I.R. NO. 2021-12

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2021-085

NEWTON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by the Newton Education Association (Association), alleging that the Newton Board of Education (Board) violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a (1), and (5), when it unilaterally determined to change health insurance carriers from Horizon Blue Cross Blue Shield to AETNA effective January 1, 2021. The Association's application presented a case of first impression for the Commission arguing that the identity of insurance providers must be a mandatorily negotiable term and condition of employment as a matter of law.

The Designee determined that the Association had not established a substantial likelihood of prevailing in a final Commission decision or that substantial, immediate and irreparable harm would occur. Additionally, this was a matter of first impression for the Commission and material facts were in dispute. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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NEWTON EDUCATION ASSOCIATION,

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Appearances:

For the Respondent,
Weiner Law Group, LLP, attorneys
(Stephen J. Edelstein, of counsel)

For the Charging Party,
Oxfeld Cohen, attorneys
(Sanford R. Oxfeld, of counsel)

INTERLOCUTORY DECISION

The Newton Education Association (Association or NEA) filed an unfair practice charge accompanied by a request for interim relief on October 29, 2020. The charge alleges that the Newton Board of Education (Board) violated the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.4a (1) and (5),[1/] when it unilaterally determined to change health

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"; and "(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
(continued...)

insurance carriers during negotiations for the next collective negotiations agreement (CNA) from Horizon Blue Cross Blue Shield (Horizon) to AETNA, effective January 1, 2021.

The Association represents all Teaching Staff, Aides and Custodians employed by the Board. The most recent CNA between the parties expired on June 30, 2020.

The Association requests the following relief:

> a. An Order declaring that the Respondent has violated the Act.
> b. An Order requiring the Respondent to post that it has violated the Act.
> c. An Order requiring the Respondent to cease and desist from violating the Act.
> d. An Order requiring the Respondent to remain with the current health insurance carrier.
> e. An Order requiring the Respondent to negotiate with the Association over the identity of the health insurance carrier before changing carriers.
> f. All such other just and equitable relief.

The Association submitted a brief and a certification from John Ropars (dated October 28, 2020), a NJEA UniServ Field Representative (Ropars).

On October 30, 2020, I issued an Order to Show Cause with a return date via telephone conference call for November 10.

In response to the Association's application, the Board filed a brief; a certification with exhibits (dated November 6, 2020) from Dr. G. Kennedy Greene (Greene), the Superintendent of

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1/ (...continued)
refusing to process grievances presented by the majority representative."

the Board; a certification with exhibits (dated November 6, 2020) from Donna C. Snyder-DeVita (Snyder-DeVita), the Interim School Business Administrator and Board Secretary of the Board; and a certification with exhibits (dated November 6, 2020) from Stephen J. Edelstein, Esq., the attorney for the Board (Edelstein).

PRELIMINARY STATEMENT

This application for interim relief presents a novel argument and a matter of first impression for the Commission and the New Jersey Courts. The Association is essentially arguing that aside from the relevant CNA provisions between the parties regarding health insurance levels, the identity of insurance providers must be a mandatorily negotiable term and condition of employment as a matter of law.

This theory is based on several arguments: that public employees are required to contribute in part for their health benefits under P.L. 2011, c. 78; there is a significant financial and time consuming burden placed on the Association to investigate the differences between the existing carrier's plan and the new plan regarding the negotiated level of benefits; if the level of benefits is determined by the Commission to not meet the required standard in the parties' CNA, the remedy is for the employer to establish a fund to reimburse employees but not to revert back to the original plan - at that point, the burden is on the individual employee to maintain records in order to be potentially compensated from the fund and, as a result, may forgo

seeking needed medical treatment; and, finally, based on the "quid pro quo" theory of labor negotiations, the majority representative should have the ability to negotiate to determine how the economic package should be distributed if the employer is paying less for the new insurance.

