P.E.R.C. NO. 2010-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

COUNTY OF BURLINGTON,

Respondent,

-and- Docket No. CO-2009-317

POLICEMAN'S BENEVOLENT ASSOCIATION,
LOCAL 249,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies Policeman's Benevolent Association, Local 249's motion for reconsideration of I.R. No. 2009-25, 35 NJPER 167 (¶63 2009). In that decision, a Commission designee denied an application for interim relief submitted by the PBA with an unfair practice charge it filed against the County of Burlington. The PBA argues that the designee applied the wrong legal standard because he acknowledged during the interim relief hearing that the PBA was likely to succeed on the merits, but denied relief because the PBA had not established a "substantial likelihood" of success on the merits. The Commission finds that the designee applied the correct standard and denies reconsideration finding that the PBA did not allege any new evidence and only argued that the Commission designee applied too stringent a standard in denying its application.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Charging Party.

Appearances:

For the Respondent, Capehart & Scatchard, attorneys (Alan Schmoll, of counsel)

For the Charging Party, Mets, Schiro & McGovern, LLP, attorneys (Kevin McGovern, of counsel)

DECISION

Policeman's Benevolent Association, Local 249 seeks reconsideration of I.R. No. 2009-25, 35 NJPER 167 (¶63 2009). In that decision, a Commission designee denied an application for interim relief submitted by the PBA with an unfair practice charge it filed against the County of Burlington. The PBA argues that the designee applied the wrong legal standard. We disagree and deny reconsideration.

The PBA's unfair charge alleges that the County violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et

seq., specifically 5.4a(1), (3), and (5),[1/] when it terminated the health benefits of correction officer Jennifer Michinski. The charge further alleges that the action against Michinski represented the County's unilateral implementation of a negotiations proposal that the PBA had rejected calling for the termination of benefits for employees on suspension or unpaid status for more than 10 days in a month. The PBA alleges that the policy was implemented after the expiration of the parties' most recent collective negotiations agreement and during the course of negotiations for a new agreement. The PBA sought an order restoring Michinski's benefits and requiring the County to negotiate over related terms and conditions of employment.

The Commission designee heard the parties arguments on April 28, 2009 and issued a decision on the record at the end of the hearing. On May 8, he memorialized that decision in a written opinion. I.R. No. 2009-25. In his written decision, the designee declined to restrain the County from ending Michinski's benefits, but ordered that:

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 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. . . ."

> [T]he County shall not discontinue Michinski's coverage which was in effect on April 28, 2009, until the effective date established by the County in a reasonable advance written notification of [health benefits] termination which also advises Michinski of her COBRA rights.[2/]

The background of the dispute and the designee's reasoning are contained in his written decision. Applying the standards for the issuance of interim relief, the designee referred to a principle established by Commission and Court decisions that a unilateral change by an employer in a term and condition of employment during the course of negotiations for a new agreement constitutes irreparable harm. 35 NJPER at 63.

However, the designee found that it was not clear that the action taken by the County deviated from language in the parties' most recent agreement. Referring to his oral decision at the end of the April 28, 2009 hearing, the designee wrote:

> I found I was unable to conclude that there was a substantial likelihood that the PBA would prevail on the merits of the case. Consequently, I denied the application to restrain the County from terminating Michinski's health coverage, but to avoid undue hardship to her and in the interest of fundamental fairness, I directed the County not to abruptly terminate her coverage, but to give her reasonable advance notice of a termination date and her COBRA rights.
>
> [35 NJPER at 169]

2/ COBRA is an acronym for the "Consolidated Omnibus Budget Reconciliation Act." It allows individuals to continue health coverage on a self-paid basis after losing coverage under an employment-related health plan.

The PBA argues that reconsideration is appropriate because the designee acknowledged during the interim relief hearing that the PBA was likely to succeed on the merits, but denied relief because the PBA had not established a "substantial likelihood" of success on the merits. At the hearing, the designee stated:

> I cannot conclude based on the arguments and looking at these regular contract and also the health care coverage language . . . and listening . . . to the arguments of the parties, I can't conclude that there is a substantial likelihood of success on the merits of this charge to require an interim order that the payment of the health benefits will continue. I can only conclude that there is a likelihood, but that isn't the standard.
>
> [Tr. 43-7 to 43-15]

The PBA asserts that the designee's analysis of the standard for success on the merits conflicts with the legal authority cited in his decision.[3/] It asserts that those cases do not require a "substantial likelihood of success on the merits" and accordingly the designee erred by holding the PBA to that required showing.

The PBA also argues that we granted reconsideration in an analogous case, Franklin Tp., P.E.R.C. No. 2006-103, 32 NJPER 135

3/ 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).

(¶102 2006), reconsidering I.R. No. 2006-19, 32 NJPER 135 (¶62 2006), and granted interim relief even though the designee found that the charging party had not shown that it was "substantially likely" that the employer had violated existing terms and conditions of employment. 32 NJPER at 137.

The County responds that the designee properly applied the "substantial likelihood" of success on the merits standard. It cites City of Passaic, P.E.R.C. No. 2004-50, 30 NJPER 67 (¶21 2004) and North Hudson Regional Fire and Rescue, P.E.R.C. No. 2008-61, 34 NJPER 113 (¶48 2008), cases in which we cited the "substantial likelihood" standard in refusing to reconsider interim relief decisions.

City of Passaic, 30 NJPER at 67, describes the limited circumstances in which we will reconsider a Commission designee's interim relief ruling:

> In rare circumstances, a designee might have misunderstood the facts presented or a party's argument. That situation might warrant the designee's granting a motion for reconsideration of his or her own decision. However, only in cases of exceptional importance will we intrude into the regular interim relief process by granting a motion for reconsideration by the full Commission. A designee's interim relief decision should rarely be a springboard for continued interim relief litigation.

In rendering his oral decision, although the designee differentiated between a "likelihood" and a "substantial likelihood" of success on the merits of the charge, he properly

applied the latter standard. Although the lead New Jersey court case on injunctive relief, Crowe v. De Gioia, does not use "substantial likelihood," the courts have recognized that the Crowe standard is similar to that standard. 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). In addition, "substantial likelihood" is the standard we have consistently used in considering interim relief applications. We therefore conclude that this is not a case of exceptional importance warranting the extraordinary action of reconsidering an interim relief ruling.

Franklin Tp. is distinguishable. There, the Commission designee found that the charging party had not shown that it was substantially likely the employer had overstepped its contractual discretion with regard to health benefit options. However, he ordered that documents describing new medical care options be made available to the charging party. When the charging party sought reconsideration, the documents detailing changes in medical coverage that had been produced pursuant to the designee's order, were supplied to us with the application for reconsideration. Thus, we were able to review information that had not been supplied to the designee. We stated:

> The initial evidence submitted to the designee, combined with the evidence gathered

> from the plan documents submitted to the PBA pursuant to the designee's initial order, convinces us that the PBA has a substantial likelihood of proving that the Township violated the Act by unilaterally decreasing the level of health benefits.
>
> [32 NJPER at 102]

Here, the charging party does not allege that any new evidence, not presented at the time of its initial application for interim relief, is before us. It simply argues that the Commission designee applied too stringent a standard in denying its application. That claim does not warrant reconsideration, especially as the standard applied by the designee was correct.

ORDER

Reconsideration is denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed. Commissioner Colligan recused himself.

ISSUED: November 24, 2009

Trenton, New Jersey