I.R. NO. 2019-10

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ORANGE TOWNSHIP,

Petitioner,

-and- Docket No. SN-2019-019

PBA LOCAL 89,

Respondent.

SYNOPSIS

A Commission Designee partially grants and partially denies the City's request for an interim restraint of binding arbitration pending the outcome of a scope of negotiations petition before the Public Employment Relations Commission. The grievance alleges that the City violated the parties' past practice when it failed to make 2018 opt-out payments for those PBA members who had waived the City's health care coverage for 2018. The Designee finds that the City failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its argument that N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a completely preempt arbitration. The Designee grants interim relief to the extent that the amount of any applicable health care coverage opt-out payments that may be awarded exceed the maximums set forth in N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a, but otherwise denies interim relief.

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Appearances:

For the Petitioner, Scarinci Hollenbeck, attorneys (Ramon E. Rivera, of counsel and on the brief; John J.D. Burke, on the oral argument)

For the Respondent, Detzky, Hunter & DeFillippo, LLC, attorneys (David J. DeFillippo, of counsel and on the brief)

DECISION

On September 11, 2018, the City of Orange Township (City) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 89 (Local 89). The grievance alleges that the City violated the parties' past practice when it failed to make 2018 opt-out payments for those Local 89 members who had waived the City's health care coverage for 2018. On October 5, the City filed the instant application for interim relief seeking a temporary restraint of

binding arbitration scheduled for November 7 pending disposition of the underlying scope of negotiations petition.[1/]

PROCEDURAL HISTORY

On October 9, 2018, I signed an Order to Show Cause directing Local 89 to file any opposition by October 18 and setting October 23 as the return date for oral argument. On October 16, Local 89 filed opposition to the application for interim relief. On October 23, counsel engaged in oral argument during a telephone conference call. In support of the application for interim relief, the City submitted a brief, exhibits, and the certification of Christopher M. Hartwyk, the City's Business Administrator. In opposition, Local 89 submitted a brief, exhibits, and the certification of Joseph Lane, former Local 89 President.

FINDINGS OF FACT

Local 89 represents all police officers employed by the Orange Police Department below the rank of sergeant. The City and Local 89 are parties to a collective negotiations agreement (CNA) effective January 1, 2010 through December 31, 2020, the terms of which are codified in a 2010-2020 Memorandum of Agreement and have been fully implemented. The 2010-2020 CNA has not been fully executed.

1/ On October 25, the parties notified me that the arbitrator granted the City's October 23 request to adjourn the hearing until the resolution of this interim relief application.

The parties had a past practice whereby the City would provide "opt-out" payments to Local 89 officers who declined health care coverage under the City's health care plan. The practice was to distribute the opt-out payments in the fall of the year in which coverage was waived. The record does not show how much the annual opt-out payments were or how they were calculated. At least six Local 89 members waived the City's health care coverage for calendar year 2018. On July 11, 2018, the City adopted Resolution No. 194-2018 (Resolution) cancelling the disbursement of the "opt-out" incentive payment to eligible City municipal employees and elected officials who had waived health care benefits for the 2018 budget year. The City advised Local 89 that employees who had waived health coverage for 2018 could not resume employer health coverage until January 1, 2019.

On August 20, 2018, Local 89 filed a request for grievance arbitration contesting the City's rescission of the 2018 health coverage opt-out payment via the July 11 Resolution. The City's scope of negotiations petition and this interim relief application ensued.

LEGAL ARGUMENTS

The City argues that its application for interim relief should be granted because N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a preempt the issue of providing opt-out payments for waivers of health care coverage. It asserts that the Commission

has held these statutes preemptive and restrained binding arbitration in Town of Westfield, P.E.R.C. No. 2018-12, 44 NJPER 144 (¶42 2017) and Township of Clinton, P.E.R.C. No. 2013-33, 39 NJPER 212 (¶70 2012). The City contends that the July 11, 2018 Resolution "cancelling the disbursement of the cash incentive to eligible City municipal employees and elected officials who waive health care benefits for the 2018 budget year . . . was the City's prerogative; and is expressly exempted from bargaining." It therefore argues that it has a substantial likelihood of success on the merits. The City further asserts that incurring the time and expense of proceeding to arbitration would cause it to suffer irreparable harm; that an interim relief order would protect rather than harm the public interest; and the hardship to the City if interim relief is not granted outweighs the hardship to Local 89 if interim relief is granted.

