I.R. NO. 2002-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK HOUSING AUTHORITY,

Respondent,

-and- Docket No. CO-2002-1

SKILLED TRADES ASSOCIATION, INC.,

Charging Party.

SYNOPSIS

The prescription drug plan applicable to unit employees provided for employees and their family to obtain prescription medications through their local pharmacy subject to a copay and annual maximum. Employees and their family members who required long-term drug therapy could also obtain those prescriptions through a mail order pharmacy, which did not require a co-payment and was not subject to an annual cap. On the basis of the Newark Housing Authority's reading of N.J.S.A. 17:48a-7i, it imposed the same co-pay and cap on prescription drugs obtained through the mail order pharmacy as through a local pharmacy. The Commission Designee found that the Authority's actions appeared to constitute a unilateral change in terms and conditions of employment during the course of on-going successor negotiations in violation of 5.4a(5) of the Act. The Designee issued an order restraining the Authority from unilaterally changing the prescription drug program.

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Appearances:

For the Respondent,
Samuel Manigault, Assistant Counsel

For the Charging Party,
Dr. Simon M. Bosco, Consultant

INTERLOCUTORY DECISION

On July 2, 2001, the Skilled Trades Association (Association) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Newark Housing Authority (Authority) committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) by violating N.J.S.A. 34:13A-5.4a(1), (3) and (5).[1/] The Association contends that the

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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. (3) Discriminating

Footnote Continued on Next Page

Authority has unilaterally changed terms and conditions of employment by imposing a co-pay and cap on certain prescriptions which previously had been filled without charge through the prescription drug plan's mail order pharmacy.

On July 18, 2001, the Association filed an application for interim relief seeking to enjoin the Authority from implementing a co-pay on prescriptions filled by the plan's mail order pharmacy. On July 20, 2001, an order to show cause was executed and a return date was scheduled for August 21, 2001. The Association submitted a brief, affidavit and exhibits in accordance with Commission rules. The Authority submitted no written response. Both parties argued orally on the return date. The following facts appear.

The Authority and the Association are parties to two collective negotiations agreements, both of which expired on March 31, 2001. The parties are currently engaging in negotiations for successor collective agreements. The Association, in separate negotiations units, represents all non-supervisory skilled maintenance trades persons and all supervisory maintenance trades persons employed by the Authority.

1/ Footnote Continued From Previous Page

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."

Under the Authority's prescription drug benefit program, unit employees were eligible to obtain prescription medications from local pharmacies subject to co-payments of $2.50 for generic medicines and $5 for "name brand" medications. Additionally, each unit employee was subject to a maximum annual limit of $1,000 and $4,000 per family for prescription medications filled at the local pharmacy. The prescription drug plan allowed employees and their family members requiring long-term drug therapy ("maintenance drugs") to order such drugs through a mail order pharmacy which was exempted from the annual maximums and co-pays. On or about June 15, 2001, the Authority's benefits manager issued a memorandum to unit employees indicating that all prescriptions filled by mail would be subject to the same annual maximum benefits as prescriptions filled by local pharmacies. The memorandum stated that the change was retroactive to April 1, 2001.

The Authority contends that it is constrained to impose the limitations on the mail order "maintenance drug" program in order to remain in compliance with N.J.S.A. 17:48A-7i, which provides, in part, as follows:

> a. Notwithstanding any other provision of law to the contrary, no group or individual medical service corporation contract which provides benefits for pharmacy services, prescription drugs, or for participation in a prescription drug plan, shall be delivered, issued, executed or renewed in this State or approved for issuance in this State on or after the effective date of this act, unless the contract:
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> * * *

> (4)(a) Provides that no subscriber shall be required to obtain pharmacy services and prescription drugs from a mail service pharmacy;
>
> (b) Provides for no differential in any copayment applicable to any prescription drug of the same strength, quantity and days' supply, whether obtained from a mail service pharmacy or a non-mail service pharmacy, provided that the non-mail service pharmacy agrees to the same terms, conditions, price and services applicable to the mail service pharmacy; and
>
> (c) provides that the limit on days' supply is the same whether the prescription drug is obtained from a mail service pharmacy or a non-mail service pharmacy, and that the limit shall not be less than 90 days.

The Authority contends that the statute requires that there be no differential in the level of benefits between that which an employee receives at a local pharmacy and that provided by a mail order pharmacy. The Authority further argues that the collective agreement is silent with respect to the level of prescription drug benefits and requires only that the level of benefits not be reduced. It further asserts that there is no express provision concerning the level of prescription drug benefits in the Authority's personnel manual. Consequently, the Authority argues that the parties must look to the contract between it and its insurance carrier to determine the appropriate level of benefits.

The Authority points to page 25 of the contract between it and the insurance carrier wherein it states:

> PAYMENT:
>
> a. Payment for Covered Charges for Prescription Drugs dispensed by a Pharmacy other than a Mail-Order Pharmacy:

> 1. Payment is limited to a maximum of $1000 per Benefits Period. $1000 per Covered Person and $4000 aggregate per family-type Policy.

