

P.E.R.C. NO. 2018-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY,

Petitioner,

-and-

Docket No. SN-2018-001

HEALTH PROFESSIONALS and ALLIED
EMPLOYEES AFT/AFL-CIO, LOCAL 5094,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants Rutgers' request for a restraint of binding arbitration of a grievance filed by the Health Professionals and Allied Employees, AFT/AFL-CIO, Local 5094 contesting Rutgers' failure to immediately reinstate a member's health insurance benefits when she was rehired following her termination in a reduction in force. The Commission finds that arbitration is preempted by the State Health Benefits Program Act and its implementing regulations, which require two months of continuous full-time service in order to be eligible for coverage, and that the member was ineligible for immediate coverage due to her break in service.

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, Rutgers, The State University of
New Jersey, attorneys (David A. Cohen, Associate Vice
President and Deputy General Counsel; Farrah Gold
Henry, Associate General Counsel)

For the Respondent, Health Professionals and Allied
Employees AFT/AFL-CIO, attorneys (Emma Reborn, General
Counsel)

DECISION

On July 7, 2017, Rutgers, the State University of New Jersey (Rutgers), filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Health Professionals and Allied Employees AFT/AFL-CIO, Local 5094 (HPAE). The grievance asserts that Rutgers violated Article 9 of the parties' collective negotiations agreement (CNA) when Rutgers failed to reinstate the grievant's health benefits upon her being recalled from a layoff.

Rutgers has filed briefs, exhibits, and the certifications of Abdel Kanan, Director of Labor Relations - Rutgers Biomedical Health Services, and John Teubner, Rutgers Director of Benefits and Wellness. HPAE filed a brief, exhibits, and the certification of its counsel, Emma R. Rebhorn, Esq.

HPAE represents all non-supervisory, full and part-time professional staff members of Rutgers who have satisfactorily completed their initial probationary period.^{1/} Rutgers and HPAE are parties to a CNA in effect from October 1, 2014 through June 30, 2018. The grievance procedure ends in binding arbitration.

Article 9 of the CNA, entitled "Monetary Benefits: Health Benefits, Prescription Drug Program, Dental Care Program, Life Insurance and Pension," provides in relevant part:

9.01 Health Benefits:

The parties acknowledge that pursuant to N.J.S.A. 52:14-17.25 et seq., employees of the University are deemed to be employees of the State for purposes of health benefits and that health benefits are provided to eligible employees as set forth in applicable statutes and regulations. During the term of this Agreement, employee contributions to the cost of health care shall be based on the health care contribution rates set forth in PL 2011, chapter 78 and in effect September 30, 2014.

^{1/} As a result of the New Jersey Medical and Health Sciences Education Restructuring Act, N.J.S.A. 18A:64M-1, et seq., effective July 1, 2013, the University of Medicine & Dentistry of New Jersey (UMDNJ) ceased to exist and many of its schools and programs became part of Rutgers. This includes legacy UMDNJ employees represented by HPAE at those schools and programs that became part of Rutgers.

On May 19, 2016, Rutgers laid off the grievant from her position as a Clinical Nurse Coordinator, which was a position in the Communications Workers of America (CWA) unit. Pursuant to the CNA between Rutgers and CWA, Rutgers placed the grievant on a recall list. In September of 2016, Rutgers contacted the grievant to determine whether she wanted to return to work at Rutgers as a Health Care Case Manager, which is a position in the HPAE unit, effective November 21, 2016.

Kanan certifies that on November 10, 2016, the grievant accepted the position. On November 21, Rutgers rehired the grievant as a Health Care Case Manager and she continues to hold that position. According to Kanan, when the grievant became re-employed, Rutgers informed the grievant that she would have a 60-day waiting period from her date of hire before she could enroll in the State Health Benefits Program (SHBP). On November 22, a Rutgers Benefits Associate e-mailed the grievant the following:

As per our conversation, please submit new enrollment applications. You will have a 60 day waiting period from your date of hire. Your effective coverage date should be 01/21/2017.

Teubner certifies that the grievant became re-enrolled in health benefits coverage under the SHBP on or about January 21, 2017.

On December 12, 2016, HPAE filed a grievance alleging that Rutgers denied health, prescription drug, and dental benefits to the grievant. According to the grievant, following her layoff,

she made COBRA premium payments to maintain health insurance coverage for herself and her family for the months of November and December 2016. She did not make COBRA payments for the month of January 2017. The grievant seeks reimbursement for her COBRA payments for November and December 2016, forgiveness or payment of the COBRA payment for January 2017, and reimbursement for out-of-pocket medical expenses incurred in January 2017.

On March 30, 2017, Rutgers held a grievance hearing during which HPAE alleged that the grievant was not told that she would have to re-enroll for health benefits and wait two months for her coverage to begin. On April 11, Rutgers denied the grievance. On April 21, HPAE filed a Request for Submission of a Panel of Arbitrators. This petition ensued.

