

I.R. NO. 2011-8

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

GREATER EGG HARBOR REGIONAL
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2011-013

GREATER EGG HARBOR REGIONAL
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief based upon an unfair practice charge filed by the Greater Egg Harbor Regional Education Association against the Greater Egg Harbor Regional. The charge alleges that on April 12, 2010, during collective negotiations, the Board voted to change health insurance plans, effective August 1, 2010 from Horizon Blue Cross/Blue Shield plans to the School Employees Health Benefits Program. The Board's conduct allegedly violated 5.4a(1), (2), (3), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

The Designee outlined the law concerning changes in health insurance carriers during the course of collective negotiations. He observed that where a contemplated change in carriers would change health benefit levels, absent a contractual defense, an order could issue barring an employer from implementing such a change. However, the Designee determined that the Association did not adequately demonstrate that the change in plans would alter health insurance coverages and other related benefits. The Designee noted that a reimbursement fund, created by the Board's resolution, to reimburse employees for any differences in coverage between the existing and new plans, would preserve existing coverage levels. Although the Association questioned whether such a plan was compatible with coverage under the SEHBP, the Board asserts that it may create and operate the reimbursement plan. The Designee finds there is no indication that the Board will not implement the reimbursement plan when it changes health insurance carriers.

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Appearances:

For the Respondent, Capehart & Scatchard, attorneys
(Alan R. Schmoll and Kelly M. Estevam, of counsel)

For the Charging Party, Myron Plotkin, New Jersey
Education Association UniServ Representative

INTERLOCUTORY DECISION

On July 7, 2010, the Greater Egg Harbor Regional Education Association filed an unfair practice charge and a request for interim relief with the Public Employment Relations Commission. The Association alleges that the Greater Egg Harbor Regional Board of Education, on April 12, 2010 while the parties were engaged in negotiations for a successor collective negotiations agreement, engaged in unfair practices proscribed by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by adopting a resolution providing that, effective August 1, it would change existing health insurance benefits by becoming a participant in the New Jersey School Employees Health Benefits

Plan (SEHBP). The charge alleges that the Board's action violates N.J.S.A. 34:13A-5.4a(1), (2), (3), (5) and (7),^{1/} and that an order restraining the Board from implementing the change is required to preserve the status quo and prevent irreparable harm.

An Order to Show Cause was signed on July 9, 2010 setting a return date of July 22 for oral argument. The parties submitted briefs, certifications and exhibits and argued orally on the scheduled return date. The following pertinent facts appear.^{2/}

The Board and the Association are parties to a collective negotiations agreement effective from July 1, 2006 through June 30, 2009. Article 7.D contains a prescription drug plan to obtain medications at retail or mail order pharmacies and lists co-pays for generic and name-brand drugs. Article 7.E of the

^{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 in that unit, or refusing to process grievances presented by the majority representative. . . (7) Violating any of the rules and regulations established by the commission."

^{2/} The Board submitted an Answer admitting the majority of the factual allegations of the charge. Pertinent allegations that have been denied, in whole or in part, are noted.

agreement describes the Health Insurance coverage that includes a Blue Cross/Blue Shield "Blue Card PPO" plan (7.E.1). The premium for that plan is paid by the Board and includes a \$15.00 per visit co-pay for in-network providers.^{3/} Article 7.H allows employees covered by health insurance plans provided by the employer of their spouses to opt out of Board-provided health insurance, prescription or dental coverage and receive a payment of 25 per cent of the annual premium costs.

The parties are negotiating for a new contract, but to date have been unable to reach agreement. Mediation was unsuccessful and fact-finding has been invoked. During negotiations and mediation the Board proposed changes in the prescription and in the existing Blue Card PPO health insurance coverages.^{4/}

Subsequently, the Board proposed to provide health insurance coverage through the SEHBP. The Board asserted that the change would result in cost savings that could preserve the jobs of teachers who had received layoff notices. The Association did not agree to the change.

^{3/} The article also has an HMO option, sets per visit co-insurance and maximums for Blue Card PPO enrollees using out-of-network providers. It also describes other aspects of the health insurance plans.

^{4/} The Board proposed that employees pay 15 per cent of the health insurance premiums and also sought other changes in existing coverage. For prescriptions, the Board proposed raising co-pays for both generic and brand name medications.

On April 12, 2010, the Board adopted a resolution providing that, effective August 1, it would become a participant in the SEHBP. The resolution also provides that, if an employee has out-of-pocket costs under the SEHBP coverage that would not have been incurred under the existing plan, the employee will be reimbursed upon submitting proof of the expenditure. The plan scheduled to take effect on August 1 is called SEHBP Direct 10.

