I.R. NO. 2013-6

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BURLINGTON COUNTY BOARD
OF CHOSEN FREEHOLDERS,

Respondent,

-and-

Docket No. CO-2013-121

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1036,

Charging Party.

SYNOPSIS

A Commission Designee grants an application for interim relief filed by the Charging Party alleging that the Respondent violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") and the parties' collective negotiations agreements ("CNA") when it unilaterally added three new health plans, while maintaining the original heath plan, during negotiations for successor CNAs.

The Designee found that the Respondent had unilaterally dealt directly with the Charging Party's members in violation of the Act, Court and Commission precedent, their CNAs and past practice.

The Designee found that the Charging Party had established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and had established all the required elements to obtain interim relief.

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Appearances:

For the Charging Party, Mets, Schiro & McGovern, LLP, attorneys (David B. Beckett, of counsel and on the brief)

For the Respondent, Capehart & Scatchard, attorneys (Carmen Saginario, Jr., of counsel)

INTERLOCUTORY DECISION

On November 14, 2012, the Communication Workers of America, Local 1036 ("CWA") filed an unfair practice charge against the Burlington County Board of Chosen Freeholders ("County"), which was accompanied by an application for interim relief, an affidavit, an initial brief, a reply brief, a supplemental brief, certifications from Adam Liebtag, President of CWA Local 1036, and exhibits. The CWA is the majority representative for approximately 750 employees in four different units: the Main Unit; the Supervisory Unit; the Prosecutor's Office - Clerical Unit; and the Superintendent of Elections Unit. Each unit has a

separate collective negotiation agreement ("CNA") and all expired on December 31, 2010; the parties are currently in negotiations for successor agreements. The charge alleges that the County violated the parties' collective negotiations agreements ("CNA") when it unilaterally offered three new health plans ("New Plans") (in addition to the health plan ("Current Plan") that was negotiated by the parties) to all of the County's employees including CWA members. The CWA asserts that the County's conduct allegedly violated 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 requiring the County to return to the status quo ante by eliminating the three new plans and to negotiate with the CWA for any new health plans. The County responds that, since it maintained the Current Plan, it was authorized to unilaterally add additional plans under the terms of the collective negotiation agreements ("CNAs") between the parties.

On November 19, an Order to Show Cause was issued. The County filed an opposition brief, a reply brief to the CWA's

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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."

supplemental brief, a certification from Daniel Hornickle, Esq., Director of Human Resources for the County, and exhibits. The parties presented oral argument via telephone conference call on December 6.

FINDINGS OF FACT

The County is self-insured and its employees are not enrolled in the State Health Benefits Plan ("SHBP"). The Current Plan has been in effect for approximately five years and was negotiated by the parties. The past practice of the parties since at least 1992 has been to negotiate changes in health care plans. The parties have been in negotiations for successor CNAs since approximately January of 2011. The negotiations have included discussions for a successor health plan to the Current Plan. On March 20, 2012, the County submitted a proposal to CWA outlining three new plans. In response, the CWA submitted a proposal in bargaining on April 18, 2012, to create a subcommittee to further study the topic of healthcare.

On October 25, 2012, the County unilaterally offered the three New Plans to all of its active employees/subscribers on the County Health Benefits plan.[2/] The New Plans vary from the

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2/ The County claims in the Hornickle certification that it offered the three New Plans to afford employees some choices when it comes to healthcare due in part to the enactment of P.L. 2011, Chapter 78, which significantly increased public employee healthcare contributions. Additionally, the County claims that the New Plans do not "cut back any benefits" in (continued...)

Current Plan by having differing co-pays, co-insurance or deductibles in exchange for lower monthly premiums. One of the New Plans was a "High Deductible Health Plan"[3/] where the County planned to contribute to a tax-deferred Health Savings Account ("HSA") to help offset some of the deductible for the employees who decided to enroll in that plan. Additionally, the New Plans also provided for free wellness benefits that are not furnished in the Current Plan.[4/]

The CNAs at Article XVI, Paragraph A2 provide:

> 2. During the term of this Agreement, there shall be no change in the Health Benefits set forth in paragraph A(1) paid for by the Employer on behalf of the employees as shown above. However, this shall not prevent the Employer from substituting new and equivalent or more beneficial plans for the ones set forth herein. However, whenever the Employer

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2/ (...continued)
comparison to the Current Plan and the only difference in New Plans is the contribution structure for the employees who choose those plans. The level of benefits, however, is not material to the outcome of this decision as will be set forth below.

