

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Petitioner,

-and-

Docket Nos. SN-2012-016
SN-2012-019
SN-2012-020
SN-2012-021
SN-2012-022

JERSEY CITY PSOA, JERSEY POBA,
JERSEY CITY IAFF LOCAL 1066,
JERSEY CITY IAFF LOCAL 1064,
JERSEY CITY PUBLIC EMPLOYEES
LOCAL 246,

Respondent.

SYNOPSIS

A Commission Designee denies the request of the City of Jersey City for an interim restraint of binding arbitration of five grievances involving five separate majority representatives during the pendency of a scope of negotiations petition before the Public Employment Relations Commission.

The grievances and the demands for binding arbitration were filed by majority representatives of civilian, fire and police employees: Jersey City Public Employees Local 246; Jersey City IAFF Local 1064; Jersey City IAFF Local 1066; Jersey City PSOA; and Jersey POBA. The grievances claim that the City violated the parties' previous collective negotiation agreements when it unilaterally changed the health benefit plan for retirees.

The City argued that retirees are not employees within the meaning of the Act, and as a result, the Unions have no standing to file grievances on behalf of retirees; the matter is outside of the Commission's jurisdiction and is not mandatorily or permissibly negotiable.

The Unions argued that the retirees' benefits vested when they retired under the prior CNAs; and since the City unilaterally changed the retirees' contractually mandated health benefits, it is a permissive, if not a mandatory subject of negotiations that may proceed to arbitration.

The designee found that the Commission is substantially likely to find that the grievances are legally arbitrable due to the Commission's limited jurisdiction in scope of negotiations proceedings and Commission precedent in similar cases.

I.R. NO. 2012-16

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Appearances:

For the Petitioner, City of Jersey City, William C. Matsikoudis, Corporation Counsel (Terry Keller, of counsel)

For the Respondent, Jersey City PSOА, Loccke, Correia, Linsky & Bukosky, attorneys (Lauren P. Sandy, of counsel)

For the Respondent, Jersey city POBA, Detzky & Hunter, attorneys (Stephen B. Hunter, of counsel)

For the Respondent, Jersey City IAFF Local 1066, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (Paul L. Kleinbaum, of counsel)

For the Respondent, Jersey City IAFF Local 1064, Cohen, Leder, Montalbano & Grossman, attorneys (Michael A. McLaughlin, of counsel)

For the Respondent, Jersey City Public Employees Local 246, Law Office of Paul W. Mackey, attorneys, Paul W. Mackey, of counsel)

INTERLOCUTORY DECISION

On November 7, 2011, the City of Jersey City ("City") petitioned for a scope of negotiations determination regarding a grievance filed by the Jersey City Police Superior Officers Association ("PSOA"). On November 28, the City petitioned for a scope determination regarding grievances filed by the Jersey City Police Officers Benevolent Association ("POBA"), the Jersey City Public Employees Local 246 ("Local 246"), the Uniformed Fire Fighters Association of Jersey City Local 1066, IAFF, AFL-CIO ("IAFF Local 1066") and the Jersey City Fire Officers Association Local 1064, IAFF, AFL-CIO ("IAFF Local 1064"). (Collectively "Unions").

On December 6, the City filed an amended scope petition regarding the PSOA grievance. All five of the matters were consolidated as the grievances all assert that the City violated the parties' previous collective negotiation agreements ("CNAs") when it unilaterally changed the health benefit plan for retirees.

On January 20, 2012, the City sought to temporarily restrain the arbitrations which had been previously scheduled. On February 15, 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 on March 2. The parties filed

briefs and exhibits.^{1/} On March 2, a hearing was conducted. After hearing the parties' arguments, I orally denied the application for temporary restraints of arbitration of the grievances. These facts appear.

The PSOA represents superior police officers with the ranks of sergeant through inspector, the POBA represents all non-supervisory police officers, Local 246 represents certain non-uniformed employees;^{2/} IAFF Local 1066 represents all non-supervisory firefighters; and, IAFF Local 1064 represents all fire superior officers in the ranks of captain, battalion chief, deputy chief and supervisor of apparatus.

All of the CNAs are effective from January 1, 2008 through December 31, 2012 except the Local 246 CNA, which was effective from July 1, 2008 through June 30, 2011. The grievance procedures in each of the CNAs end in binding arbitration.

1/ Local 246 relied on the briefs submitted by the other Unions and the CNA with the City which Local 246 previously submitted. The City also filed certifications.

