

I.R. No. 2011-5

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF BELLEVILLE,

Respondent,

-and-

Docket No. CO-2010-497

BELLEVILLE PBA LOCAL #28,

Charging Party.

SYNOPSIS

A Commission Designee grants a restraint on an application for interim relief based upon an unfair practice charge alleging that during negotiations for a successor collective negotiations agreement, a public employer unilaterally reduced supplemental payments to workers compensation benefits from a rate of 100% of a unit employee's average weekly wage to 70%. The charge specifically alleges that a named officer's benefits were reduced in compliance with the employer's directive.

The Designee ordered a restraint, despite a certification from the employer asserting that benefits are paid at a rate of 100% during the first year of an employee's illness or disability. The Designee determined that the employer filed a certification setting forth instances of employees receiving benefits at 100% of their average weekly wage, regardless of the length of time of the injury or illness.

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Appearances:

For the Respondent, Thomas M. Murphy, Township Attorney

For the Charging Party, Klatsky, Sciarrabone & De
Fillippo, attorneys (David J. De Fillippo, of counsel)

INTERLOCUTORY DECISION

On June 21, 2010, Belleville PBA Local #28 filed an unfair practice charge against the Township of Belleville. The charge alleges that on May 28, 2010, during collective negotiations for a successor collective agreement, the Township unilaterally changed an existing employment condition by ordering that workers compensation benefits be paid prospectively to unit employees at a rate of 70% of the employee's average weekly wage. Benefits were previously paid at the rate of 100% of average weekly wages. The charge specifically alleges that before May 28, 2010, police officer Nicholas Tribley received 100% of his average weekly wages and afterwards his compensation was reduced. The Township's conduct allegedly violates 5.4a(1), (2), (3), (4),

(5), (6) and (7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

The charge was accompanied by an application for interim relief, together with a certification, documents and an accompanying brief. The application seeks an Order reinstating workers compensation benefits paid to injured unit employees to 100% of their average weekly wages and making whole employees whose benefits were reduced to 70% of their average weekly wages.

On June 22, I signed an order to Show Cause specifying July 13, 2010 as the return date for argument in a telephone conference call. I also directed the Township to file an answering brief, together with opposing certifications, documents and proof of service upon the PBA. On July 6, the Township filed

^{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. (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."

its response. On July 13, the parties argued their cases in a telephone conference call. The following facts appear.

The parties signed a collective negotiations agreement extending from January 1, 2007 through December 31, 2009. They are negotiating a successor agreement. Article VI (Sick Leave and Vacation Leave) provides "unlimited sick leave" to all unit employees, except "new employees", who receive 15 sick leave days off in their first year of employment. Article XIX (Terms of Agreement) provides in a pertinent part: "In the event negotiations continue after December 31, 2009, the terms and conditions of this agreement shall continue in full force and effect until a substitute agreement is executed."

Officer Nicholas Tribley has been employed as a Township police officer for several years. On July 6, 2009,^{2/} he "went off-duty" and has not return to work. One of Tribley's paycheck stubs, dated May 5, 2010, provides a payment of \$1,182.66. Another paycheck stub, issued June 9, 2010, provides a "worker's comp" payment of \$711, from which other deductions were taken.

On May 28, 2010, Township Manager Victor Canning issued a memorandum to "all employees," advising:

Effective immediately, [emphasis supplied]
Worker's Compensation Benefit Rates will be

^{2/} The certification provides that Tribley has been "off-duty" since June 1, 2009. On July 12, Township counsel filed a letter advising that the correct date is July 6, 2009, and that Tribley has not returned to duty.

paid based on NJ workers' Compensation Law, Title 34:15-12, as follows:

If and [sic] injured worker is disabled for a period of more than seven days, he or she will be eligible to receive temporary total benefit, retroactive to the first day of lost time. The benefit will be paid at a rate of 70% of the worker's average weekly wage, not to exceed the statutory maximum rate or fall below the statutory minimum rate established annually by the Commissioner of Labor and Workforce Development (see schedule attached). These benefits are provided until the worker has returned to work, has reached maximum medical improvement, or has reached the statutory 400-week maximum.

For example: If an employee got injured in 2010 and his/her weekly wages at the time of injury were \$1,100.00, he/she will receive the maximum of \$794.00/week, paid directly to the employee by our Worker's Compensation carrier (Scibal Associations).

Joseph Rotonda, the Township Police Chief, certifies that over the past five years, "the Township has not paid 100% average weekly wage in workers compensation benefits beyond one year, with one exception." Over the past twelve years, 100% payments have been issued to employees beyond one year, "only twice." One of the exceptions concerned an officer suffering a "double amputation."

Officer "M.C." received 100% of his average weekly wage in workers compensation benefits in 2008-2009 for a service-related injury.

Officer "J.P." received ". . . one year[\'s] pay, a combination of comp. and sick time" in 2009-2010.