3/ The CWA provided as an exhibit, the New Jersey Department of Community Affairs, Local Finance Notice LFN 2011-20R that states that non-SHBP members, such as the County, are not required to provide alternate plan designs, but nothing prevents them from doing so.

4/ The County claims Title IV of the Patient Protection & Affordable Care Act of 2010, Section 10406, requires employers to provide wellness and preventative benefits at no charge to employees. The Current Plan does not provide for wellness and preventative benefits. The CWA filed an exhibit from the U.S. Department of Labor that allegedly provides that wellness plans are encouraged but not required by the Affordable Care Act.

> determines that it may be in its interest to change the health care provider or administrator, the County shall give the union at least 30 days advance notice, along with a copy of the proposed contract. In the event that a change in the health care provider or administrator results in a change in panel providers, all employees will be given advance notice of the change and will be notified of where they can obtain a copy of the list of new health care providers.

CONCLUSIONS OF LAW

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[5/] 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); Burlington Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009), citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe); 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). In Little Egg Harbor Tp., the designee stated:

5/ Material facts must not be in dispute in order for the moving party to have a substantial likelihood of success before the Commission.

> [T]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

The crux of this matter is whether the County was authorized to add the three New Plans, while maintaining the Current Plan, based on the language in the CNAs in Article XVI, Paragraph A2; and more specifically if it could do so while the parties were in negotiations for successor CNAs.

The Commission has long held that the level of health benefits is mandatorily negotiable and may not be unilaterally changed by an employer. 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 Bor., P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984). 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). See also Closter Boro., P.E.R.C. No. 2001-75, 27 NJPER 289 (¶32104 2001) (A unilateral change in health benefits during

collective negotiations can destabilize and irreparably harm the process).[6/]

In Bergen Cty., P.E.R.C. No. 97-124, 23 NJPER 297 (¶28136 1997), the Commission discussed the prohibition against changing the status quo during negotiations:

> As early as 1975, we held that an employer is normally precluded from altering the status quo while engaged in collective negotiations, and that such an alteration constitutes an unlawful refusal to negotiate. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975). We noted that in such cases we are not enforcing or imposing an expired contractual obligation. Rather, we are simply requiring the maintenance of terms and conditions of employment during successor contract negotiations. See also Galloway Tp. Bd. of Ed., P.E.R.C. No. 76-32, 2 NJPER 186 (1976), rev'd 149 N.J. Super. 352 (App. Div. 1977), rev'd 78 N.J. 25 (1978).

Under Article XVI, Paragraph A2 the County had the ability to unilaterally "substitute new and equivalent or more beneficial plans" for the Current Plan. In this case, however, the County left the Current Plan in tact and merely added the three New Plans; the three New Plans did not "substitute" for the Current Plan.

6/ The facts in Closter Boro. concerned the changing of insurance carriers and a change to the insurance prescription plan while the parties were in the ratification process of their memorandum of agreement; the decision, however, holds that even a mid-contact repudiation can undermine a collective negotiations agreement and the collective negotiations process.

The County however, argues that under the CNAs it did have the right to offer the three New Plans as long as it maintained the Current Plan. Viewing this argument in the best light for the County, Article XVI, Paragraph A2, is at best ambiguous. When a CNA provision is ambiguous, the Commission has looked to the past practice between the parties. In Sussex Cty., P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982), the Commission held:

> Generally, a past practice which defines terms and conditions of employment is entitled to the same status as a term and condition of employment defined by statute or by the provisions of a collective agreement. In re Watchung Borough, P.E.R.C. No. 81-88, 7 NJPER 94 (¶12038 1981). Where a collective agreement is silent or ambiguous on the issue at hand, past practice controls. In re Rutgers, The State University, P.E.R.C. No. 82-98, 8 NJPER 300 (¶13132 1982); In re Barrington Board of Education, P.E.R.C. No. 81-122, 7 NJPER 240 (¶12108 1981), appeal dismissed App. Div. Docket No. A-4991-80 (1982); In re Twp. of Jackson, P.E.R.C. No. 81-76, 7 NJPER 31 (¶12013 1980).

In this case, as set forth above, the past practice between the parties was for joint negotiations regarding changes to the health care plans.