On May 26 and 27, 2010, representatives of the SEHBP visited the District's school and distributed informational packets and enrollment forms.

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 level of health benefits is mandatorily negotiable and may not be changed unilaterally. Piscataway Tp. Bd. of Ed.,

P.E.R.C. No. 91, 1 NJPER 49 (1975). Unilateral changes in health benefits violate the duty to negotiate in good faith. Borough of Metuchen., P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984). Where changing the identity of the health insurance carrier affects terms and conditions of employment, e.g., the level of insurance benefits or the administration of the plan, an alternative carrier is a mandatory subject for negotiations. City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439, 440 (¶12195 1981). If benefit levels and plan administration are unaffected, a public employer is not required to negotiate a change in carrier. Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 87-83, 13 NJPER 78, 82 (¶18036 1986). If the contract permits the employer to change benefits if the new plan is "substantially equivalent" to existing benefits, it may provide a defense to a charge that a carrier change should have been negotiated. City of Orange Tp., I.R. No. 2009-27, 35 NJPER 175 (¶66 2009). But, in the absence of such latitude, a unilateral move to a new carrier that changes benefits, even if some are improved, violates the Act. Metuchen.

Any unilateral change in a term and condition of employment during negotiations has a chilling effect and undermines labor stability. Galloway Tp. Bd. of Ed. V. Galloway Tp. Ed. Assn., 78 N.J. 25, 48 (1978). And changes may not be made, where as here, the parties are engaged in fact-finding, a statutorily-mandated impasse resolution procedure.

The Association asserts that switching to the SEHBP plan will change health benefit levels; eliminate eligibility for coverage for employees working 20 to 24 hours per week; and will eliminate opt-out payments for some employees who previously declined coverage provided by the Board in exchange for receiving a payment of 25 per cent of the cost of their health insurance premium. The Association contends that by moving into SEHBP coverage, aspects of health insurance benefits that were previously mandatorily negotiable, will now be controlled by actions of the State Health Benefits Commission and/or the School Employees Health Benefits Commission. It maintains that coverage under a plan that narrows the range of currently negotiable health insurance benefits, is a change in a mandatorily negotiable term and condition of employment and represents the establishment of a parity arrangement that has been held to inhibit collective negotiations.

The Association argues that implementing these changes, while the parties are in collective negotiations, violates the Act and warrants an interim relief order restraining the Board from joining the SEHBP on August 1, 2010.

The Board asserts that an interim relief proceeding is not the time to conduct a factual review of current and future health insurance plans, maintaining that such issues should be explored

in a plenary hearing or before an arbitrator.^{5/} The Board asserts that its switch, accompanied by a reimbursement fund, will result in benefits that are equal to or better than those currently provided by the current carrier, will not deprive any current employee of health care coverage, and will not have an adverse financial impact on any employees, because if they incur non-covered expenses, the Board will reimburse employees for documented out-of-pocket costs. The Board also submits that the cost savings to be realized from the change in health insurance will promote the public interest by saving the jobs of many of its teaching staff who would be otherwise laid off.

The Association disputes the authority of the Board, once it decides to participate in the SEHBP, to maintain a fund to reimburse employees. It asserts that such a fund conflicts with both the terms and assumptions of the SEHBP. It argues the fund changes the terms of the SEHBP's Direct 10 plan by making payments to employees for coverage that is not within the plan's parameters and will thereby undermine the plan's actuarial

^{5/} Exhibits CP-1 and CP-2 are documents prepared, according to the Association's representative, by the New Jersey Education Association's Research Division. They purport to show differences between the current plans and the SEHBP's Direct 10 program. These documents were admitted into the record over the Board's objection. No witness provided testimony concerning them. The Board's business manager testified that under the SEHBP plan, co-pays for office visits to in-network providers would be reduced from \$15.00 under the current plan to \$10.00.

assumptions. It relies on a brief submitted by the Attorney General's office to a trial court considering whether to sustain an arbitration award ordering that a board of education reimburse employees for costs not covered by the SEHBP.^{6/}

The Board disputes the significance of the brief, countering that only the Division of Pensions can determine the validity of the reimbursement fund. It also asserts that the Commission may not make such a ruling.

Responding to the Board's argument that the legality of a reimbursement fund is an unsettled issue, the Association argues that the Board should be ordered to maintain the present health coverage at least until a ruling is obtained from the Division of Pensions as to whether the fund is valid.

Both parties have cited numerous interim relief decisions where Commission designees, as part of orders granting interim relief involving a unilateral change in health carriers, have directed employers to create funds to reimburse employees for expenses that the new plans no longer cover. In most cases, the employer had already made the changes when the interim relief applications were filed. Those remedies were designed to restore the status quo.

