

P.E.R.C. NO. 2001-75

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF CLOSTER,

Respondent,

-and-

Docket No. CO-2001-208

CLOSTER PBA LOCAL NO. 233,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants the request of Closter PBA Local No. 233 for reconsideration of I.R. No. 2001-11. In that decision, a Commission designee denied the PBA's application for interim relief. The application was filed along with an unfair practice charge alleging that the Borough of Closter violated the New Jersey Employer-Employee Relations Act by changing health benefits without negotiations. The Commission finds that there are no extraordinary circumstances warranting revisiting the designee's ruling concerning whether a change occurred during the collective negotiations process based on the facts presented to her. However, the Commission believes that extraordinary circumstances warrant reconsideration of the ruling that the PBA had not established that the employees would be irreparably harmed by the change in prescription benefits. The Commission finds that the employer has not identified any specific harm to it from restoring the status quo and that the hardship that employees may suffer far outweighs any hardship to the employer. The Commission orders the employer to create an interim program that guarantees that employees have funds available to them to pay the up-front costs of prescription drugs during the pendency of this litigation.

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, Breslin & McNerney, attorneys
(Michael J. Breslin, of counsel)

For the Charging Party, Loccke & Correia, attorneys
(Michael A. Bukosky, of counsel)

DECISION

On May 18, 2001, Closter PBA Local No. 233 moved for reconsideration of I.R. No. 2001-11, 27 NJPER 225 (¶32077 2001). In that decision, a Commission designee denied the PBA's application for interim relief. The application was filed along with an unfair practice charge alleging that the Borough of Closter violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3), (5) and (7),^{1/} by changing health benefits without negotiations.

^{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

The parties filed briefs and affidavits. Oral argument was postponed until May 3, 2001 pending settlement discussions that proved unsuccessful.

On May 9, 2001, the designee denied interim relief. I.R. No. 2001-11. She found that the PBA had not established that the parties were in negotiations when the Borough changed insurance carriers on March 1, 2001. She therefore concluded that the PBA had not established a chilling effect on negotiations. She further found that the PBA had not established that employees were irreparably harmed by a change in the prescription drug plan from one where employees presented a card and paid 20% of the cost of the prescription to one where employees must pay the full cost of the prescription up front and then be reimbursed within eight business days for 80 or 90% of the cost. The designee stated that an affidavit from the PBA's president speculated that it was likely that members would forego filling expensive prescriptions because of the up-front expenditure, but that the PBA did not establish that employees will be denied access to needed medications because they

1/ Footnote Continued From Previous Page

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. (7) Violating any of the rules and regulations established by the commission."

are unable to purchase medications. She noted that money damages do not constitute irreparable harm.

The PBA argues that the designee erred in finding that the parties are no longer in negotiations. It asserts that while the parties have entered into a memorandum of agreement, that memorandum is subject to ratification and until a final agreement is executed, the parties are still in the negotiations process. It further argues that the designee erred in requiring that harm actually occur before interim relief is appropriate. It asserts that it was not required to show that a member, or a family member, has already been harmed by medical trauma due to a lack of a prescription drug and that the harm in this case cannot be addressed by monetary damages.

Unilateral changes in health benefits violate the obligation to negotiate in good faith. City of South Amboy, P.E.R.C. No. 85-16, 10 NJPER 511 (¶15234 1984); Borough of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984). If a change occurs during contract negotiations, the harm is exacerbated. Galloway Tp. Bd. of Ed. v. Galloway Tp. Teachers Ass'n, 78 N.J. 25, 48-49 (1978). Unilateral changes, even during the ratification process, can shift the balance of power in the collective negotiations process. Such changes are unlawful and, where appropriate, will be rescinded if the standards for obtaining interim relief have been met. In addition, N.J.S.A. 34:13A-21 prohibits changes in wages, hours and other conditions of employment during the pendency of proceedings before an interest arbitrator.

To obtain interim relief, a charging party must first demonstrate that it has a substantial likelihood of success on the merits. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982). This employer unilaterally changed prescription drug coverage by requiring employees to pay for drugs up front and then seek reimbursement. The employer does not dispute that fact. Therefore, the PBA has met its initial burden.

To obtain interim relief, a charging party must also demonstrate that irreparable harm will occur if the requested relief is not granted. Crowe. Whether a unilateral change in health benefits occurs during collective negotiations or interest arbitration, or during the term of a contract often changes whether the inquiry about irreparable harm focuses on the negotiations process or the individual employees.

A unilateral change in health benefits during the collective negotiations or interest arbitration process can destabilize and irreparably harm that process. But it is not clear to us that the charging party proved to the designee that the change occurred during negotiations or the pendency of proceedings before the interest arbitrator. The unfair practice charge and the brief in support of interim relief both state that the parties were subject to an agreement effective until March 2004. The possibility that one or both parties may not have ratified the memorandum of agreement was raised during this motion, as was the possibility that the parties agreed that the interest arbitrator would retain

jurisdiction pending execution of a final agreement. But it does not appear that the PBA established to the designee that the change occurred during collective negotiations at a point where it could have harmed the collective negotiations process. There are no extraordinary circumstances warranting our revisiting the designee's ruling based on the facts presented to her.

Assuming, as the designee did, that the parties had entered into a binding memorandum of agreement, we note that a unilateral change in the prescription drug program could nevertheless irreparably harm unit employees.^{2/} We therefore next ask whether there are extraordinary circumstances warranting our reconsideration of the designee's ruling that the PBA had not established that the employees would be irreparably harmed by the change in prescription benefits. We believe that there are. Employees will likely be harmed if the prescription program is not restored during this litigation. Prescription drugs are often very costly and having to pay these costs up front may well induce employees to forego or delay purchasing medically necessary drugs. The substantial costs associated with prescription drugs has changed the type of harm an employee may suffer from mere monetary damages to losing access to necessary medications. This is so where a prescription plan is

^{2/} A mid-contract repudiation can also undermine a collective negotiations agreement and therefore the collective negotiations process.

terminated, see Hillside Tp., I.R. No. 99-22, 25 NJPER 315 (¶30135 1999), and also, we believe, in a case like this where employees are required to pay 100 percent, rather than 20 percent, of the cost of a prescription up front.

Finally, in deciding whether to grant interim relief, the relative hardship to the parties must be considered, and a determination made that the public interest will not be injured by an interim relief order. Crowe. The employer has not identified any specific harm to it from restoring the status quo. The hardship that employees may suffer far outweighs any hardship on the employer resulting from an order requiring it to ensure that employees are not bearing the full cost of prescriptions, even for a limited time. Nor would granting interim relief harm the public interest.

Given the undisputed unilateral change in the prescription drug plan, the absence of any asserted harm to the employer or the public interest, and the potential harm to employees and their families, we believe that it is appropriate to order the employer to guarantee that employees will have funds available to them to pay the up-front costs of prescriptions drugs during the pendency of this litigation. We will not order the employer to enter into a different plan at this time. We will simply issue this order which we believe protects the employees from any possible harm.

ORDER

Reconsideration is granted. The Borough of Closter is ordered to create an interim program that guarantees that employees have funds available to them to pay the up-front costs of prescription drugs during the pendency of this litigation. This interim order will remain in effect pending a final Commission order in this matter.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Madonna abstained from consideration.

DATED: June 28, 2001
Trenton, New Jersey
ISSUED: June 29, 2001