Local 89 argues that arbitration should not be restrained because of "the gross inequity of its attempt to reap the savings from enticing employees to opt out of coverage for calendar year 2018 and, thereafter, cancelling its obligation to compensate" them. It acknowledges that N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a preempt negotiations over the compensation payable to employees who waive health coverage, but asserts that the City could only discontinue the past practice of opt-out payments on a prospective basis (for 2019 and beyond), and not retroactively

"escape its obligation to properly compensate officers who previously waived 2018 coverage." Local 89 contends that Westfield, supra, is distinguishable because the elimination of opt-out payments was made prospectively in that case before the annual waivers were made. It argues that Clinton, supra, is distinguishable because those parties had a CNA provision providing a health coverage waiver stipend equal to 40% of the employer's cost savings, and because the employer chiefly asserted that the grievant was not entitled to the stipend due to N.J.S.A. 52:14-17.31, which prohibited dual State Health Benefits Plan (SHBP) coverage through an employer and as a dependent. Local 89 asserts that the City should not be permitted to engage in an act of bad faith by reneging on its commitment to compensate officers who already waived coverage for 2018 and who are not allowed to re-enroll until 2019 while the City continues to enjoy the savings from the 2018 health coverage waivers.

STANDARD OF REVIEW

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).

Scope of negotiations determinations must be decided on a case-by-case basis. See Troy v. Rutgers, 168 N.J. 354, 383 (2000) (citing City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574 (1998)). Where a restraint of binding 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 Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978); Bd. of Ed. of Englewood v. Englewood Teachers, 135 N.J. Super. 120, 124 (App. Div. 1975).

In a scope of negotiations determination, the Commission's jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978) 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 employer may have.

The scope of negotiations for police officers and firefighters 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, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

> 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.

Arbitration is permitted if the subject of the grievance 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). Thus, if a grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

In Bethlehem Twp. Bd. of Ed. v. Bethlehem Twp. Ed. Ass'n, 91 N.J. 38, 44 (1982), the Supreme Court of New Jersey articulated its statutory preemption test:

> As a general rule, an otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation. However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations. Negotiation is preempted only if the regulation fixes a term and condition of employment "expressly, specifically and comprehensively," Council [of New Jersey State College Locals v. State Board of Higher Education] 91 N.J. [18] at 30. The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." In re IFPTE Local 195 v. State, 88 N.J. 393, 403-04 (1982), quoting State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978).

Our Supreme Court has also held that "statutes and regulations are effectively incorporated by reference as terms of any collective agreement covering employees to which they apply"

and "[a]s such, disputes concerning their interpretation, application or claimed violation would be cognizable as grievances subject to the negotiated grievance procedure contained in the agreement." West Windsor Twp. v. PERC, 78 N.J. 98, 116 (1978). Thus, "grievances involving the application of controlling statutes or regulations . . . may be subjected to resolution by binding arbitration" as long as the award does not have the effect of establishing a provision of a negotiated agreement inconsistent with the law. Old Bridge Bd. of Education v. Old Bridge Education Assoc., 98 N.J. 523, 527-528 (1985).

ANALYSIS

N.J.S.A. 40A:10-17.1 provides (emphasis added):

> N.J.S.A. 40A:10-17.1 County, municipal, contracting unit employee permitted to waive healthcare coverage.
>
> Notwithstanding the provisions of any other law to the contrary, a county, municipality or any contracting unit as defined in section 2 of P.L.1971, c.198 (C.40A:11-2) which enters into a contract providing group health care benefits to its employees pursuant to N.J.S.40A:10-16 et seq., may allow any employee who is eligible for other health care coverage to waive coverage under the county's, municipality's or contracting unit's plan to which the employee is entitled by virtue of employment with the county, municipality or contracting unit. The waiver shall be in such form as the county, municipality or contracting unit shall prescribe and shall be filed with the county, municipality or contracting unit. In consideration of filing such a waiver, a county, municipality or contracting unit may pay to the employee annually an amount, to be

> established in the sole discretion of the county, municipality or contracting unit, which shall not exceed 50% of the amount saved by the county, municipality or contracting unit because of the employee's waiver of coverage, and, for a waiver filed on or after the effective date [May 21, 2010] of P.L.2010, c.2, which shall not exceed 25%, or $5,000, whichever is less, of the amount saved by the county, municipality or contracting unit because of the employee's waiver of coverage. An employee who waives coverage shall be permitted to resume coverage under the same terms and conditions as apply to initial coverage if the employee ceases to be covered through the employee's spouse for any reason, including, but not limited to, the retirement or death of the spouse or divorce. An employee who resumes coverage shall repay, on a pro rata basis, any amount received which represents an advance payment for a period of time during which coverage is resumed. An employee who wishes to resume coverage shall file a declaration with the county, municipality or contracting unit, in such form as the county, municipality or contracting unit shall prescribe, that the waiver is revoked. The decision of a county, municipality or contracting unit to allow its employees to waive coverage and the amount of consideration to be paid therefor shall not be subject to the collective bargaining process.

