

I.R. NO. 2010-24

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF UNION CITY,

Petitioner,

-and-

Docket No. SN-2010-085

PATROLMEN'S BENEVOLENT ASSOCIATION,
LOCAL 8 AND SUPERIOR OFFICERS'
ASSOCIATION, LOCAL 8A

Respondents.

SYNOPSIS

A Commission Designee denies the application of the City of Union City for a temporary restraint of arbitration of identical grievances filed by Patrolmen's Benevolent Association, Local 8 and the Superior Officer's Association, Local 8A. Both grievances allege that the City violated negotiated agreements and past practices when it raised the amount of prescription co-pays of previously retired police officers. The designee concludes that, based on prior cases, the Commission is substantially likely to hold that a grievance filed by a majority representative to seek adherence to the terms of agreements it negotiated that were in effect when the officers retired, is legally arbitrable.

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Appearances:

For the Petitioner, O'Toole, Fernandez, Weiner, Van
Lieu, attorneys (Juan C. Fernandez, of counsel, Kenneth
B. Goodman on the brief)

For the Respondents, Oxfeld Cohen, attorneys
(Sanford R. Oxfeld of counsel, Randi Doner
April on the brief)

INTERLOCUTORY DECISION

On April 27, 2010, the City of Union City petitioned for a
scope of negotiations determination, and submitted an application
for interim relief. The City sought to temporarily restrain a
July 29, 2010 arbitration hearing on grievances filed by
Patrolmen's Benevolent Association Local 8 and Superior Officer's
Association Local 8A pending a final determination by the
Commission on its petition. The grievances allege that the City
violated its contracts with the Local 8 and Local 8A, as well as
past practices, by increasing the prescription drug co-pays for
already retired police officers.

On May 13, 2010, acting as Commission Designee pursuant to N.J.A.C. 19:14-9.2(d), I executed an Order to Show Cause setting a return date for the City's application. The parties filed briefs, exhibits and certifications.^{1/} On June 2, a hearing was conducted by means of a telephone conference call. After hearing the parties' arguments, I orally denied the application for temporary restraints of arbitration of the grievances.

Local 8 represents rank-and-file police officers and Local 8A represents superior officers.^{2/} The City-Local 8 and City-Local 8A collective negotiations agreements are effective from January 1, 2008 through December 31, 2012. The grievance procedures end in binding arbitration. Article XIX.3.e of the City-Local 8A agreement sets prescription co-pays for retirees and differentiates between officers retiring before January 1, 1998. Article XXVI.3.e of the City-Local 8 contract provides

1/ Local 8 and Local 8A have filed certifications from three retirees: one who retired in 1995 as a Patrolman; another who retired as an Inspector in 2003; and a Detective who retired in 2004 who had been the Local 8's President from 1993 to 1998.

2/ When originally filed, the petition only sought to restrain a grievance filed by Local 8. During the hearing I was informed by the parties that an identical grievance was being pursued to arbitration by Local 8A. Accordingly, I permitted an amendment to the petition to add Local 8A as a respondent and allow the City's application to seek restraints of arbitration of both grievances. The parties also referred to recently filed actions concerning changes in co-pays for active officers represented by Local 8 and Local 8A, but the City's petition and this determination does not include those claims.

that generic drugs are free to retirees, and sets a \$5.00 co-pay for name brand medications.

Local 8 and Local 8A allege that the contracts require that prescription drug co-pays for retirees remain at the level in force when the officer retired and that past practice has been that the retirees' co-pays are frozen at that level, irrespective of any later changes that might affect active employees.

During late November or early December 2009, the City increased prescription drug co-pays for retired officers to \$5.00 for generic drugs and \$10.00 for name brands.^{3/}

On March 26, 2010, an unfair practice charge filed by Local 8 and Local 8A was dismissed on the grounds that officers who had already retired were not employees within the meaning of the Act and the Commission lacked jurisdiction over those charges. However, the letter issued by the Director of Unfair Practices stated that a remedy might lie elsewhere and cited an unreported appellate division case referenced in a Commission decision.

