

I.R. No. 2009-28

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF AVALON,

Respondent,

-and-

Docket No. CO-2009-365

AVALON PBA LOCAL 59,

Charging Party.

SYNOPSIS

A Commission Designee denies a request to restrain the Borough of Avalon from switching to the State Health Benefit Plan. The Borough raised a contractual defense for its action and PBA Local 59 is entitled to grieve the change to arbitration for a determination on the contract defense.

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Appearances:

For the Respondent, Gruccio, Pepper, DeSanto & Ruth,
P.A., attorneys, (Lawrence A. Pepper, Jr., of counsel)

For the Charging Party, Loccke, Correia, Schlager,
Limsky & Bukosky, attorneys, (Charles E. Schlager, Jr.,
of counsel)

INTERLOCUTORY DECISION

On April 7, 2009, Avalon PBA Local 59 (PBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Borough of Avalon (Borough) violated 5.4a(1), (2), (3) and (5)^{1/} of the New Jersey Employer-

^{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 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; (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 (continued...)"

Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The PBA alleged that the Borough will violate the Act by changing its health insurance plan when it switches from a self-insured plan administered by Insurance Design Administrators (IDA) to the New Jersey State Health Benefit Program (SHBP).

The unfair practice charge was accompanied by an application for interim relief. An Order to Show Cause was executed on April 8, 2009, scheduling a return date for May 6, 2009. Pursuant to the Borough's request and the PBA's consent, the return date was rescheduled for May 15, 2009. The parties submitted briefs, certifications and exhibits in support of their respective positions and argued orally on the return date.

On or about March 31, 2009, the Borough gave notice to the PBA of its intent to switch to the SHBP NJ Direct 10 plan effective June 1, 2009. The PBA argues that switching health benefit carriers after contract expiration and during negotiations for a new agreement violated the Act because of its chilling effect on negotiations. The Borough raised a contract defense for its action arguing that it did not unilaterally change the terms and conditions of employment.

The following facts appear:

1/ (...continued)
in that unit, or refusing to process grievances presented by the majority representative."

The Borough and PBA were parties to a collective agreement effective from January 1, 2005 until December 31, 2008. Pursuant to that agreement, the Borough has been providing employees with health benefit insurance through an Exclusive Provider Organization and Traditional Plan administered by IDA. Article 16 Section J of the parties' contract provides the Borough can change the insurance plans or carriers. It says:

The Borough may, at its option, change any of the existing insurance plans or carriers providing such benefits, so long as the level of benefits provided to the employees and their eligible dependents is substantially similar. The Borough further reserves the right, at its option, to self-insure any of said plans and coverages so long as the level of benefits provided to the employees and their eligible dependents is substantially similar. Prior notice of intent to make the change must be made to the employees of any change in the above described benefits within 60 days.

During negotiations for a successor agreement, the Borough expressed concern over health benefit costs and suggested increased deductibles and premium sharing. The PBA offered to accept a change to the SHBP if the parties could agree on wages. The PBA contended the Borough indicated it was not interested in changing to the SHBP. The Borough contended it said that its health benefit consultant would analyze benefit options, including the SHBP, and that it informed the PBA that the SHBP was being considered as an alternate health plan.

In December 2008 the Borough informed the PBA that based upon Article 16 Section J of the agreement it had the right to change health providers as long as the benefit level is substantially similar to the current level, and told the PBA that it thought the SHBP met or exceeded that requirement.

In January 2009, Sergeant Vogelei, a member of the PBA's negotiations committee, spoke to Mayor Pagliughi who was not on the Borough's negotiations committee. The parties contend that Vogelei and Pagliughi agreed to a three year contract at 3.75% across the board, but they dispute whether they agreed to change to the SHBP. There was no written agreement.

In early 2009 the Borough reached agreement with Teamsters Local 676 representing the Borough's blue collar employees, and with the United Independent Union covering dispatchers to change to the SHBP.

The PBA submitted a chart showing several differences between the SHBP NJ Direct 10 plan and the traditional component of the IDA plan. The Borough submitted a report from its insurance consultants comparing the SHBP NJ Direct 10 with the IDA plan. Although the report recognized plan differences and noted considerable variation on how those differences would affect individual employees, the report concluded that:

. . . in our opinion, the switch easily meets the ". . . substantially similar . . ." language in the Local 59 agreement. In fact, we believe that beneficiaries who use in-

network providers will most often realize materially higher benefits at lower cost to them by virtue of the more favorable deductibles, co-pays and coinsurance provisions in the NJ Direct 10 product.

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).

In this case the PBA argues that regardless of contract language, any change in a term and condition of employment after contract expiration and during negotiations disturbs the level playing field required in collective negotiations. It asserts that the change to SHBP created a chilling effect on negotiations for a new agreement.

The Borough argued that since the switch to the SHBP was consistent with and authorized by the parties contract, the change had been negotiated and does not constitute a unilateral change.

Based upon the facts presented, I cannot conclude that the interim relief standards have been met. While I am not finding whether the switch to the SHBP complied with Article 16 Section J of the parties' contract, the report provided by the Borough's insurance consultant suggests the switch complied with the contract making it impossible for me to conclude that the PBA has a substantial likelihood of success on the merits of the case. The dispute over whether the Borough told the PBA it was not interested in changing to the SHBP merely reinforces that conclusion. The PBA may grieve over whether the change complied with the contract.

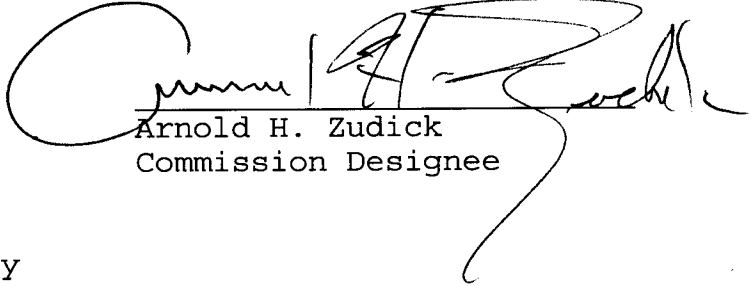
This case is similar to the facts and result in Camden County College, I.R. No. 2008-18, 34 NJPER 104 (¶45 2008), where the Commission Designee denied a request to restrain a health

benefit change. The College cited contractual language as a defense and the Designee concluded an arbitrator needed to review the contract to determine if the change complied with the contract. The result here must be the same.

Based upon the above findings and analysis, I issue the following:

ORDER

The application for interim relief is denied.



Arnold H. Zudick
Commission Designee

DATED: May 27, 2009
Trenton, New Jersey