

I.R. NO. 2019-11

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PATERSON,

Respondent,

-and-

Docket No. CO-2019-154

PATERSON BATTALION CHIEFS ASSOCIATION,
PATERSON DEPUTY FIRE CHIEFS ASSOCIATION,
PATERSON FIREFIGHTERS ASSOCIATION,
PATTERSON FIRE OFFICERS ASSOCIATION,
PATERSON POLICE PBA LOCAL 1 AND PATERSON
POLICE PBA LOCAL 1, SUPERIOR OFFICERS
ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Adams, Gutierrez & Lattiboudere,
LLC, attorneys (Derlys M. Gutierrez, of counsel)

For the Charging Parties, Paterson Battalion Chiefs
Association, Paterson Deputy Fire Chiefs Association,
Paterson Firefighters Association and Paterson Fire
Officers Association, Law Offices of Craig S. Gumpel,
LLC, attorneys (Craig S. Gumpel, of counsel)

For the Charging Parties Paterson Police PBA Local 1
and Paterson Police PBA Local 1, Superior Officers
Association, Shaw, Perelson, May & Lambert,
LLP, attorneys (Mark C. Rushfield, of counsel)

INTERLOCUTORY DECISION

On December 18, 2018, Paterson Firefighters Association
(PFA), Paterson Fire Officers Association (PFOA), Paterson
Uniformed Battalion Chiefs Association (PUBCA), Paterson Deputy
Fire Chiefs Association (PDFCA, Paterson Police PBA Local 1 (PBA)
and Paterson Police PBA Local 1, Superior Officers Association

(SOA) filed an unfair practice charge against the City of Paterson (City), together with an application for interim relief seeking a temporary restraint, certifications, exhibits and a brief. The charge alleges that on or about September 25, 2018, the City passed resolutions authorizing it to transfer medical and prescription benefits coverage for active and retired employees from its current, self-insured plans to the New Jersey State Health Benefits Program (NJSHBP), effective January 1, 2019.

The charge alleges that all charging parties have signed collective negotiations agreements with the City extending from 2010 (all uniformed firefighters) or 2012 (all police) through July 31, 2019 and that all retired unit(s) employees, ". . . have contractual vested benefits which prohibit the City from making any changes to [their] medical and prescription drug plans." The charge alleges that all active police and firefighters have contractual protections against changing from the City's current self-insured plan(s) to other plan(s) unless the benefits and fee schedules are "substantially equivalent" to existing benefits. Active police officers and superiors allegedly have an added contractual benefit of prohibiting any changes, ". . . if its insurance benefits expert determines that such change does not meet the criteria of 'substantially similar to the current level

of benefits' and leaves it to an insurance expert chosen by the PBA and SOA to make that determination."

The charge alleges that in September, October, and November, 2018, the charging parties met with City representatives and objected to the elimination of the City's current self-insurance medical and prescription plans for active and retired members. The charge alleges that the unions' insurance expert determined that the NJSHBP is not "substantially equivalent" to the City's current plans. The City's action allegedly repudiates, ". . . past and present collective negotiations agreements between [the parties]" and constitutes a "unilateral change in terms and conditions of employment without negotiations," violating section 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 charging parties seek a remedy prohibiting the City from eliminating the current self-insured medical and prescription plans for active and retired unit(s) employees and their dependents and implementing the NJSHBP, effective January 1, 2019.

^{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 December 19, 2018, I issued an Order to Show Cause, without a temporary restraint, setting forth dates for the City's response and argument in a conference call. Late on December 26, 2018, I received a notice of appearance of new counsel for the City, who requested an extension of time until 5:00 p.m., December 27th, to file the City's response. Over a charging party Counsel's objection, I approved the request, with a 3:30 p.m. deadline for submission. On December 28th, the parties argued their cases.

Later that day, I issued an Order denying interim relief, finding that the charging parties had not shown a "substantial likelihood of success" on the merits, writing that material factual issues regarding the "substantial equivalence" of benefits under the then-current health plan and the NJSHBP precluded a grant of relief. I noted that a decision - this decision - setting forth findings of fact and conclusions of law would follow the Order.

