I.R. No. 2011-16

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF FAIR LAWN,

Respondent,

-and- Docket No. CO-2011-57

FAIR LAWN PBA LOCAL 67 AND SOA,

Charging Parties.

SYNOPSIS

A Commission Designee denies an application for interim relief based upon an unfair practice charge alleging that the public employer unilaterally changed its health insurance plan from Horizon Blue Cross/Blue Shield to a self-insurance plan administered by Insurance Design Administrators (IDA), and that the change reduced health benefits levels. The parties are engaged in interest arbitration for successor collective negotiations agreements. The expired agreements allow the public employer to change carriers "so long as equivalent coverage or superior coverage results."

The Designee found that certifications and documents provided by the parties revealed a material factual dispute over the level of benefits provided by IDA. Accordingly, the Designee determined that the charging parties had not demonstrated a substantial likelihood of success on the merits of its factual and legal allegations.

I.R. No. 2011-16

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF FAIR LAWN,

Respondent,

-and- Docket No. CO-2011-57

FAIR LAWN PBA LOCAL 67 AND SOA,

Charging Parties.

Appearances:

For the Respondent, Goodman & Lustgarten, attorneys (Richard A. Lustgarten, of counsel)

For the Charging Party, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (Paul L. Kleinbaum, of counsel)

INTERLOCUTORY DECISION

On August 5, 2010, Fair Lawn PBA Local 67 and SOA (PBA) filed an unfair practice charge against the Borough of Fair Lawn (Borough), together with an application for interim relief, certifications, exhibits and a letter brief. The charge alleges that on June 15, 2010, the Borough voted to change its health insurance provider from Horizon Blue Cross/Blue Shield to a self-insurance plan administered by Insurance Design Administrators (IDA), effective August 1, 2010. The provider networks in the IDA plan are allegedly ". . . substantially smaller than the network used by Horizon." The new plan allegedly does not provide coverage for autism and its appeal procedure is ". . .

far less rigorous than Horizon's and does not provide for review by an outside agency."

The charge also alleges that the expired collective negotiations agreements permit the Borough to change providers as longs as ". . . equivalent or superior coverage results." Finally, the charge alleges that interest arbitration proceedings are pending (IA-2009-113, 114). The Borough's conduct allegedly violates 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 application seeks an Order restraining the Borough from maintaining health insurance coverage through IDA and reinstating coverage provided by Horizon BC/BS.

On August 9, 2010, I signed an Order to Show Cause, specifying September 1, 2010 the return date for argument on the application in our Newark offices. I also directed the Borough to file an answering brief, together with opposing certification(s) and proof of service upon the PBA by August 24, 2010. I also wrote that the PBA could file a reply by August 25.

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."

On the return date, the parties argued their cases. The following facts appear.

The Borough and the PBA (and the Borough and Fair Lawn Superior Officers Association) signed collective negotiations agreements extending from January 1, 2005 through December 31, 2008. Articles 28 (Medical Coverage Dental Plan) and 27 (Medical Coverage) of the respective agreements are otherwise identical and provide in pertinent parts:

> 28.01 (27.01) The Employer will provide and pay for Blue Cross, Blue Shield Medallion Plan, Rider J. and Major Medical for employees covered by the agreement and their families.
> . . . .
> 28.08 (27.08) The Employer shall have the right to change carriers so long as equivalent coverage or superior coverage results.

The Borough, the PBA and SOA conducted joint negotiations for successor collective negotiations agreements. On June 19, 2009, the PBA and SOA jointly filed petitions to initiate compulsory interest arbitration (IA-2009-113, 114). An arbitrator was assigned. On April 7, 2010, the parties signed a memorandum of agreement for a six-year term, with the arbitrator's assistance. The PBA and SOA promptly ratified the memorandum. The Borough did not vote on it; on May 14, 2010, it presented a new proposal which set forth ". . . substantially different terms" than the memorandum. On or about June 19, 2010, the PBA filed an unfair practice charge (Dkt. No. CO-2010-475)

alleging among other things, that the Borough unlawfully refused to vote on the memorandum of agreement.

In or around February 2010, the Borough advised the PBA and SOA that it was considering changing health insurance carriers to a self-insurance administrator, IDA. On June 15, 2010, the Borough passed a resolution "transferring" the health benefits provider from Horizon BC/BS to IDA, effective August 1, 2010.