FINDINGS OF FACT

The health insurance benefit levels that the Board is required to maintain when changing insurance providers is set forth in the parties' expired CNA and has two different levels: for the teaching staff, the new provider must provide for "substantially similar" benefits; for the custodians, the new provider must provide "equal to or better than" benefits. (Ropars cert., para. 7).[2/]

Ropars certifies that the parties participated in a private health insurance plan provided by Horizon. [Ropars cert., para. 3]. "During the course of negotiations, the Board advised the NEA that it would be changing providers for health insurance and would be switching to the School Employees Health Benefits Plan (SEHBP). The Board indicated it anticipated saving in excess of $150,000." (Ropars cert., para. 4).

The Association did not challenge the Board making such a change, since Horizon was the carrier for the plan options available to the members in the SEHBP, and, "Although in terms of

2/ Both the Association and Board are using the "equal to or better than standard."

the total cost of health insurance $150,000 was not a significant amount of money, the NEA assumed the change would benefit its members by having more money available for pay raises." (Ropars cert., para. 5).

Ropars further certifies, "However, mid-way through September, 2020, the Board said it had reconsidered going into the SEHBP, and instead decided to go into a different private plan, but would still be leaving Horizon. It would instead sign a contract with AETNA to provide health insurance." (Ropars cert., para. 6).

Based on P.L. 2011, Chap. 78, the members of the Association currently contribute approximately 22% of the total cost of health insurance in Newton. They contribute over $1 million annually. (Ropars cert., para. 9, para. 10).

Ropars certifies the following regarding the change to AETNA:

> The members of the NEA objected to the District unilaterally leaving Horizon and joining AETNA. Even a quick perusal of the list of participating doctors in the region caused immediate concern as a number of doctors who the members used when in Horizon were not available with AETNA. [Ropars cert., para. 11].
>
> Consequently, the Local President, Stephen Mull, at the direction of Ropars demanded to negotiate with the Board over the identity of the health insurance provided. He did so as the NEA pays a significant portion of the health insurance costs. And he did so recognizing that there might be less or no cost savings which could inhibit the Board's

ability to negotiate on certain other economic issues. [Ropars cert., para. 12].[3/]

Edelstein, on behalf of the Board, responded during the first week of October, and said both that the Board was refusing to enter into negotiations on the identity of the health insurance provider and that the Board would be making the unilateral decision to go with AETNA in the near future. [Ropars cert., para. 13].

3/ Several paragraphs and subparagraphs in the Ropars certification are written in the third person. New Jersey Court Rules require that affidavits and certifications in lieu of oath run in the first person. R. 1:4-4. Affidavits provides:

(a) Form. Every affidavit shall run in the first person and be divided into numbered paragraphs as in pleadings. The caption shall include a designation of the particular proceeding the affidavit supports or opposes and the original date, if any, fixed for hearing. Ex parte affidavits may be taken outside the State by a person authorized to take depositions under R. 4:12-2 and R. 4:12-3.

(b) Certification in Lieu of Oath. In lieu of the affidavit, oath or verification required by these rules, the affiant may submit the following certification which shall be dated and immediately precede the affiant's signature: "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment."

(c) Requirement for Original Signature. Every affidavit or certification shall be filed with an original signature, except that a copy of an affidavit or certification may be filed instead, provided that the affiant signs a document that is sent by facsimile or in Portable Document Format (PDF), or similar format, by the affiant and provided that the attorney or party filing the copy of the affidavit or certification files the original document if requested by the court or a party.

The Board's response to the above and the Association's position regarding negotiations are set forth in the Edelstein certification by emails exchanged between the parties.

