.

On January 29, February 2, and February 27, and March 23, 2009, the City and Charging Parties met to discuss the differences between Horizon and the SHBP and attempted to reach agreement about the proposed switch to SHBP. They did not reach agreement.

On March 3, 2009, the City Council voted to change from Horizon to the SHBP, effective June 1, 2009. The SHBP has approved the City's application. The City notified Horizon of its decision.

Charging Parties have filed a grievance over the alleged change in benefit levels.

Elvin Padilla, president of the FMBA Local 10, certified that the differences in the benefits provided by the SHBP include fewer in-network providers (approximately 3,400 fewer out of 10,000); lifetime maximums; increased out-of-pocket expenses and balance billing; higher maximum out-of-pocket limits; increases of \$25 in co-pays for hospital emergency room visits; new requirement to use in-network dialysis and surgical centers; new limits on skilled nursing, chiropractic services, and physical and speech therapy; and new pre-approvals and pre-certifications for service. Padilla further stated that the City's alleged unilateral change in health benefits will have a chilling effect on and place a pall over the current negotiations between the FMBA and the City, will undermine the FMBA's ability to enforce contract provisions, and could cause members to lose confidence in the FMBA.

John Kelly is the acting business administrator for the City. Kelly certified that the City decided to return to the SHBP from Horizon because it expects to save almost \$1 million in the first year of enrollment and that if the City is required to continue with Horizon in the immediate future, Horizon will charge the City an additional \$110,000 per month until a new Horizon contract can be negotiated.

The City contends that Horizon Direct Access is very similar to the SHBP's Direct 10 plan, except for a higher co-pay for

medical visits. The City contends that there are many benefits in the SHBP that are superior to Horizon's Traditional plan.

The City acknowledges that the SHBP provides different and, in some cases, lower levels of health benefits than the Horizon Traditional plan. For these situations, the City has offered to maintain the levels of contractual benefits for a period of time, to set up an insurance review panel that will include a member from the Charging Parties to review claims of reduced benefits and to have Horizon provide its view about whether a service would have been covered under Horizon's plans. The idea for the panel is derived from the 2007 arbitration award.

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 long held that the identity of insurance carriers is a permissive, not a mandatorily subject of negotiations for police and fire employees and is not a mandatory subject of negotiations for civilian employees. Union Township, I.R. No. 2002-7, 28 NJPER 86 (¶33031 2001), aff'd. P.E.R.C. No. 2002-55, 28 NJPER 198 (¶33070 2002) and City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439, 440 (¶12195 1981). The Commission has also 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). Unilateral changes in terms and conditions of employment violate the obligation to negotiate in good faith N.J.S.A. 34:13A-5.4a(5). See, Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25, 48 (1978).

A change in carrier resulting in a unilateral change in health benefits levels is an unfair practice. Union Township; City of South Amboy, P.E.R.C. No. 85-16, 10 NJPER 511 (¶15234 1984); Bor. of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984); Piscataway Tp. Differences in benefit levels as a result of a change in carriers may be permitted by a collective agreement. Alternatively, the differences may be remedied by the creation of a fund from which to reimburse employees for additional out-of-pocket expenses. See Union Township and City of Newark.

Initially, I dismiss the application as it relates to the SOA. The City and SOA have agreed to the SHBP level of benefits in their recently negotiated agreement.

The Charging Parties and the City agree that in changing to the SHBP, there will be additional co-pays, increases in co-pays, and the change in provider networks may mean providers will require up-front payments at the time services are rendered rather than await reimbursements. The City has offered to set up an insurance review panel to review claims by employees that a benefit level is not substantially equivalent to the benefit previously provided. The City argued that if the benefit is determined to be inferior it will either reimburse the employee, or forward payment to the medical provider. The City is thus arguing that, should there be a diminution of benefits, it intends to honor its contractual duty to maintain the level of benefits.

I decline to restrain the City from enrolling in the SHBP. If the City's procedures achieve what they are intended to, then the health benefits levels will be maintained. To the extent the Charging Parties' dispute that the procedures will maintain benefit levels, they are entitled to proceed through their grievance procedures for a determination. There are material facts in dispute and, therefore, I cannot conclude that the Charging Parties have a substantial likelihood of success on the

merits. Under these circumstances, interim relief is not appropriate.

The Commission has not often restrained employers from changing carriers, but has required employers to create a fund to reimburse employees for any differences in their benefit levels. See, Franklin Tp., P.E.R.C. No. 2006-103, 32 NJPER 135 (¶102 2006); Union Tp. Orders requiring such funds have been issued even when employers have recognized their obligation and volunteered to create funds or procedures for reimbursement.^{2/}

Here, the City recognizes its obligations and has agreed to establish a mechanism and procedures to maintain substantially equivalent health benefit levels, particularly for employees in the Horizon Traditional plan, which the City recognizes provides greater benefits than the SHBP in some instances. Even though I find that the requested relief is not appropriate, in recognition of the City's commitment to maintain health benefit levels and in fairness to the Charging Parties, I will insure these procedures by the Order below.

As to the alleged repudiation of the 2007 arbitrator's award, there are disputed material facts. The City asserts that it has complied with the award by offering to set up an insurance

^{2/} See, Borough of Lodi, I.R. No. 2009-018, ___ NJPER ___ (¶ ___ 2009), City of Bayonne, I.R. No. 2009-11, 34 NJPER 369 (¶117 2008); Borough of Princeton, I.R. No. 2004-15, 30 NJPER 266 (¶92 2004).

review panel and other procedures to reimburse employees. Where there are disputed material facts, the likelihood of success on the merits is diminished and interim relief is inappropriate.

Based on the above, I issue the following:

ORDER

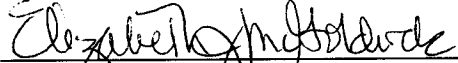
The Charging Parties' request to restrain the City from implementing the SHBP is denied.

The City shall implement the insurance review panel and/or other procedures negotiated between the parties to promptly reimburse employees the difference, if any, between the benefits provided by Horizon and those provided by the SHBP.

The City shall make funds available for employees to pay any up-front costs of medical care and any additional costs of treatment that would have been available to them under Horizon's plans, pending the completion of this litigation or the conclusion of their respective collective negotiations.

The City shall negotiate upon demand with the Charging Parties regarding procedures for the implementation and operation of the fund.

This Order shall remain in effect until the underlying charge is resolved.


Elizabeth J. McGoldrick
Commission Designee

DATED: May 21, 2009
Trenton, New Jersey