

P.E.R.C. NO. 2017-58

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF BURLINGTON,

Respondent,

-and-

Docket No. CO-2009-317

POLICEMEN'S BENEVOLENT ASSOCIATION,  
LOCAL 249,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts the Hearing Examiner's report and recommended decision dismissing a complaint alleging 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), by unilaterally implementing a collective negotiations proposal and unlawfully terminating the health insurance benefits of a unit employee. The Commission finds that the PBA did not satisfy its burden of demonstrating that there was a change in a term and condition of employment because the record establishes that the employee was not treated differently from other similarly situated employees. The Commission also finds that the County's negotiations proposal was not connected to its treatment of the employee.

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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Appearances:

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

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

DECISION

This case is before the Commission on exceptions filed by Policemen's Benevolent Association, Local 249 (PBA) to the Report and Recommended Decision of a Commission Hearing Examiner, H.E. No. 2016-20, 42 NJPER 526 (¶147 2016). The Hearing Examiner recommended that the Commission dismiss the PBA's charges that the County of Burlington (County) violated the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.4a(1), (3), and (5)<sup>1/</sup>. The Hearing Examiner concluded

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<sup>1/</sup> 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  
(continued...)

that the PBA failed to prove that the County unilaterally implemented a collective negotiations proposal (that was rejected by the PBA) and unlawfully terminated the health insurance benefits of a unit employee. He reasoned that the PBA did not show that ending the employee's benefits was a change in a mandatorily negotiable term and condition of employment as he found that the County had treated other similarly-situated employees in the same manner.

On March 26, 2013, Hearing Examiner Tim Averell conducted a one-day evidentiary hearing. He was unable to continue in the case, and the matter was reassigned to Hearing Examiner Jonathan Roth. At the parties' request, Hearing Examiner Roth agreed to conduct a new evidentiary hearing. However, the parties later agreed that they would submit the case to Hearing Examiner Roth for decision based upon a stipulated record that included the transcript of the March 26 hearing and certain exhibits. The parties' stipulation included an acknowledgment that to the extent the stipulated record was insufficient to sustain the

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1/ (...continued)  
regard to hire or tenure of employment to encourage or discourage 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 refusing to process grievances presented by the majority representative."

Association's burden of proof by a preponderance of the evidence, the Complaint was subject to dismissal.

On April 22, 2016, following the close of the record and receipt of post-hearing briefs, Hearing Examiner Roth issued his Report and Recommended decision, which concludes that the complaint, based upon the PBA's unfair practice charges, should be dismissed because the PBA did not meet its burden of proving:

- That the County's termination of employee Jennifer Michinski's health care coverage unilaterally changed a term and condition of employment; and
- That the County "unilaterally implemented" its February 23, 2009 negotiations proposal to end health benefit insurance of suspended unit employees or those on unpaid status.

On May 13, 2016, in accordance with extensions of time, the PBA filed exceptions. On June 22, the County, in accordance with extensions of time granted, responded to the PBA's exceptions. The PBA was granted leave to file a reply brief and did so on July 15. The matter is now before the Commission to adopt, reject or modify the Hearing Examiner's recommendations.

We begin by summarizing the Hearing Examiner's findings of fact, which are based on the testimony adduced at the hearing, the parties' stipulations, and exhibits admitted into evidence. The findings are set forth at H.E. No. 2016-20 at pp. 3 to 25.

The applicable collective negotiations agreement signed by the parties covering corrections officers has a term of January 1, 2005 through December 31, 2008.

Article IV (Health Benefits) provides, inter alia:

1. Coverage will take effect for full time employees (30 or more hours per week) after three (3) months of service.<sup>2/</sup>
2. For employees who have exhausted sick leave and are on an approved leave of absence without pay, health coverage (including dependent coverage) will continue for an additional 90 days.
3. Where a leave continues beyond 90 days coverage will be terminated, but the employee will be eligible for coverage under rules applicable to the Consolidated Omnibus Budget Reconciliation Act (COBRA).
4. Upon returning to work, coverage will be reinstated effective the first of the month following the date of return.

Article VIII of the CNA addresses worker's compensation benefits and provides in relevant part:

Employees who are temporarily or permanently disabled from a work related injury/illness will be covered under worker's compensation law and will receive a leave of absence for the duration of the disability.

The Hearing Examiner made these findings, which we condense here, concerning the employment history and leaves of absence of corrections officer Jennifer Michinski:

- Jennifer Michinski was hired as a corrections officer on March 31, 2003, working 40 hours per week and is in the PBA unit. She received, but did not review, the County health benefits plan.
- In the Fall of 2004, Michinski was approved for leave under the federal Family and Medical Leave Act until March, 2006, when she returned to work.

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<sup>2/</sup> All correction officers are full-time.