The City admits having resolved on September 25, 2018 to participate and enroll in the NJSHBP, effective January 1, 2019. It admits that its blue collar employees and white collar employees, law department employees and other employees, in addition to the charging parties, will be enrolled in the NJSHBP, effective January 1, 2019. It avers that it terminated its "contractual arrangement with its third party administrator,

Horizon" and that an Order precluding its transition to NJSHBP on January 1, 2019 would leave all City employees and retirees without health insurance coverage.

The City also contends that the NJSHBP is ". . . equal to or better than the coverage provided by its prior self-insured plan, even though there are some differences in certain items" (brief at 6). It argues that the prescription drug coverage for active employees is "contractually permissible." It disputes that the charging parties will suffer irreparable harm by the switch in providers, contending that all unit(s) employees and retirees, ". . . may face only monetary damages," that are "reimbursable" (brief at 5-6). The City also contends that the relative harm to the City and its employees and retirees is "substantial" because their "old [insurance] cards" will have expired on December 31, 2018, leaving them, ". . . without health insurance if the requested relief is granted" (brief at 9). The City concedes that on December 19, 2018, the New Jersey Division of Pensions and Benefits denied the City's request for permission to "carve out" several categories of police and fire employees and retirees.

The following facts appear:

The City and PFA signed a collective negotiations agreement extending from July 1, 2010 through June 30, 2019. Article VII of the agreement, "Health Benefits," at section D, provides:

The City reserves the right to self-insure or to change insurance companies in providing health benefits agreed to hereunder so long as the health benefits and fee schedules set forth in the agreement are substantially equivalent to the existing [] health benefits.

Article VII, section E, "Vested Benefits," provides all retirees - as of July 2, 2016 or later - ". . . vested with the same medical, health, dental and prescription benefits that exist under this contract" and that those benefits, ". . . shall be unaffected by future changes in medical, health, dental and prescription benefits by the City, whether established pursuant to subsequent contracts or otherwise."

The City and PFOA, PUBCA and PDFCA have separate, signed collective negotiations agreements extending from August 1, 2010 through July 31, 2019. All three agreements have the same-worded health benefits provisions for active and retired employees, permitting a change in health insurance providers - from the self-insured to the NJSHBP-so long as the benefits and fee schedules are "substantially equivalent" to existing benefits. For retirees from all three units, the benefits are "vested" in the same contractual manner that benefits are vested for retirees from the PFA unit.

The City and PBA and SOA signed separate collective negotiations agreements extending from August 1, 2012 through

July 31, 2019. They set forth identically-worded "Health and Welfare Benefits" provisions. In particular:

Section 31.12 provides that the City shall pay the cost of hospitalization and medical coverage for surviving spouses and then-dependents as defined in the hospital-medical plan of active employees who do not die in the line of duty.

Section 31.6 reserves to the City the right to change insurance companies provided that the health benefits and fee scheduled shall be substantially equivalent to the existing health benefits

Section 31.7 provides that retired officers are "vested" with the existing medical and health benefits they enjoyed at the time of their retirement and that such benefits will be unaffected by subsequent changes to those benefits by the City.

Section 31.10 enables the City to change from a self-insured health benefits plan for active employees to the NJSHBP, provided that four conditions are met, including, ". . . the [unions'] insurance expert concludes that the SHBP is substantially similar to the current level of benefits" (31.10.1(d)).

On September 25, 2018, the City authorized the transition from "the City's Health Benefits Plan" to the NJSHBP, effective January 1, 2019. The City's Insurance Manager, Dena Cortese, wrote in an October 12, 2018 memorandum to all City retirees that the, ". . . current plans will terminate effective December 31, 2018."

On October 1, 2018, the City Director of Personnel issued a

memorandum to "all (benefits-eligible) City employees," advising that on January 1, 2019, the City will "transition" to the NJSHBP from its current plans through "Horizon Blue Cross/Blue Shield of N.J. and Citizens Rx," which ". . . will terminate effective December 31, 2018." The letter prescribes, among other things, mandatory employee enrollment meetings and an application process. It admonishes that, "Employees who do not sign-up for a SHBP plan will lose their current medical/prescription coverages effective December 31, 2018."