N.J.S.A. 52:14-17.31a is identical in all relevant respects to N.J.S.A. 40A:10-17.1, but concerns health care coverage waivers and opt-out payments for employees whose employers participate in the SHBP.

The Commission cases cited by the City are distinguishable from the instant case. In Westfield, P.E.R.C. No. 2018-12, the employer announced in 2016 that it would end health care opt-out

payments effective January 1, 2017. The union argued that because the parties' CNA had a provision for health care waiver opt-out payments, the employer should be required to maintain the opt-out payments until the expiration of the CNA. The Commission held that: "N.J.S.A. 40A:10-17.1 clearly preempts opt-out payments for waiving coverage in the Town's health insurance plan and [they] should not have been negotiated and/or included in the parties' CNA." 44 NJPER at 146. In restraining arbitration, the Commission noted: "Lastly, the PBA has not produced any evidence that affected unit members were precluded from re-enrolling in the Town's health insurance plan on January 1, 2017 after opt-out payments were discontinued." Ibid. In contrast, here Local 89 is not attempting to enforce a CNA clause that never should have been negotiated, and is not claiming that the City must maintain its waiver and opt-out payment practice in future years or for the duration of the current CNA. Furthermore, in Westfield the employer announced the end of opt-out payments prior to the year the change would become effective, and the Commission found it significant that the PBA members could not show that they were prevented from re-enrolling or rescinding their waivers in time for the start of the next benefits year. Here, the City retroactively cancelled opt-out payments more than halfway through the year in which the waivers applied, and Local 89 members could not resume coverage until the following year.

In Clinton, P.E.R.C. No. 2013-33, the Commission restrained binding arbitration of a grievance contesting the employer's failure to provide an employee with an opt-out payment for waiving SHBP coverage. Unlike Westfield, but like the instant case, the denied opt-out payment was for a year in which the affected employee had already waived coverage. However, the employee already had SHBP coverage as a dependent on his spouse's SHBP plan so there were no issues about being unable to re-enroll in the same plan or in not having the benefit of the employer's plan as opposed to a different plan with the expectation of receiving an opt-out payment. Furthermore, like Westfield and unlike the instant case, the parties' CNA included a clause providing for health coverage waiver opt-out payments. The Commission held: "Therefore, Article XIV, Section D should have never been negotiated and placed in the CNA in the first place." 39 NJPER at 213.

The scope of negotiations question presented here is not whether Local 89 can negotiate over waivers and opt-out payments or enforce a negotiated clause that never should have been allowed in the CNA. It is also not about whether Local 89 can compel the City to continue a waiver and opt-out payment system prospectively (e.g., for the following year, or for the duration of the CNA) based on past practice. The question for the Commission will likely be: Where the public employer has

exercised its discretion per N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a to allow employees to waive employer health care coverage in exchange for providing an opt-out fee, do those statutes ban arbitration over the employer's refusal to pay that annual opt-out fee for employees who waived health care coverage for that year?

I find that N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a do not "expressly, specifically, and comprehensively" preempt this issue. Bethlehem. N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a preempt negotiations over health care coverage waivers and opt-out payments because they provide that the employer's decision "to allow its employees to waive coverage and the amount of consideration to be paid therefor shall not be subject to the collective bargaining process." However, the statutes do not prohibit an employer from offering such a waiver and opt-out payment system. Rather, they specifically authorize a public employer to, in its discretion, allow waivers and make payments "in consideration of filing" such waivers up to a maximum of $5,000 or 25% of the amount saved by the employer due to the waiver, whichever is less. Thus, while an employer cannot be compelled to negotiate over whether to offer waivers and how much of an opt-out payment to provide as an incentive to waive coverage, once an employer has exercised its discretion to institute a waiver and payment system, nothing in the statutes

precludes arbitration to enforce the employer's chosen waiver and payment system for a year in which it was in effect based on the employer's acceptance of the employees' waivers prior to any announced changes in the opt-out payment amount.

In other words, though an employer has the discretion per N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a to decide whether to provide opt-out payments in exchange for waivers for a given benefit year, its failure to follow through on its waiver system by retracting promised opt-out payments subsequent to employees' waiving coverage may be arbitrated. This is analogous to Commission precedent concerning generally non-negotiable subjects that nevertheless may create arbitrable disputes to enforce a public employer's announced exercise of its managerial prerogative. For example, in Tp. of Wall and Wall Tp. PBA Local 234, P.E.R.C. No. 2002-22, 28 NJPER 19 (¶33005 2001), aff'd, 29 NJPER 279 (¶83 App. Div. 2003), the Commission held that a public employer has the non-negotiable managerial prerogative to set promotional criteria and make a promotion, but that where the employer has decided to make a promotion, it may be obligated to fill the position with the employee at the top of the promotional list developed from applying its own unilaterally set criteria to the eligible candidates. Thus, where the employer had exercised its discretion to set criteria and make a promotion but promoted an employee who was not at the top of its promotional list, the