She continued to receive health care coverage for the first 90 days of that leave, pursuant to Article IV of the 2005-2008 CNA.

- In July, 2007, Michinski fell from a chair that broke under her at work, causing a back injury. She was out of work until December 23, 2008. While receiving workers compensation benefits until June 2008, the County continued her health insurance.
- Michinski went on an unpaid leave of absence from June 12 to September 30, 2008 with County health insurance benefits as per the CNA. On October 1 the County discontinued Michinski's health care coverage, because her leave exceeded 90 days.
- Michinski remained on an approved leave without health coverage through December 23, 2008 when she reported for work after a County physician cleared her for duty. On January 1, 2009, Michinski's health insurance benefits were reinstated.
- But, on January 2, 2009, a County physician filed a supplemental medical report stating that she could not fully perform correction officer duties.
- Michinski was placed on light duty until January 13, 2009, when she was suspended from employment and advised that she was medically unfit for duty because she was restricted from lifting anything over thirty-five pounds. After a hearing, the County determined that Michinski was ". . . physically unable to perform the duties of a corrections officer."
- On February 23, 2009, the County advised Michinski: (1) due to reduced work hours, her health insurance was terminated as of January 31, 2009; (2) how to maintain health insurance coverage through COBRA; and (3) to contact the benefits office to reinstate County benefits on returning to work.

The Hearing Examiner's 40-page Report and Recommended Decision has extensive references to testimony and documentary

evidence, which we need not fully repeat here. He recommends the dismissal of the Complaint issued on the PBA's unfair practice charge for the reasons discussed therein. His critical conclusions are: that the PBA did not satisfy its burden of demonstrating that the County's treatment of Michinski violated the parties CNA; was inconsistent with how the County treated similarly situated employees; and that the rejection of the County's negotiations proposal by the interest arbitrator showed that the County had unilaterally changed a term and condition of employment.

The PBA has filed these exceptions:

1. The Hearing Examiner's conclusion that the County had a past practice of terminating health benefits for employees suspended for more than 10 days is inconsistent with the factual record, and Commission cases.
2. There was no past practice of terminating health coverage to employees suspended for more than 10 days because the County's contract was not "clearly enunciated," "readily ascertainable," or "agreed to" by the PBA.
3. The Hearing examiner held that the PBA had notice of health care plan eligibility requirements and of each instance of unit employee suspension(s) from work. He concluded that the PBA should have known or inquired of the possibility that the length of certain suspensions or periods of "unpaid" status of unit employees could result in a loss of health insurance benefits. The PBA asserts that this conclusion is not supported by the record. The PBA also asserts that, as a matter of law, the Hearing Examiner should not have imputed knowledge to the PBA.

4. The PBA did not waive its right to negotiate over the termination of health care benefits as to members who were suspended for more than 10 days. Any waiver ended when the PBA rejected the County's proposal on February 25, 2009.

The County makes these points in response to the PBA's exceptions:

1. As the Hearing Examiner found that the PBA did not show that the termination of Michinski's health coverage changed a term and condition of employment, the County was not required to establish a "past practice" defense.
2. The termination of Michinski's health coverage was consistent with the terms of the plan (J-5) that was distributed to all collective negotiations unit members and majority representatives in 2007, including the PBA President, who voiced no objection.<sup>3/</sup>
3. The termination of Michinski's health coverage was not inconsistent with the terms of the most recent PBA-County CNA. The contract refers to the Plan (J-5) and is silent on the issue of termination of benefits, a subject addressed by the Plan.
4. There is no relationship between the termination of Michinski's health coverage and the County's proposal made during collective negotiations to place into the CNA specific language addressing health benefit termination.

The PBA's argument rests on its claim that the termination of Michinski's health coverage was a departure from an established past practice and was a unilateral change in a mandatorily negotiable term and condition of employment.

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<sup>3/</sup> The County supports its contention with citations and quotes to specific testimony by both PBA and County officials, which was either credited by the Hearing Examiner or not rebutted.



We have reviewed the record, the Hearing Examiner's findings of fact and conclusions of law, including his determination that the PBA did not satisfy its burden of demonstrating that there was a change in a term and condition of employment. We adopt his findings of fact. We also adopt his legal conclusions.<sup>4/</sup> The record establishes that Michinski was not treated differently from other similarly situated employees and that the County's proposal during collective negotiations and interest arbitration was not connected with its treatment of Michinski.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau and Voos voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Eskilson recused himself. Commissioner Wall was not present.

ISSUED: April 27, 2017

Trenton, New Jersey

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<sup>4/</sup> We also agree that the Hearing Examiner's recommendation is not inconsistent with prior Commission decisions discussed in his report. H.E. No. 2016-20 at 36-38.