> Annexed as Exhibit B is a copy of an email from Dr. Mull to Dr. Greene dated September 24, 2020:
>
> I understand that the board is contemplating changing insurance carriers and we want to negotiate with the board over the selection of the carrier. The Association no longer agrees that, given the large insurance contributions made by the employees towards the cost of insurance, that this choice should now be made unilaterally by the district. We are demanding that the parties negotiate over the selection of the carrier. [Edelstein cert., para. 3].
>
> Annexed as Exhibit C is a copy of the email dated September 29, 2020 which I sent to John Ropars, negotiator for the Newton Education Association:
>
> John - On September 24, Dr. Greene received an email from Mr. Mull re health insurance. The email said: "I understand that the board is contemplating changing insurance carriers and we want to negotiate with the board over the selection of the carrier. The Association no longer agrees that, given the large insurance contributions made by the employees towards the cost of insurance, that this choice should now be made unilaterally by the district. We are demanding that the parties negotiate over the selection of the carrier."
>
> I want to be clear about our position on this request. In the context of our larger negotiations for a new contract, health insurance and many other issues are on the table. However, outside of that context, and even while those CBA negotiations continue, the Board reserves and will, if it sees fit,

> exercise its prerogative to change carriers so long as the new coverage is equal to or better than the current coverage and it has provided the Association with reasonable back-up and a reasonable time to review. Here, that has all been done. So, Mr. Mull's "demand" that the Board negotiate over the selection of the carrier is rejected. Steve. [Edelstein cert., para. 4].
>
> Mr. Ropars responded the same day. A copy of his email to me, also dated September 29, 2020, is annexed as Exhibit D:
>
> Steve, I understand the district's position. That has been the long standing position on this issue, not just in Newton, but everywhere. However, as you know, that reasoning came to be when the district was paying the full cost of health insurance for the employees and dependents. That situation has changed significantly and since the employees now have skin in the game, in that they are contributing almost 25% of the cost of the coverage, more than a million dollars, we believe that the Association should have a say in who the carrier is going to be.
>
> We understand that the board is refusing to negotiate over this and we will act accordingly. John. [Edelstein cert., para. 5].

The Board provided information to the Association's leadership regarding the potential new plan:

> In August of this year, I communicated by email with Dr. Mull, the NEA President, about convening a meeting with NEA leadership concerning the new health insurance being considered by the Board. That meeting was to include the Board's insurance consultant, Integrity Consulting Group. [Greene cert., para. 3].
>
> The meeting was originally set up for August 26, 2020, but it did not take place on that

> date. Instead, it took place on September 17, 2020. [Greene cert., para. 4].
>
> There was definitely an opportunity at that meeting for the NEA leadership to ask questions about the new plan. [Greene cert., para. 5].

As part of its response, the Board provided the following certification and exhibits regarding the level of benefits of the incoming health and prescription plans:

> Integrity Consulting Group ("Integrity") is the Board's insurance consultant. [Snyder-DeVita cert., para. 3].
>
> Annexed as Exhibit A is a letter dated September 25, 2020 from Kevin M. Kroll, Chief Operations Officer of Benecard Services, LLC to Robert Maguire of Integrity. This letter was obtained by Mr. Maguire on behalf of the Board. In the letter, "Benecard guarantees that the benefit levels offered to the Newton Board of Education in the proposed Public Employer Benefits Trust Rx Alliance prescription program proposal are equal to the current benefit levels provided by Horizon BCBSNJ . . . ." [Snyder-DeVita cert., para. 4].
>
> Annexed as Exhibit B is a letter dated September 25, 2020 from Paul Laracy, Executive Director of the School Health Insurance Fund, to Mr. Maguire, also obtained on behalf of the Board. In the letter, Mr. Laracy states that "this letter shall memorialize that the plan of benefits contemplated in our proposal shall be equal to or better than the plan of benefits in place today." [Snyder-DeVita cert., para. 5].
>
> On behalf of the Board, and in conjunction with Mr. Maguire, I have also kept the Association and the staff apprised of information related to the new plans. See,

> Exhibits C and D. [Snyder-DeVita cert., para. 6].

Ropars' certification (at paragraphs 14/subparagraphs contained therein, 15 and 16)[4/] provides examples of other New Jersey boards of education, where he was the representative, that unilaterally changed health insurance plans that did not meet the required level of benefits in the CNAs and funds were ordered to be established by PERC or arbitrators, "In all instances, Ropars, as the NJEA Rep, basically replaces the school district's business administrator, as all questions and concerns from members about benefit level are directed to him. He has spent untold hours creating charts to track benefit levels." (Ropars cert., para. 14, first subpara.).