employee at the top was allowed to arbitrate not being promoted. Id.; see also Department of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80 (App. Div. 1981) (provision requiring public employer to make promotions in order of promotional list generated from its criteria is negotiable). The Commission and courts consider it a procedural matter that, once an employer chooses to exercise its promotion and criteria discretion, its failure to properly implement previously announced promotional criteria that employee applicants relied upon may be arbitrated. The same reasoning applies here, where once the City exercised its statutory discretion to accept health coverage waivers for 2018 with no announced changes to the opt-out payment system it had previously implemented, it could remain obligated to complete that process for any employees who had already waived coverage in 2018.[2/]

Furthermore, the pertinent statutes directly link the employer's decision to make an opt-out payment to its decision to allow the waiver, noting the payment as being "in consideration of filing such a waiver" and describing it as "the amount of consideration to be paid therefor [for the waiver]." Therefore the arbitrator may consider whether the City's irregular exercise

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2/ In contrast, a prospective notice to employees that, for example, the City will not offer an opt-out payment incentive for 2019 even if it decides to allow employees to waive coverage for 2019, would not be arbitrable.

of its waiver and opt-out system violated N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a by failing to pay the consideration promised for the 2018 waivers. See West Windsor and Old Bridge, supra (interpretation and application of controlling statutes may be subject to resolution by binding arbitration). If the City is going to invoke the health coverage waiver pursuant to N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a, it may be required to consummate the transaction by providing whatever monetary consideration, if any, below the legal maximum that it promised at the time the waiver option was made available to employees for that benefit year.

Finally, I note that the circumstances of this case may sound in equity as well. See, e.g., Middletown Twp. PBA Local No. 124 v. Twp. of Middletown, 162 N.J. 361, 367 (2000) (though Town's CNA with PBA violated N.J.S.A. 40A:10-23's requirements for retiree health benefits based on years of service, the Supreme Court held that the Town could be equitably estopped from terminating health benefits); 405 Monroe Co. v. Asbury Park, 40 N.J. 457 (1963) (illegal actions/contracts undertaken by municipality that are irregular exercises of powers the municipality does have are ultra vires in the secondary sense, so the concept of estoppel or ratification may be invoked by one who deals with the municipality in good faith); see also I.A.F.F. v. City of Hoboken, 2014 N.J. Super. Unpub. LEXIS 190 (App. Div.

2014) (though CNA's allowance of up to three years of vacation time to be carried over annually violated N.J.S.A. 11A:6-3(e), the Appellate Division upheld arbitrator's award requiring City to allow accrued vacation time per CNA). However, the Commission has been reluctant to apply equitable or promissory estoppel concepts to scope of negotiations questions and has stated that such issues are more appropriately resolved in a judicial forum. See, e.g., City of Millville, P.E.R.C. No. 2003-21, 28 NJPER 418 (¶33153 2002); Washington Tp., P.E.R.C. No. 2003-23, 28 NJPER 432 (¶33158 2002); But see Kingswood Tp. Bd. of Ed., P.E.R.C. No. 2014-34, 40 NJPER 260 (¶100 2013) (after Board denied teacher's request for salary guide advancement for master's degree, Commission declined to restrain binding arbitration pursuant to N.J.S.A. 18A:6-8.5(c)'s requirement that degree must be related to the teacher's current or future job responsibilities, where her prior PIP listed attainment of the Master's degree as a professional development goal). Therefore, while I cannot find that the Commission is likely to apply equity principles to the instant case, it is not necessary to consider such issues in order to resolve the question before me.

Given the legal precepts set forth above, I find that the City has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal allegations, a requisite element to obtain interim relief under

the Crowe factors.[3/] I accordingly deny the application for interim relief, except to restrain the award of any health care coverage opt-out payments that exceed the limits of "25%, or $5,000, whichever is less, of the amount saved by the [employer] because of the employee's waiver of coverage" set forth in N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a. This case will be referred to the Commission for final disposition.

ORDER

The request of the City of Orange Township for an interim restraint of binding arbitration is granted as to limiting the amount of any applicable health care coverage opt-out payments that may be awarded to the maximums of "25%, or $5,000, whichever is less, of the amount saved by the [employer] because of the employee's waiver of coverage" set forth in N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a, but is otherwise denied pending the final decision or further order of the Commission.

/s/ Frank C. Kanther
Frank C. Kanther
Commission Designee

DATED: November 1, 2018
Trenton, New Jersey

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