

P.E.R.C. NO. 2009-49

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF RIVER EDGE,

Petitioner,

-and-

Docket No. SN-2009-004

LOCAL 108, PUBLIC EMPLOYEES DIVISION,
RWDSU BLUE COLLAR UNIT,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Borough of River Edge's request for a restraint of binding arbitration of a grievance filed by Local 108, Public Employees Division, RWDSU Blue Collar Unit. The grievance alleges a violation of the Health and Welfare Benefits article of the parties' agreement. Relying on its decision in Rockaway Tp., P.E.R.C. No. 2009-1, 34 NJPER 278 (¶96 2007), the Commission holds that the grievance concerns the legally arbitrable issue of health benefit levels. If the arbitrator finds a contractual violation and a dispute arise over the negotiability of any remedy issued, the City may re-file its scope petition.

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, Scarinci Hollenbeck, attorneys
(Matthew J. Giacobbe, of counsel and on the brief and
reply brief; Yaacov Brisman, on the brief)

For the Respondent, Oxfeld Cohen, P.A., attorneys
(Nancy I. Oxfeld, on the brief)

DECISION

On July 25, 2008, the Borough of River Edge petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by Local 108, Public Employee Division, RWDSU Blue Collar Unit. The grievance alleges a violation of the Health and Welfare Benefits article of the parties' collective negotiations agreement. We deny the request for a restraint.

The parties have filed briefs and the Borough has filed a certification of its administrator/chief financial officer. These facts appear.

Local 108 represents the Borough's blue collar employees. The parties' collective negotiations agreement is effective from January 1, 2007 through December 31, 2010. The grievance procedure ends in binding arbitration.

Article 15 is entitled Health and Welfare Benefits. Section 3 provides:

The Employer shall enroll employees that file the necessary and required statements in the New Jersey State Health Benefits Program. As the same exists on the date of this Agreement, benefits provided are Blue Cross, Blue Shield 14/20 Series, Prudential Major Medical Insurance and Rider "J". Enrollment shall include the employee's dependents as defined by the Plan. The full cost of the Plan will be paid by the Employer. If, for any reason, the aforementioned Plan or a part thereof is withdrawn by the carrier, the Employer will make its best effort to obtain comparable coverage, for the employees.

The Borough has participated in the State Health Benefits Program ("SHBP") for at least 37 years. In 2005, the mayor and council created a Health Benefits Study Committee. Three elected officials and a representative group of employees served on the Committee. Among other things, the Committee met with a representative of the SHBP; received an analysis of another municipality's health benefit costs; met with the Borough's risk consultant and discussed self insurance and a health insurance pool; met with the CFO of PERMA representing the Bergen Municipal Employee Benefits Fund; recommended a Health Fair for employees; met and reviewed a draft report to the mayor and council; met for

a presentation by Bank of America to discuss the Blue Cross/Blue Shield Direct Access Plan; and met to discuss a proposal by Bank of America. The Borough ultimately decided that the SHBP provided the most comprehensive and affordable coverage.

Effective April 1, 2008, the SHBP began to offer two new plans: NJ Direct 10 to replace the Traditional Plan and NJ Direct 15 to replace NJ PLUS. Employees were notified of the changes on or about January 31, 2008.

On May 12, 2008, Local 108 filed a grievance claiming violations of Article 15. Specifically, Local 108 claims that the new plan increases out-of-pocket expenses; most of the doctors are not in the new plan; there is a longer wait to see a specialist; and there is now limited assistance from the Borough. On June 9, Local 108 demanded arbitration. This petition ensued.

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.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

[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. [Id. at 404-405]

To be preemptive, a statute or regulation must speak in the imperative and expressly, specifically and comprehensively set an employment condition. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

The Borough argues that the grievance is untimely; the contract does not require the Borough to provide comparable coverage; and N.J.S.A. 52:14-17.25 preempts negotiations over changes in the SHBP. Local 108 responds that the first two

arguments are contract arguments irrelevant to a scope of negotiations determination. As for the preemption argument, Local 108 responds that no statute prevents an employee from arbitrating a reduction in the level of benefits.

Whether the grievance was timely filed under the contract and whether the Borough had a contractual obligation to provide comparable benefits are issues outside our scope of negotiations jurisdiction. The parties' arguments on those issues can be considered by an arbitrator. Our scope jurisdiction is limited to deciding whether a subject is negotiable and therefore legally arbitrable. Ridgefield Park.

We agree with the Borough that the Legislature and the State Health Benefits Commission set the level of benefits for the SHBP. However, an arbitrator may determine whether the parties made an agreement over benefit levels and whether the employer violated such an agreement. Rockaway Tp., P.E.R.C. No. 2008-21, 33 NJPER 257 (¶96 2007), dec. on temp. remand P.E.R.C. No. 2009-19, 34 NJPER 300 (¶109 2008), app. pending App. Div. Dkt. No. A-1628-07T2; City of Bayonne, P.E.R.C. No. 2008-41, 34 NJPER 9 (¶4 2008); Borough of East Rutherford, P.E.R.C. No. 2009-15, 34 NJPER 289 (¶103 2008), app. pending App. Div. Dkt. No. A-1260-08T2. An arbitrator's authority is limited in certain respects. An arbitrator cannot order an employer to continue benefits no longer provided by the SHBP after the SHBC has exercised its

authority to set different levels. Bayonne; State of New Jersey, P.E.R.C. No. 99-40, 24 NJPER 522 (¶29243 1998). Nor can an arbitrator order that the SHBP reinstate a traditional plan or order the SHBP to lower co-pays. However, local employers are not required to participate in the SHBP and can withdraw from the SHBP at any time consistent with their obligations under existing collective negotiations agreements. New Jersey School Bds. Ass'n v. State Health Benefits Comm'n, 183 N.J. Super. 215, 218, 224 (App. Div. 1981).

The Borough's attempt to distinguish Rockaway and Bayonne is based on its argument that this collective negotiations agreement does not provide for a specific level of benefits, but only requires that the Borough make its "best efforts" to obtain comparable coverage. That argument, however, must be made to the arbitrator, who has complete authority to assess its merits.

As we stated in Rockaway, should the arbitrator find a contractual violation and a dispute arise over the negotiability of any remedy issued, the Borough may re-file its scope petition within 30 days of an award. Any speculation about possible remedies is premature.

ORDER

The request of the Borough of River Edge for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: March 26, 2009

Trenton, New Jersey