^{6/} The case involved the Rockaway Borough Board of Education. During the interim relief hearing, the Association's representative advised that, because the case was settled, the Court did not rule on the compatibility of a reimbursement fund and the SEHBP.

Here, the change to the SEHBP has not yet occurred so that, if a showing is made that benefit levels will be altered by the change in carriers and the contract affords no defense to such unilateral action, the Board can be restrained from making the change until further order of the Commission.^{7/}

The Board points to recent interim relief decisions, such as Franklin Lakes Bd. of Ed., I.R. No. 2010-8, 35 NJPER 465 (¶153 2009), as confirmation that its reimbursement plan is appropriate under the SEHBP. There the designee concluded that an impending move by that board into the SEHBP while the parties were engaged in negotiations for a successor agreement would violate the Act. As part of his interim relief order, the designee directed the board to create a fund to pay or reimburse costs to unit employees representing the difference, if any, between benefits provided by the School Employees Health Benefits Plan and those that would have been provided under the existing plan.

The context of Franklin Lakes is somewhat analogous.^{8/} And, unlike the Rockaway Borough Board of Education dispute, where the employer challenged an arbitration award directing that it create a reimbursement fund, this employer took affirmative steps to create such a fund contemporaneously with adopting a resolution

^{7/} The parties' expired agreement does not address or set a flexibility standard concerning a change in carriers.

^{8/} Franklin Lakes did not consider whether an SEHBP employer could create and maintain a reimbursement fund.

to change carriers. The Board has given no indication that, in the event there are gaps in coverage between the plans in the most recent agreement and the SEHBP's Direct 10 program, it will fail to make disbursements to affected employees, if necessary.

The Association has failed to show, in this interim relief proceeding, that switching to the SEHBP would result in changes in the level of health benefits or that employees will suffer irreparable harm if the Board is not restrained from becoming a participant in the SEHBP effective August 1, 2010.

Initially, I reject the Association's argument that, because the result of participation in the SEHBP may mean that some currently negotiable health insurance benefits, may in the future be controlled by the actions of the SHBC or the SEHBC, a change in a mandatorily negotiable subject has occurred. To show that a change in benefits has occurred, the Association must, in essence, take a "snapshot" of present benefits and compare it to the analogous features of the new coverage.

Here, the Association asserts that a change to the SEHBP will affect the ability of a unit member, whose spouse is also covered by the SEHBP, to opt-out of coverage and receive, in accordance with Article 7.H, a payment equivalent to 25 per cent of the Board' cost of the employee's health insurance premium.

However, it appears that pursuant to P.L. 2010, c. 2, dual coverage of spouses eligible for coverage under the SHBP, or the

SEHBP, is prohibited, but that an employer participating in the SEHBP or the SHBP, may compensate an employee, whose spouse is covered by the SHBP or the SEHBP, with a payment equal to 25 per cent of the Board's premium costs up to a maximum of \$5,000.00. Accordingly, the Association has not established that a switch to the SEHBP would change that benefit.^{2/}

The Association has also asserted that employees working between 20-24 hours per week will not be eligible for SEHBP coverage. The Board asserts that all current employees will continue to be covered. However, even assuming the Association is correct, and that certain future employees would be ineligible for coverage under the SEHBP, employees ineligible for coverage under state plans can have their benefits maintained by a different health care arrangement. See State of New Jersey, P.E.R.C. No. 2000-12, 25 NJPER 402 (¶30174 1999), aff'd 336 N.J. Super. 167 (App. Div. 2001) (proposal for employer to make payments to union-administered health care fund for faculty ineligible for State Health Benefits Plan coverage was mandatorily negotiable).

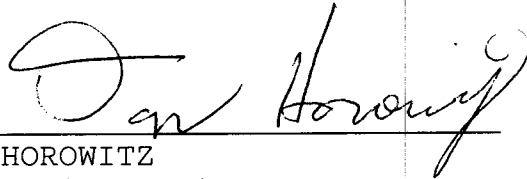
Finally, in the absence of testimony more fully explaining the comparisons made in CP-1 and CP-2, I find that those documents are insufficient to establish that the Association has

^{2/} Under the SEHBP, the decision to issue such a payment is discretionary with the employer and not subject to negotiations.

a substantial likelihood of succeeding on the merits of its charge that the change to the SEHBP will alter health insurance coverage. This is particularly so given the Board's reimbursement fund that is designed to protect employees against any coverage gaps.

ORDER

The Association's request for interim relief is denied.



DON HOROWITZ
Commission Designee

Dated: July 27, 2010
Trenton, New Jersey