On October 9, 2018, Counsel for PFA and PFOA issued a letter to the City Business Administrator, Vaughn McKoy, advising that both unions continue to object to the projected change in providers and specifically identifying these concerns; inadequate notice of change, too limited enrollment period for active and retired employees, deficient prescription drug coverages for both groups, Medicare eligibility for retirees who are ineligible for Medicare reimbursements for out-of-pocket costs.

On October 15, 2018, City Insurance Director Dena Cortese issued an email to officers of the City's unions, including charging parties, advising that enrollment letters for the NJSHBP were being issued to retirees.

Also on October 15, PFOA and PFA filed with the Commission requests for the submission of panel(s) of arbitrators to contest changes in health benefits, pursuant to the City's intended

switch to the NJSHBP (Dkt Nos. AR-2019-202, 203). PFOA and PFA promptly advised the City of its filings, the former referencing a contract provision prohibiting changes to such health and prescription benefits during the pendency of arbitration proceedings. On October 18, the PBA and SOA filed a joint request to arbitrate the same alleged changes in health benefits (Dkt. No. AR-2019-217). Arbitrators have been selected for both firefighters matters.

On October 17, 2018, then-Counsel for the City wrote a responsive letter to a Charging Party counsel, advising that the City has complied with contractual notice provisions; that the enrollment period "timeline will be followed;" that the City will provide adequate notice to retirees; that prescription coverage for active employees in NJSHBP is "contractually permissible;" and that the City is seeking to eliminate or mitigate "adverse impacts" to retiree prescription benefits and will advise unions of its "findings." Counsel also wrote that the current agreements require a minimum of twenty years of service with the City and five years elsewhere in order for an employee to retire with "full benefits."

On October 25, 2018, Dominick Fanuele, "an insurance expert" hired by the charging parties, issued to Counsel for the charging parties a "Preliminary Summary Report of Benefit Deficiencies," a comparison of the City's then-current health and prescription

plans with the NJSHBP, together with a cover letter. The letter advises of ". . . a number of areas where the benefits provided under the NJSHBP are not substantially similar to the benefits defined in the [police] agreements and "shortfalls" in the NJSHBP benefits where they are substantially equivalent to benefit levels in the [firefighter] agreements."

The report specifies that under the current self-insured plan, "new hires" receive health and prescription coverage immediately but under NJSHBP, new hires withstand a 60-day waiting period. The report characterizes the existing plan's "network of participating healthcare providers" as "larger" than the network under the proposed "Direct 10" plan, increasing the likelihood of an employee, ". . . using a non-participating provider, [resulting] in higher out-of-pocket costs." The emergency room co-pay for employees will increase from \$25 to \$75 and generic prescription co-pays will increase from \$0 to \$3 for retail purchases and \$5 for mail order purchases. Also, the NJSHBP prescription plan has "cost containment" features and a "pre-approval" process that may present "roadblocks" to certain unspecified medications, compared with the current plan. Under the current plan, "well-care" is covered for out-of-network providers (with a deductible) but not covered for out-of-network providers in the NJSHBP.

The report also describes differences between the "Horizon Traditional plan" and NJSHBP Direct 10 plan for retirees. The former plan provided "basic benefits" (e.g., choice of surgeon or other physician) at 100% but under NJSHBP retired enrollees may face "balance billing if out-of-network choice of physician fees exceed a "reasonable and customary" standard. For hospital and surgical procedures, the "traditional plan" paid all benefits at 100% but under NJSHBP Direct 10, out-of-network charges are reimbursed at 80% following a \$100 deductible fee. Retirees under the "traditional plan" paid no emergency room or "well-care" fees and were not limited to a number of chiropractic care visits per year, as distinguishable from NJSHBP Direct 10 for those benefits. The report emphasizes that prescription drug co-pays for retirees under the NJSHBP are significantly higher than under the traditional plans in place at the time of retirement. Co-pays for "non-preferred" name brand drugs under the NJSHBP, reportedly ". . . can have a devastating impact on retirees who are not taking these medications at no cost." An example given was that a drug now available at little or no cost to a retiree would cost \$44 per month under the NJSHBP. Retirees under NJSHBP will now face for the first time a \$400 per person out-of-pocket limit for in-network care and up to \$2000 per person for out-of-network care. The report concludes that, ". . . benefits available under the NJSHBP will fail to provide substantially

equivalent or similar coverage compared to the benefits currently in place."