2/ Local 246 represents non-uniformed employees in the following City departments: Department of Administration/Finance/Mayor's Office; Department of Law (non-professional employees only); Department of Fire; Department of Police; Department of Health and Human Services (except Rodent Control); Department of Housing, Economic Development and Commerce; Office of the City Clerk; Office of the Tax Assessor. Excluded from the unit are employees statutorily excluded by the New Jersey Employer-Employee Relations Act, those represented in other bargaining units, and all employees working less than twenty (20) hours per week.

The City currently provides two health benefit plans to the Unions' retirees, the "Traditional Plan" and the "Direct Access Plan." Initially, retirees who retired under prior CNAs were eligible for health benefits through the Traditional Plan at no cost. On September 2, 2011, the City informed the Unions that effective October 1, retirees would be enrolled in the Direct Access Plan^{3/} or could elect to maintain the Traditional Plan by paying the difference between the Direct Access Plan and the Traditional Plan.^{4/}

The City argues that retirees are not employees within the meaning of the New Jersey Employer-Employee Relations Act and also under the National Labor Relations Act^{5/} and, as a result,

3/ The Direct Access Plan is the only current plan available for the City's active employees.

4/ The monthly contributions for retirees who wished to remain in the Traditional Plan ranged from \$35.44 to \$1,474.30 depending on Family status and Medicare enrollment.

5/ The City cites 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) for the proposition that an employer is not under an obligation to negotiate over benefits of already retired employees under the National Labor Relations Act. However, 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

(continued...)

the Unions have no standing to file grievances on behalf of retirees and the matter is outside of the Commission's jurisdiction. Second, that the Traditional Plan is no longer available for current employees and this change was negotiated with all the Unions except the PSOA where the change was implemented via interest arbitration award. Further, the City argues that the retirees right to the Traditional Plan did not vest under prior CNAs as there is no specific language to that effect and that the City only agreed to provide retirees with health benefits at no cost and it is continuing to do that through the Direct Access Plan.

The Unions argue that the prior CNA's require that health benefits for retirees remain at the level in force when the employee retired and that past practice has been that the retirees' received the Traditional Plan at no cost, regardless of any later changes that might affect active employees; the retirees' benefits vested when they retired under the prior CNAs;

5/ (...continued)

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).

and since the City unilaterally changed the retirees' contractually mandated health benefits, it is a permissive, if not a mandatory subject of negotiations that may proceed to arbitration.

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).

The Commission's jurisdiction is narrow. Ridgefield Park at 154, states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, the Commission does not consider the contractual merits of the grievance or any contractual defenses the City may have.

The scope of negotiations for firefighters and police officers is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police officers:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public

employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

[87 N.J. at 92-93; citations omitted]

Because this dispute involving the police and fire retirees involve grievances filed by the majority representatives, arbitration is permitted if the dispute is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit the government's policy-making powers. No preemption issue is presented.

Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982), sets the test for determining if a subject is mandatorily negotiable for public employees other than fire or police:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere

with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

I conclude that the Commission is substantially likely to find that these grievances are legally arbitrable due to the Commission's limited jurisdiction in scope of negotiations proceedings and Commission precedent in similar cases. The parties' collective negotiations agreements contain provisions dealing with medical insurance for retirees. The Commission has consistently permitted Unions to seek arbitration to enforce a contract on behalf of retired employees because they have a cognizable interest in ensuring that the terms of their CNAs, regarding the retirement benefits that were contracted for in the agreement that was in effect at the time an employee retired, are honored. Voorhees Tp. P.E.R.C. No. 2012-13, 38 NJPER 155 (¶44 2011); Union City, P.E.R.C. No. 2011-73, 37 NJPER 165 (¶52 2011); Middletown Tp., P.E.R.C. No. 2006-102, 32 NJPER 244 (¶101 2006); New Jersey Turnpike Auth., P.E.R.C. No. 2006-13, 31 NJPER 284 (¶111 2005).

Based on the above, I find that the City has not established a substantial likelihood of prevailing in a final Commission

decision on its legal and factual allegations, a requisite element to obtain interim relief.^{6/} I find that the Commission is substantially likely to find the grievances are legally arbitrable. The application for interim restraints of arbitration must be denied.

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.



David N. Gambert
Commission Designee

DATED: April 20, 2012

Trenton, New Jersey

^{6/} As a result, I do not need to conduct an analysis of the other elements of the interim relief standard.