

P.E.R.C. NO. 2009-15

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF EAST RUTHERFORD,

Petitioner,

-and-

Docket No. SN-2008-079

EAST RUTHERFORD P.B.A. LOCAL 275,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Borough of East Rutherford for a restraint of binding arbitration of a grievance filed by East Rutherford P.B.A. Local 275. The grievance challenges increases in co-payments for NJPLUS and HMO office visits under the State Health Benefits Program and seeks reimbursement of additional co-pay costs and a return to negotiated co-pay levels. The Commission holds that the level of health benefits is generally negotiable. The Commission declines to restrain arbitration at this juncture, but will permit the Borough to refile its petition should the arbitrator find a contractual violation and a dispute arise over the negotiability of any remedy issued.

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 Petitioner, David F. Corrigan, LLC, attorneys  
(David F. Corrigan, of counsel and on the brief;  
Bradley D. Tishman, on the brief)

For the Respondent, Loccke, Correia, Schlager, Limsky &  
Bukosky, attorneys (Michael A. Bukosky, of counsel and  
on the brief; Lauren P. Sandy, on the brief)

DECISION

On May 16, 2008, the Borough of East Rutherford petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by East Rutherford P.B.A. Local 275. The grievance challenges increases in co-payments for NJ PLUS and HMO office visits under the State Health Benefits Program ("SHBP") and seeks reimbursement of additional co-pay costs and a return to negotiated co-pay levels. We decline to restrain arbitration at this juncture, but will permit the Borough to refile its petition should the arbitrator find a contractual violation and a dispute arise over the negotiability of any remedy issued.

The parties have filed briefs and exhibits. The Borough has submitted the certification of Larry Minda, the deputy chief of police. These facts appear.

The PBA represents all police officers, sergeants, lieutenants and captains. The parties' collective negotiations agreement is effective from January 1, 2005 through December 31, 2009. The grievance procedure ends in binding arbitration.

The Borough has been enrolled in the State Health Benefits Program since 2002. Before 2007, employees paid a co-pay of \$5 for primary doctor and specialist visits for NJ PLUS and HMO plans.

Article 29 of the parties' agreement provides:

- 29.01. The Borough will continue to provide and pay for existing Medical and prescription plans and coverage for Employees covered by this Agreement and their families. Any change in carrier or source of coverage shall result in equal or better coverage.
- 29.01(a) A Three (\$3.00) Dollar Co-Payment will be attached to the Prescription Insurance Plan, per prescription.
- 29.02 All increases in premiums during the term of this Agreement shall be borne entirely by the Borough pursuant to present practice.

On September 14, 2006, the Borough was notified of SHBP rate plan changes for 2007. One of the changes was an increase in office visit co-pays for NJ PLUS and HMO plans from \$5 to \$10.

On January 24, 2007, the PBA filed a grievance contesting the increase in co-pays. The grievance seeks reimbursement and return to the negotiated co-pay levels.

The grievance was denied. On March 30, 2007, the PBA demanded arbitration. This petition ensued.

On July 7, 2008, the Borough wrote to the State Health Benefits Commission ("SHBC") requesting a ruling on whether reimbursement of the increased co-pay cost is either authorized or permitted under the SHBP. The Borough also requested from the SHBC a copy of its determination in a Rockaway Township matter. The SHBC has not issued a response.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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.  
[Id. at 154]

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have.

Arbitration will be permitted if the subject of a dispute involving police or firefighters 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 Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), bars arbitration only if the agreement alleged to have been violated is preempted or would substantially limit government's policymaking powers.

The Borough argues that this matter is preempted by N.J.S.A. 52:14-17.29(C), an SHBP statute. It also maintains that our holdings in Rockaway Tp., P.E.R.C. No. 2008-21, 33 NJPER 257 (¶96 2007), app. pending App. Div. Dkt. No. A-001628-07T2; and City of Bayonne, P.E.R.C. No. 2008-41, 34 NJPER 9 (¶4 2008) control. The Borough also argues that N.J.S.A. 34:13A-18 bars a grievance arbitrator from considering the grievance.

The PBA responds that it does not seek any change to the SHBP or a roll-back of SHBP co-pay levels. The PBA maintains that it seeks only to have the arbitrator determine that the Borough had a contractual agreement to maintain a certain level of health care benefits and to have the arbitrator make employees whole for the decline in the level of benefits. The PBA also maintains that we have already held that N.J.S.A. 34:13A-18

applies only to interest arbitration, not grievance arbitration.<sup>1/</sup>

The SHBP statute cited by the Borough sets the co-pay for office visits under the successor to NJ PLUS. N.J.S.A. 52:14-17.29(c). That plan went into effect on April 1, 2008 and the statute does not relate to this dispute arising under an earlier form of the SHBP.