On November 16 and 28, 2018, representatives of the fire union and the City met to discuss concerns about health benefits for active and retired employees. On November 21, Counsel for charging party fire unions issued a letter to Counsel for the City summarizing ". . . the status of various issues, some resolved, some outstanding and some requiring further discussion." The letter advises that active employees' prescription benefits be maintained and that employees, ". . . not be placed in the NJSHBP prescription plan." The letter advises that the fire unions are seeking a "carve out" for named individuals with "traditional plan benefits." Counsel's letter also advises that discussions among the parties are continuing regarding the 60-day waiting period for enrollment, that new hires will have "Chapter 78 medical contribution obligations and that the City will be reimbursed for healthcare costs for new hires under a "SAFER and other grants pertaining to police officers." The letter contests adverse differences in "survivor benefits" in circumstances of retiree deaths, active employee line-of-duty deaths and non-line-of-duty deaths; specifically, NJSHBP does not provide survivor benefits for active employee non-line of duty deaths and retiree deaths with fewer than twenty-five years of service.

On December 5, 2018, then-City Counsel emailed both Charging Party Counsel, advising of his understanding that active and retired employees, ". . . will stay [in] the current prescription plan;" retirees will remain in the [traditional or current] health benefits plan; active employees will move to NJSHBP medical coverage; the 60-day waiting period under NJSHBP will apply to new hires; survivor coverage will be maintained, ". . . as currently implemented" by the City; and active employees with twenty years of service to the City but less than twenty-five years of pensionable employment will be entitled to current retiree health coverage if they retire before June 30, 2019. On December 7, then-City Counsel emailed Charging Party Counsel, advising of "a clarification regarding retirees."

On December 12, 2018, City Business Administrator Vaughn McKoy issued a letter to a representative of the New Jersey Division of Pension and Benefits, seeking "exceptions" to avoid "protracted litigation and associated costs." McKoy wrote that, "prescription coverage for all active and retired employees . . . should be carved out of the NJSHBP," acknowledging that current and past collective negotiations agreements may not allow for the change in prescription plans." He also wrote of a needed "carve out" for 667 police and fire retirees enrolled in "the Traditional, PPO and Aetna Medicare Advantage plans;" and for 65

retirees, ". . . who do not meet NJSHBP eligibility requirements."

Later on December 12, Charging Party police Counsel emailed City Counsel and the City Business Administrator that the Business Administrator's letter to the Division failed to identify "non-line-of-duty death survivor coverage with regard to active police and fire employees." Police Counsel also wrote of a needed commitment from the City to ". . . hold off active or retired police transfers into the NJSHBP until such time as all required carve outs are approved by the State."

On December 19, 2018, a representative of the New Jersey Division of Pension and Benefits issued a letter, denying the City's request to "carve out" [the requested] several categories of police and fire employees and retirees." (McKoy cert.).

Business Administrator McKoy certifies:

[I]f the City was precluded from transitioning into the NJSHBP on January 1, 2019 by virtue of the Charging Parties' instant application, City employees and retirees, not just police and fire, would be left without health insurance coverage for an unspecified period of time because the City was required to take action to terminate the prior insurance coverage and third party administrator. [cert. at p.3]

McKoy certifies that, ". . . the NJSHBP is equal to or better than the coverage provided by its prior self-insured plan, even though there are some differences in certain items." (cert. at p.3).

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain 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 Giora, 90 N.J. 126, 132-134 (1982); Whitmeyer 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 by an employer unilaterally. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975). For police and firefighters, the identity of the carrier is a permissive, not mandatory subject of negotiations. City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439, 400 (¶12195 1981). However, where changing the identity of the carrier effects terms and conditions of employment, e.g., the level of insurance benefits or the administration of the plan, an alterative carrier is a mandatory subject for negotiations. Ibid; Union Tp. and FMBA Local No. 46, FMBA Local No. 246 and PBA Local No. 69, I.R. No. 2002-7, 28

NJPER 86 (¶3031 2001), recon. den. P.E.R.C. No. 2002-55, 28 NJPER 198, 199 (¶33070 2002).