The Authority argues that the collective agreement, the personnel manual and the contract between it and the insurance carrier must be read together. It contends that the specific language setting a limit on the level of prescription drug benefits contained in the contract between the Authority and the insurance carrier, quoted above, gives definition to the vague language contained in the collective agreement and personnel manual and is determinative when N.J.S.A. 17:48A-7i is considered. Thus, the Authority asserts that since the statute requires that there be no differential in the level of benefits, and the collective agreement and personnel manual are silent with respect to the level of benefits, the contract between the Authority and the insurance carrier define the level of benefits and requires that the same cap which applies to employees obtaining drugs through a local pharmacy must equally apply to prescriptions obtained through the mail order pharmacy.

The Association contends that N.J.S.A. 17:48A-7i applies to health maintenance organizations and does not apply to the Authority, its prescription drug insurance carrier or unit employees. Consequently, the Association asserts that the undisputed past practice which provides for no limit or co-pay for employees or their families obtaining "maintenance drugs" from mail order pharmacies cannot be unilaterally changed without prior negotiations.

Additionally, the Association asserts that page 24 of the contract between the Authority and the insurance carrier expressly provides for co-payments for covered charges for prescription drugs dispensed by a pharmacy other than a mail order pharmacy at $2.50 for generic prescription drugs and $5 for "brand-name" drugs and, further, expressly provides for no co-payment for covered charges for prescription drugs dispensed by a mail order pharmacy. Thus, the Association contends that the insurance contract does not require a cap and co-pay for medications obtained through a mail order pharmacy, nor does it lend definition to the level of prescription drug benefits for unit employees.

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 Authority contends that N.J.S.A. 17:48A-7i prohibits a differential in the level of benefits provided to employees obtaining prescription drugs from local pharmacies versus mail order

pharmacies. A plain reading of the statute may support the Authority's contention.2/ However, I do not agree with the Authority's contention that when the contract between it and its insurance carrier is read together with the collective agreements, personnel manual and the statute, one is lead to conclude that the Authority is authorized to unilaterally implement a cap and co-pay for prescription drug benefits for unit employees using the mail order pharmacy. It appears that the Authority has the option to maintain the level of benefits in effect prior to the issuance of the June 15, 2001 memorandum, albeit at a higher insurance premium or through self-insurance. The critical point here is that the Authority was faced with alternative courses of action, both of which would have achieved compliance with the alleged statutory mandate to eliminate any difference between the level of prescription drug benefits provided to employees on the basis of whether the medication was dispensed from a local or mail order pharmacy. Accordingly, I find that the Authority's unilateral determination to modify the past practice and reduce the level of prescription drug benefits without negotiating with the Association appears to violate 5.4a(5) of the Act. Consequently, I find that the Association has shown that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations.

2/ The parties have not cited any Court cases interpreting N.J.S.A. 17:48A-7i, nor has my own research disclosed any cases.

The parties are currently engaged in collective negotiations for a successor agreement. A unilateral change in terms and conditions of employment during any stage of the negotiations process has a chilling effect on employee rights guaranteed under the Act and undermines labor stability. Galloway Tp. Bd. of Ed. v. Galloway Tp. EA, 78 N.J. 25 (1978). Such chilling effect undermines the Association's ability to represent its members effectively and results in irreparable harm.

Considering the public interest and the relative hardship to the parties, I find that the public interest is furthered by adhering to the tenets expressed in the Act which require the parties to negotiate prior to implementing changes in mandatorily negotiable terms and conditions of employment. Maintaining the collective negotiations process results in labor stability and promotes the public interest. In assessing the relative hardship to the parties, I find that the scale tips in favor of the Association. While the Authority may be required to bear some additional cost by returning to the status quo ante, it has submitted no documents which indicate that it is unable to maintain such status quo. Moreover, during oral argument, it appears that few, if any, unit employees have breached the cap imposed pursuant to the June 15, 2001 memorandum. Thus, such additional costs appear to be minimal especially when compared to the potential hardships imposed upon affected employees by the newly imposed coverage cap and co-pay for maintenance drugs. Further, the Association will

suffer irreparable harm as the result of a unilateral change in a term and condition of employment during the pendency of collective negotiations.

Thus, the Association's request for interim relief is granted. This case will proceed through the normal unfair practice processing mechanism.

ORDER

The Authority is restrained from implementing the memorandum issued June 15, 2001. The Authority is ordered to immediately reinstitute the terms of the prescription drug program in effect prior to the issuance of the June 15, 2001 memorandum and make all affected unit employees whole for any demonstrable costs incurred as the result of the change in the prescription drug program implemented pursuant to the June 15, 2001 memorandum. This interim order will remain in effect pending a final Commission order in this matter.

Stuart Reichman
Commission Designee

DATED: August 30, 2001
Trenton, New Jersey