The City, citing Middlesex Cty., P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979), aff'd in pt., rev'd in pt. 6 NJPER 338 (¶11169 App. Div. 1980) and other similar decisions, contends that these

^{3/} One of the certifications was accompanied by a printout showing prescriptions and amounts paid for them. It reflects that, on November 19, 2009, the retired officer received a medication for which he was not charged any co-pay. On December 20, he received the same amount of the same medication, but was charged \$5.00 for the prescription.

grievances are not arbitrable because majority representatives cannot negotiate on behalf of already retired employees. The City also notes it is a "fiscally distressed City" eligible for special municipal aid under N.J.S.A. 52:27D-118.25.^{4/}

Locals 8 and 8A cite IAFF Local 2081, P.E.R.C. No. 2009-47, 35 NJPER 66 (¶25 2009) and Grasso v. FOP, Glassboro Lodge No. 108, 2008 N.J. Super. Unpub. LEXIS 1078 (App. Div. 2008) for the proposition that a majority representative has standing to arbitrate a claim on behalf of retired officers claiming that the benefits they were to receive, based on negotiated agreements in force when they retired, have been changed or diminished. It also cites the letter opinion of the Superior Court, Chancery Division in Disoteo, Ruffio, et. al. v. City of Clifton (Passaic Cty. Dkt No. C-119-06, April 11, 2007) holding that the union representing firefighters had standing to pursue binding arbitration on behalf of retired firefighters or their widows as to whether they were entitled to free lifetime health benefits.

^{4/} Attached as exhibits are a memorandum of understanding between the City and the Director of the Division of Local Government Services, setting forth conditions that the City has agreed in order to be eligible for special financial aid, and a resolution authorizing the City to enter into the agreement. The resolution is dated January 10, 2010 and the memorandum of understanding was signed by the mayor and certified by the municipal clerk on January 13. The copy supplied to us has a space for, but does not contain, the signature of the Director.

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 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). Where a restraint of binding grievance arbitration is sought a showing that the grievance is not legally arbitrable warrants issuing an order suspending the arbitration until the Commission issues a final decision. See Ridgefield Pk. Ed. Ass'n v. Ridgefield Pk. Bd. of Ed., 78 N.J. 144, 155 (1978); Bd. of Ed. of Englewood v. Englewood Teachers, 135 N.J. Super. 120, 124 (App. Div. 1975).

I conclude that the Commission is substantially likely to find that these grievances are legally arbitrable. See Middletown Tp., P.E.R.C. No. 2006-102, 32 NJPER 244 (¶101 2006); Borough of Bradley Beach, P.E.R.C. No. 2000-17, 25 NJPER 412 (¶30179 1999); and New Jersey Turnpike Auth., P.E.R.C. No. 2006-13, 31 NJPER 284 (¶111 2005). These decisions hold that a

majority representative may enforce, through arbitration, contractually-based benefits for retired employees, as it has a cognizable interest in ensuring that the terms of the agreements it has negotiated, whether current or expired, are honored.^{5/}

That principle is different from the proposition, based on Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157, 92 S. Ct. 383, 30 L. Ed. 2d 341 (1971) that an employer is not under an obligation to negotiate over benefits of already retired employees. As explained in Textile Workers of America v. Columbia Mills, Inc., 471 F. Supp. 527, 530-531 (N.D.N.Y 1978):

[T]he issue is not whether the Company must bargain with the Union over the benefits of retired employees, but rather whether the Company did, in fact, contractually commit itself to provide continuous insurance coverage for retirees for the duration of their natural lives. If the Company made such a commitment in the collective bargaining agreement it entered into with the Union, "then under accepted contract principles the union has a legitimate interest in protecting the rights of the retirees and is entitled to seek enforcement of the applicable contract provisions." United Steelworkers of America, AFL-CIO v. Canron, Inc., 580 F.2d 77, 80-81 (3d Cir. 1978) (footnote omitted).

^{5/} The City has not made any specific arguments as to how arbitration of these grievances would conflict with any provision of its memorandum of understanding with the Division of Local Government Services. Moreover, I note that the effective dates of both current agreements, as well as the contracts in effect on the dates the retirees stopped working for the City, all precede January 13, 2010.

I do not rule on the merits of the grievances. See
Ridgefield Pk. Ed. Ass'n., 78 N.J. at 154.

ORDER

The application for interim restraints of arbitration is
denied.

Don Horowitz
Commission Designee

DATED: June 4, 2010
Trenton, New Jersey