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 "equivalent" or "substantially equivalent" benefit plans. An employer will not be found to have acted unilaterally if the contract authorizes a particular change in health benefits. Camden Cty. College, P.E.R.C. No. 2008-67, 34 NJPER 254, 254-55 (¶89 2008); City of South Amboy, P.E.R.C. No. 85-16, 10 NJPER 511, 512 (¶15234 1984). The Designee in Camden Cty. College, I.R. No. 2008-18, 34 NJPER 104 (¶45 2008) (whose decision was not reconsidered on appeal to the Commission, as cited above), wrote:

The equivalence standard, as opposed to the "equal to" or "equal to or better than" standards, for example, allows some room for evaluating particular plan factors to determine whether the contractual standard has been maintained. Thus, the determination of whether [the new, unilaterally imposed health plan] is equivalent to [the former health plan] is a matter of contract interpretation and resolvable by an arbitrator after careful analysis of the elements comprising both plans in accordance with the negotiated contractual standard. [Id., 34 NJPER at 106]

The facts of this case are not uncontroverted, despite the specificity of certain benefit(s) shortfalls for active City employees in the NJSHBP, as set forth in Charging Parties' expert's October 25, 2018 cover letter and accompanying "Preliminary Summary Report of Benefit Deficiencies."

In another interim relief case regarding a unilateral change in carriers, thereby reducing the level of health benefits, Bridgeton Bd of Ed., I.R. No. 2006-8, 31 NJPER 315 (¶31 2005), the facts included a side-by-side comparison of the two plans and the Designee's legal determination that a public employer's contractual obligation to provide "substantially equivalent medical benefits" is not as rigorous as an obligation to provide "equivalent" medical benefits. In this case, I don't have the aid of a side-by-side comparison of the plans, notwithstanding the expert's conclusion that the plans are not "substantially equivalent." I agree with the Designee's assessment Camden Cty. College that "[substantial] equivalence" is a matter of contract(s) interpretation resolvable by an arbitrator. For these reasons, I find that the Charging Parties have not demonstrated a substantial likelihood of prevailing in a final Commission decision on its factual and legal allegations regarding unlawful diminutions of active employee medical and prescription benefits, a requisite element for granting interim relief.

Under interim relief standards, I am not persuaded that the added contractual protection in the PBA and SOA agreements (conditioning the City's change in carriers upon a determination of substantial equivalence by the charging party's expert) is mandatorily negotiable. Although police officers and firefighters may enter enforceable agreements over permissive subjects (i.e., the identity of a health insurance provider), it is not an unfair practice for an employer to refuse to negotiate before setting or changing permissively negotiable employment conditions. Paterson Police PBA Local No. 12 v. Paterson, 87 N.J. 78 (1981); Montclair Tp., P.E.R.C. No. 93-28, 19 NJPER 492 (¶23225 1992). Even if the report provided by the expert hired by the charging parties is not "subjective," it does not include an analysis of the actual level of benefits under the two plans. See Borough of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 194); Connecticut Light and Power Company, 476 F. 2d 1079, 82 LRRM 3121 (2d. Cir. 1973).

Finally, I deny the application for interim relief regarding retirees because they are not "employees" within the meaning of the Act, thereby depriving the Commission of jurisdiction over them. Union Tp.; IAFF Local 2081 (Sarapuchiello) P.E.R.C. No. 2009-47, 35 NJPER 66 (¶25 2009). A union may enforce a contract on behalf of a retired employee since it has a cognizable interest in ensuring that the terms of a collective negotiations

agreement are followed. New Jersey Turnpike Auth., P.E.R.C. No. 2006-12, 31 NJPER 284 (¶111 2005). The mechanism for enforcing the agreement is a grievance, not an unfair practice charge. Voorhees Tp., P.E.R.C. No. 2012-13, 38 NJPER 155 (¶44 2011), aff'd 39 NJPER 69 (¶27 App. Div. 2012).

The application for interim relief is denied. This case shall be processed through the normal unfair practice mechanism.


Jonathan Roth
Commission Designee

DATED: January 4, 2019