Additionally, even if the three New Plans are viewed as a benefit to the employees, or in other words as more beneficial than the Current Plan, the County was not authorized to provide that benefit without negotiations with the CWA. See Lakewood Tp. P.E.R.C. No. 89-134, 15 NJPER 417 (¶20172 1989)(unilateral grant

of salary increases during negotiations is a violation of the Act); Hunterdon Cty., P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986)(employer's unilateral institution of a "Safety Incentive Demonstration Program" which provided, in part, for cash rewards to employees was a violation of the Act); Atlantic Cty. Sewerage Auth. and Int'l Brotherhood of Firemen & Oilers, Local 473, P.E.R.C. No. 81-91, 7 NJPER 99 (¶12041 1981), recon. den. P.E.R.C. No. 81-111, 7 NJPER 162 (¶12072 1980), aff'd NJPER Supp.2d 128 (¶108 App. Div. 1983) (Employer violated the Act when it implemented a 10% annual pay raise without prior negotiations).[7/] See also Geweke Co., 344 N.L.R.B. 628 (N.L.R.B. 2005)(Employer violated the National Labor Relations Act when it unilaterally benefited employees when it increased its contribution to the monthly premium for each enrolled employee from $175 per month to $200 per month).

7/ See also In re Bridgewater Tp., P.E.R.C. No. 82-3, 7 NJPER 434 (¶12193 1981), recon. den. P.E.R.C. No. 82-36, 7 NJPER 600 (¶12267 1981), aff'd NJPER Supp.2d 120 (¶100 App. Div. 1982), aff'd 95 N.J. 235 (1984), where the Court cited the United States Supreme Court in NLRB v. Exchange Parts Co., 375 U.S. 405, 409, 84 S.Ct. 457, 460, 11 L.Ed.2d 435, 439 (1964):

> "The danger inherent in well-timed increases in benefits is the suggestions of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."

Based on the foregoing, the CWA has demonstrated a substantial likelihood of success in a final Commission decision. The material facts in this case are not in dispute. I find that the County has unilaterally dealt directly with CWA members in violation of the parties' CNAs and past practice.

The CWA has also established irreparable harm. Based on the County's actions, the standing and status of the CWA has been undermined and, as set forth by the Court in Galloway, any unilateral change in a term and condition of employment during negotiations has a chilling effect and undermines labor stability.

Next, in deciding whether to grant interim relief, the relative hardship to the parties must be considered and a determination made that the public interest will not be injured by the interim order. Crowe. The County argues that if interim relief is granted, it will be unable to provide its employees with alternative healthcare options that may satisfy their individual needs, address potential issues related to the statutory imposition of escalating employee contributions, and comply with the Patient Protection and Affordable Care Act requirements. Additionally, the County argues that the three New Plans, should employees decide to use them, will result in a direct premium payment savings which will be realized by both the employees and the County. Therefore, should employees select

these New Plans, the taxpayers will save monies by virtue of the changes in deductibles and co-pays.[8/] The CWA argues that its members may be required to pay higher co-pays, receive less coverage and may even forgo necessary medical treatment due to increased up-front costs. I find that the relative hardship to the parties weighs in favor of the CWA as they have a duty to negotiate for the best health plans possible on behalf of their members and that they have a legitimate concern that their members may be harmed if they opt for one of the three New Plans.

Finally, in considering the public interest, I find that it is furthered by adhering to the tenets expressed in the Act which require the parties to engage in collective negotiations prior to changing terms and conditions of employment. Adhering to the collective negotiations process results in labor stability and promotes the public interest.

Based on the above, I find that the CWA has established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain interim relief. The application for interim

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8/ Neither the County nor the CWA has provided, through their certifications or exhibits, any information regarding how many CWA members, if any, have decided to use one of the three New Plans. Therefore, there is no evidence in the record that the taxpayers will be harmed if the CWA members are required to continue to use the Current Plan.

relief is granted. Accordingly, this case will be transferred to the Director of Unfair Practices for further processing.

Having granted the CWA's application, I nevertheless, encourage the parties to consider a negotiated resolution to this matter to avoid negative employment actions.

ORDER

The application for interim relief is granted. CWA members are only eligible for the Current Plan unless the parties negotiate a substitute plan. The charge will be forwarded to the Director of Unfair Practices for processing in accordance with the Commission's Rules.

David N. Gambert
Commission Designee

DATED: December 28, 2012

Trenton, New Jersey