Rockaway governs the claim that the Borough is contractually obligated to maintain the level of health benefits. As we said in that case, the level of health benefits is generally negotiable absent a preemptive statute or regulation and a grievance contesting a change in a negotiated level of benefits is generally arbitrable. In re Council of New Jersey State College Locals, 336 N.J. Super. 167 (App. Div. 2001). The Borough asserts that arbitration must be restrained because the Borough never committed to a specific co-pay level. That is a contractual argument addressing the merits of the grievance.

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<sup>1/</sup> On July 17, 2008, the Borough submitted a copy of a July 19, 2007 letter to the Township of Rockaway from the Director of the Division of Pensions & Benefits that was part of the record in Rockaway. The PBA opposes the submission because it was not a decision of the SHBC. We will accept the submission with the understanding that it is not a decision of the SHBC. In the letter, the Director stated that the Township of Rockaway had no legal authority to reimburse any of an employee's out-of-pocket costs and that termination of an employer's participation is the most powerful tool the SHBC has to ensure compliance with the rules and regulations governing the program.

Consideration of that argument is outside our jurisdiction.

Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J.

144 (1978). An arbitrator may determine whether the parties made an agreement over co-pays and whether the employer violated it.

The Borough also argues that arbitration should be restrained until the SHBC responds to the Borough's letter or comments further on the case involving Rockaway Township. We disagree.

First, we do not know when the SHBC will respond. Second, the question that will be presented to the arbitrator does not interfere with the SHBC's authority. The arbitrator will consider whether the Borough violated an alleged contractual obligation to maintain a certain level of health benefits. There may or may not be a contractual obligation, and there may or may not be a contractual violation.

If the arbitrator finds a contractual violation and orders the employer to make employees whole through reimbursement, that may be inconsistent with the employer's obligations as a participant in the SHBP. Perhaps the SHBC will not permit the Borough to remain a participant and reimburse. Perhaps it will permit the Borough to reimburse and remain a participant pending the next round of negotiations when the contract can be conformed to the higher co-pays. Perhaps the Borough would rather change providers than incur a reimbursement obligation. Nothing

obligates the Borough to remain a participant in the SHBP. New Jersey School Bds. Ass'n v. State Health Benefits Comm'n, 183 N.J. Super. 215, 218, 224 (App. Div. 1981) (observing that local employers are not forced to participate in the SHBP and that employers can withdraw from the SHBP at any time consistent with their obligations under existing collective negotiations agreements); City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439 (¶12195 1981) (level of benefits but not choice of providers is mandatorily negotiable).

To restrain arbitration, we would have to first conclude that the PBA is not entitled to pursue its claim that the Borough was obligated to maintain a contractual level of benefits. Such a holding would be a departure from well-established case law. Purchasing insurance from the SHBP does not insulate an employer from enforcement of an agreement over a level of health benefits. Absent a preemptive statute or regulation not present here, an employer must reconcile its contractual obligations with its choice of health insurance providers.

The Borough also argues that even if arbitration is not restrained, the arbitrator would have very limited authority under N.J.S.A. 34:13A-18. We disagree. As we stated in Rockaway, that statute prohibits an interest arbitrator from issuing, with respect to any participating public employer, "any finding, opinion or order regarding any aspects of the rights,



duties, obligations in, or associated with the State Health Benefits Program. . . ." By its terms, the statute applies only to interest arbitration. Borough of Bradley Beach, P.E.R.C. No. 2000-17, 25 NJPER 412 (¶30179 1999).

Finally, Rockaway stated that an arbitrator cannot order the employer to continue the previous co-pay levels for NJ PLUS and HMO office visits since the SHBC has exercised its authority to set higher levels. See also Bayonne (arbitrator cannot order roll-back of SHBP co-pays). We repeat that admonition here. Should the arbitrator find a contractual violation and a dispute arise over the negotiability of any remedy issued, the Township may re-file its scope petition.

ORDER

The request of the Borough of East Rutherford for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Fuller and Joanis voted in favor of this decision. None opposed. Commissioner Watkins was not present.

ISSUED: September 25, 2008

Trenton, New Jersey