For the Board, Edelstein certifies the following regarding the above:

> The New Jersey Education Association website has an entire section on the services it provides its members in the areas of Pensions and Health benefits. A copy of those pages is annexed as Exhibit H. [Edelstein cert., para. 10].
>
> In addition, the New Jersey Education Association employs a full-time Associate Director in its Pensions and Benefits section. I know from personal experience that this gentleman, Michael Salerno, participates in analyzing comparative health plans. See, Exhibit I. [Edelstein cert., para. 11].

4/ Ropars' certification at paragraph 17 provides the Association's "quid pro quo" theory of labor negotiations.

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[5/] and that irreparable harm will occur if the requested relief is not granted; in certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. 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:

> [T]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited

5/ All material facts must not be controverted in order for the moving party to have a substantial likelihood of success before the Commission. Crowe at 133.

> 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 Commission set forth the standard for addressing unilateral changes in health benefits in Union Tp. and FMBA Local No. 46, FMBA Local No. 246 and PBA Local No. 69, I.R. No. 2002-7, 28 NJPER 86 (¶33031 2001), recon. den. P.E.R.C. No. 2002-55, 28 NJPER 198 (¶33070 2002):

> We begin with an overview of our approach to unilateral changes in health benefits. 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, 440 (¶12195 1981). However, where changing the identity of the 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. Ibid.
>
> In Borough of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984), we found that a unilateral change in insurance carriers violated the obligation to negotiate in good faith. The level of insurance benefits under the new plan was different from and, in certain important respects, lower than that previously provided. That certain benefits of the new plan were greater was irrelevant in determining that there was an unfair practice. Id. at 128. We ordered the employer to reimburse employees for any

financial losses incurred due to the change in carriers. In that case, no employees had to pay money up front under either plan, and we did not consider whether it would have been appropriate to require a return to the previous plan in the absence of a specific exception raising that point. Id. at 128, 130 n.5.

After Metuchen, we issued an important decision holding that a mere breach of contract does not amount to an unfair practice. State of New Jersey (Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Health benefit levels are often set by contract. One might have thought, after Human Services, that a unilateral change in the level of health benefits would be viewed as a mere breach of contract, not an unfair practice. City of South Amboy, P.E.R.C. No. 85-16, 10 NJPER 511 (¶15234 1984), however, clarified that we are not divested of our unfair practice jurisdiction simply because the employer asserts that the contract permits the unilateral action or because the unfair practice, if proved, may also breach the contract. Employees have a statutory right not to have health benefits unilaterally reduced when the employer changes carriers. As we said in South Amboy, a unilateral reduction in insurance protection which would affect every member of the negotiations unit is akin to an employer's decision to reduce wages unilaterally. Id. at 512. If proved, both would amount to a statutory violation.

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. Id. at 512.

The Commission similarly held in Rockaway Bor. Bd. of Ed., P.E.R.C. No. 2010-9, 35 NJPER 293 (¶102 2009) regarding the change in health insurance carriers:

> An employer's choice of health insurance carriers is not mandatorily negotiable so long as the negotiated level of benefits is not changed. City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439 (¶12195 1981). Where changing the identity of the carrier changes terms and conditions of employment, i.e., the level of insurance benefits, and the administration of the plan, it becomes a mandatory subject for negotiations. Bor. of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984). However, parties can agree to permit an employer to change carriers consistent with the collective negotiations agreement. See Camden Cty. College, P.E.R.C. No. 2008-67, 34 NJPER 254 (¶89 2008) (many contracts permit changes to equivalent or substantially equivalent benefit plans).

In the instant matter, the only statement that the Association has provided regarding the differences between the Horizon and AETNA plans is, "Even a quick perusal of the list of participating doctors in the region caused immediate concern as a number of doctors who the members used when in Horizon were not available with AETNA." [Ropars cert., para. 11].