On July 20, the Borough adopted a budget, including an allocation for the IDA insurance plan. On July 21, the PBA received a copy of the IDA plan document.

The parties have submitted certifications from consultants (on behalf of the PBA) and IDA employees with experience and/or expertise in health benefits administration. The PBA has filed certifications and submitted documents showing that the appeal procedure under the Horizon plan is more lenient and generous to an employee than the IDA procedure; that the claims process under Horizon was far less cumbersome than the IDA claims process; that the IDA plan substitutes a "patchwork" of networks for Horizon's simpler "in-network" or "out-of network" assemblage of providers; and that the Horizon network of out-of-state providers is significantly larger than IDA's.

The Borough has submitted certifications and documents showing that the combination of three IDA Networks (Amerihealth,

CHN and PMCS) yields 1565 providers, compared with Horizon's 1539. Another IDA employee has certified:

> . . . [D]espite re-formatting and rephrasing of the new plan document and benefit booklets, IDA shall provide to the Borough of Fair lawn all terms of the benefits provided under Horizon, effectively mirroring all prior coverage. The mirroring of benefits extends to all aspects, including the filing deadlines, process of appeals, co-pays and autism benefits.

The certification also provides that if the "benefit and claims process" requires adjustment to "replicate" Horizon coverages and processes, IDA "will implement the change immediately."

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).

Health benefits is a mandatorily negotiable term and condition of employment 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. Metuchen Boro., P.E.R.C. No. 84-91 10 NJPER 127 (¶15065 1984). A change in an insurance carrier is generally permissibly negotiable for police and fire employees. City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439 (¶12195 1981). A change in carriers that alters the level of benefits is mandatorily negotiable. Union Tp., P.E.R.C. No. 2002-55, 28 NJPER 198 (¶33070 2002). In Union Tp., the Commission continued the analysis:

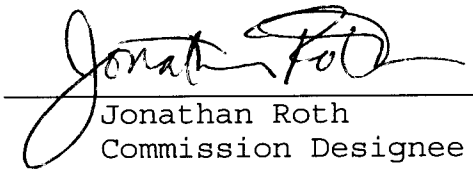
> A contract clause requiring the employer to maintain the level of health benefits may create additional protections for employees. It may also provide a contractual defense for the employer to an unfair practice allegation that the employer violated the Act by acting unilaterally. Many contracts permit changes to, for example, "equivalent" or "substantially equivalent" benefit plans. An employer satisfies its negotiations obligation when it acts pursuant to the contract. [citation omitted]
>
> Even though health benefit changes may violate the Act, unfair practice charges alleging unilateral changes in health benefits will ordinarily be deferred to binding arbitration because the contract often sets the benefit level and the conditions under which the employer may change benefits. [citation omitted] [28 NJPER 200]

The question in this matter is whether the change in carrier from Horizon to IDA has resulted in "equivalent" or "superior" coverage, as set forth in the parties' collective agreements. If the Borough as acted ". . . pursuant to the contract[s]," it has satisfied its duty to negotiate because no change in terms and conditions of employment has occurred.

The "equivalence" standard is more flexible than an "equal to . . ." or "equal to or better than . . ." standard because it allows " . . some room for evaluating particular plan factors to determine whether the contractual standard has been maintained." Camden Cty. College, I.R. No. 2008-18, 34 NJPER 104, 106 (¶45 2008); motion for recon. den., P.E.R.C. No. 2008-67, 34 NJPER 383 (¶124 2008).

The PBA has argued that "undisputed" facts reveal a diminution of certain benefit levels. It reiterates that those facts are revealed in plan documents, conceding that it has not received all of the documents which will comprise the entire package of benefits. The Borough has argued that certain facts reveal that IDA has larger provider network than Horizon and that the PBA consultant's methodology for analysis leads to an inaccurate assessment of benefits. It has also provided certifications attesting to IDA's "mirroring" of Horizon's benefit levels, appeal processes, co-pays, filing deadlines, etc.

Under these circumstances, I cannot conclude that the PBA has demonstrated a substantial likelihood of succeeding on its factual and legal allegations. I decline the PBA's application for interim relief.



Jonathan Roth
Commission Designee

DATED: September 2, 2010
Trenton, New Jersey