Officer "S.S." received "fourteen months pay in 2009-2010 due to an extraordinary illness which required the amputation of part of his right leg and his lower left arm."

Chief Rotonda certifies that the "past practice . . . over the past 12 years . . . is that no injured officer has ever received more than one year\'s pay at 100% of his average weekly wage."

ANALYSIS

A charging party may obtain interim relief in certain cases. 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).

Public employer payments to employees for work-related injuries and disabilities supplementing workers compensation benefits is a mandatorily negotiable subject. Morris Cty., P.E.R.C. No. 79-2, 4 NJPER 304 (¶4153 1978), aff'd NJPER Supp. 2d 67 (¶49 App. Div. 1979); City of East Orange, P.E.R.C. No. 2000-14, 25 NJPER 405 (¶30176 1999), aff'ing H.E. No. 99-23, 25 NJPER 354 (¶30150 1999).

The problem in this case is defining the term and condition of employment because it is not set forth in the collective negotiations agreement. N.J.S.A. 34:13A-5.3 defines an employer's duty to negotiate before changing working conditions:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

An employer violates the duty to negotiate when it unilaterally alters an existing practice or rule governing a term and condition of employment even if the practice or rule is not set forth in the agreement. Even if the agreement did not bar the change, it does not provide a defense for the employer because it does not expressly authorize a change. Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983); See Middletown Tp. and Middletown PBA Local 124, P.E.R.C. No.98-77, 24 NJPER 28

(¶29016 1998), aff'd 334 NJ Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000).

The PBA's certification about the existing employment condition allows no exception; the Township ". . . pay[s] workers' compensation benefits to our members at the rate of 100% of the injured officer's average weekly wages." The Township's May 28, 2010 memorandum also allows no exception; all injured employees disabled for more than seven days will be paid at a rate of 70% of the worker's average weekly wage. Officer Tribley's reduced pay on June 9, 2010 apparently implements the terms of the memorandum, despite his absence from work due to injury of less than one year.

The Township certifies that it pays 100% of an injured officer's average weekly pay for one year and 70% afterwards. It has represented that officer Tribley shall be made whole, i.e., paid 100% of his average weekly wages for one year, dating from his initial absence due to injury.

The Township also certifies two "exceptions" to its purported one year rule, conceding that two unit employees were provided 100% of their average weekly wages for more than one year. Although the Township has provided examples of unit employees who received 100% of their average weekly wages before May 28, 2010, it has not provided examples of employees whose supplemental payments were reduced to 70% of their average weekly

wage after one year. I am constrained to find that the "exceptions" do not prove the rule; rather, they undermine the credibility of the purported rule. Accordingly, I find that the PBA has demonstrated a substantial likelihood of success on its allegation that the Township unilaterally reduced supplemental payments to injured unit employees collecting workers compensation benefits from 100% of their average weekly wages to 70%. I note that the State statutes referenced (N.J.S.A.18A:30-2.1; N.J.S.A. 34:15-12; and N.J.S.A. 40A:9-7) do not preempt collective negotiations over the disputed term and condition of employment. The Township is not bound to maintain the practice; it is required to negotiate before changing it. Middletown Tp.; UMDNJ, P.E.R.C. No. 2010-98, 35 NJPER _____ (¶____ 2010).

The Commission has regularly held that a unilateral change in terms and conditions of employment during negotiations for a successor agreement has a chilling effect on the negotiations and causes irreparable harm. City of East Orange, I.R. No. 2007-5, 32 NJPER 354 (¶148 2006). An employer's unilateral action is the antithesis of good faith negotiations. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978). The Township unilaterally decreased the level of supplemental payments to employees eligible for and receiving workers compensation benefits during negotiations. Continuation of that change will irreparably harm the negotiations process.

I must also consider the relative hardship to the parties and the public interest in granting or denying relief. The Township has not identified harm it will endure by restraining or retaining the status quo. The Township's unilateral change during collective negotiations undermines the PBA's ability to represent its members. I find that the public interest is furthered by requiring the parties to adhere to a tenet of the Act - the requirement to negotiate before implementing changes in terms and conditions of employment. Adherence to the process also results in labor stability.

I find that the PBA has met the standard for granting its application for interim relief.


ORDER

The Township is ordered to restore payments to unit employees (for work-related injuries and disabilities) supplementing workers compensation benefits to 100% of an injured officer's average weekly wages. Such payments shall continue unabated beyond the employee's one year anniversary of disability or injury, provided that he or she continues receiving workers compensation benefits.

The Township is ordered to rescind its manager's May 28, 2010 memorandum, as it applies to police officers represented by PBA Local #28.

The Township is ordered to make officer Tribley whole; i.e. pay back pay and restore payments, consistent with the first paragraph of this Order.

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



Jonathan Roth
Commission Designee

DATED: July 14, 2010
Trenton, New Jersey