The Board, however, provided evidence through both letters and other exhibits that indicate that the proposed AETNA plan and the proposed prescription benefits plan meet the standard negotiated by the parties in their CNA. With respect to the

AETNA plan, the Board provided, "this letter shall memorialize that the plan of benefits contemplated in our proposal shall be equal to or better than the plan of benefits in place today." [Snyder-DeVita cert., para. 5]. Regarding the prescription benefits level, the Board provided, "Benecard guarantees that the benefit levels offered to the Newton Board of Education in the proposed Public Employer Benefits Trust Rx Alliance prescription program proposal are equal to the current benefit levels provided by Horizon BCBSNJ . . . ." [Snyder-DeVita cert., para. 4]. The Board further provided documents regarding the proposed plans in Exhibits C (prescription plan benefits) and D (AETNA plan comparison to Horizon plan in pertinent part). [Snyder-DeVita cert., para. 6].

Based on the above, I find that there is a material factual dispute between the parties regarding the level of benefits set forth in their CNA.

Further, the Association's novel argument that the identity of insurance providers must be a mandatorily negotiable term and condition of employment as a matter of law, premised on their specific assertions as set forth above, appears to be a matter of first impression for the Commission based on the facts of this case and the legal authority cited by the parties and, as a result, should proceed to a plenary hearing to develop a full record. See City of Paterson, P.E.R.C. No. 2006-50, 32 NJPER 11

(¶5 2006); City of Newark, I.R. No. 2002-2, 27 NJPER 393 (¶32145 2001). Therefore, as set forth in Crowe, interim relief "should be withheld when the legal right underlying plaintiff's claim is unsettled." Id. at 133.

Additionally, it should be noted that the Association negotiated the last CNA with the Board that allows for the unilateral change in health insurance plans as long as the Board meets the level of benefits agreed to by the parties.

As set forth above, the change to the AETNA plan is currently scheduled to take effect but has not been implemented at this point.[6/] "Generally, the equitable relief of a preliminary injunction should not be entered except when necessary to prevent substantial, immediate and irreparable harm." Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997), citing Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 303-04 (E. & A. 1878). Since there has been no implementation, I cannot conclude that the Association is suffering or on the verge of suffering "substantial, immediate and irreparable harm" at this point.

The Association argues, citing Ferraiuolo v. Manno, 1 N.J. 105 (1948), that it is appropriate for an interim relief order in this case to protect the "res" until the Commission can decide

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6/ Although not in the record, the Board's attorney stated during oral argument that the AETNA plan was scheduled to take effect on January 1, 2021.

this matter (the "res" in this case would be requiring the Board to maintain the Horizon plan). Ferraiuolo is inapposite however, because that case involved a commercial lease for two complainants who ran a fruit and vegetable stand in the front of the defendant's store that he (the defendant) was attempting to close to use for his own business. The complainants showed that they were not able to relocate their business and would suffer irreparable harm by losing contracts, customers, and goodwill if the injunctive relief was not granted. Additionally, the Court found that the defendant's affidavits were deficient. Ferraiuolo at 108. In the instant matter, the Board's certifications and exhibits are not deficient and there is no evidence of substantial, immediate and irreparable harm. Further, the Horizon plan could be ordered to be reinstated if necessary by the Commission or the courts.

Given the heavy burden required for interim relief, I find that the Charging Party has not established a substantial likelihood of prevailing in a final Commission decision on their legal and factual allegations, a requisite element to obtain interim relief. Crowe.[7/] Additionally, I find that this is a matter of first impression for the Commission, material facts are in dispute and there is no evidence in the record to indicate

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7/ As a result, I do not need to conduct an analysis of the other elements of the interim relief standard.

that substantial, immediate and irreparable harm will occur. The application for interim relief is denied. Accordingly, this case will be transferred to the Director of Unfair Practices for further processing.

ORDER

IT IS HEREBY ORDERED, that the Charging Party's application for interim relief is denied and this matter will be returned to the Director of Unfair Practices for further processing.

/s/ David N. Gambert
David N. Gambert
Commission Designee

DATED: November 30, 2020
Trenton, New Jersey