The Commission's inquiry on a scope of negotiations petition is quite narrow. We are addressing a single issue in the abstract: whether the subject matter in dispute is within the scope of collective negotiations. The merits of the union's claimed violation of the agreement, as well as the employer's contractual defenses, are not in issue, because those are matters for the arbitrator to decide if the Commission determines that the question is one that may be arbitrated. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

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.]

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

Where a statute or regulation is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically and comprehensively. Council of N.J. State College Locals, NJSFT-AFT/AFL-CIO v. State Bd. of Higher Ed., 91 N.J. 18, 30 (1982); Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory

Employees Ass'n, 78 N.J. 54, 80-82 (1978). If a particular item in dispute is controlled by a specific statute or regulation, the parties may not include any inconsistent term in their agreement. Id.

The New Jersey State Health Benefits Program Act (SHBPA), N.J.S.A. 52:14-17.25 et seq., provides the following regarding employee eligibility and the effective date of SHBP coverage:

52:14-17.31 Effective date of coverage; rules, regulations; information provided to division.

The coverage provided solely for employees shall, subject to the provisions below, automatically become effective for all eligible employees from the first day on or after the effective date of the program on which they satisfy the definition of "employee" contained in this act. . . .

[N.J.S.A. 52:14-17.31.]

The SHBPA's definition of "employee" is set forth at N.J.S.A. 52:14-17.26(c) (2), which provides in pertinent part:

(2) After the effective date [May 21, 2010] of P.L.2010, c.2, the term "employee" means (i) a full-time appointive or elective officer whose hours of work are fixed at 35 or more per week, a full-time employee of the State, or a full-time employee of an employer other than the State who appears on a regular payroll and receives a salary or wages for an average of the number of hours per week as prescribed by the governing body of the participating employer which number of hours worked shall be considered full-time, determined by resolution, and not less than 25, or (ii) an appointive or elective officer, an employee of the State, or an employee of an employer other than the State

who has or is eligible for health benefits coverage provided under P.L.1961, c.49 (C.52:14-17.25 et seq.) or sections 31 through 41 of P.L.2007, c.103 (C.52:14-17.46.1 et seq.) on that effective date and continuously thereafter provided the officer or employee is covered by the definition in paragraph (1) of this subsection. For the purposes of this act an employee of Rutgers, The State University of New Jersey, shall be deemed to be an employee of the State, . . . For the purposes of this act the term "employee" shall not include persons employed on a short-term, seasonal, intermittent or emergency basis, persons compensated on a fee basis, persons having less than two months of continuous service or persons whose compensation from the State is limited to reimbursement of necessary expenses actually incurred in the discharge of their official duties, provided, however, that the term "employee" shall include persons employed on an intermittent basis to whom the State has agreed to provide coverage under P.L.1961, c.49 (C.52:14-17.25 et seq.) in accordance with a binding collective negotiations agreement. An employee paid on a 10-month basis, pursuant to an annual contract, will be deemed to have satisfied the two-month waiting period if the employee begins employment at the beginning of the contract year. . . . A determination by the commission that a person is an eligible employee within the meaning of this act shall be final and shall be binding on all parties.

[N.J.S.A. 52:14-17.26(c) (2); emphasis added.]

The SHBPA's implementing regulations provide that the definition of full-time employee shall have the same meaning as established under N.J.S.A. 52:14-17.26(c), and repeats that "[t]he term 'employee' shall not include . . . persons having

less than two months of continuous service." N.J.A.C. 17:9-1.8.

The regulations further provide:

§ 17:9-4.3 Ineligible employees defined

(a) For purposes of State and local coverage, "employee" shall not mean:

- 1. Any person with less than two months of continuous service; . . .

Regarding termination of full-time employment and SHBP coverage, the SHPBA provides (emphasis added):

52:14-17.32 Health care benefits for retirees.

a. The health care benefits coverage of any employee, and the employee's dependents, if any, shall cease upon the discontinuance of the term of office or employment or upon cessation of active full-time employment subject to such regulations as may be prescribed by the commission for limited continuance of coverage during disability, part-time employment, leave of absence or layoff, and for continuance of coverage after retirement, any such continuance after retirement to be provided at such rates and under such conditions as shall be prescribed by the commission, subject, however, to the requirements hereinafter set forth in this section. . . .

* * *

52:14-17.32b. Cessation of active full-time employment; payment of premiums

The cessation of active full-time employment shall be deemed to occur on the last day of the coverage period for which premiums have been paid and such premiums will be required if the employee receives payment for any service rendered in the coverage period.

The regulations provide the following specific events that would terminate an employee's SHBP eligibility:

§ 17:9-7.2 Termination of eligibility

(a) The coverage of an employee and such employee's eligible dependents shall terminate whenever such employee's eligibility shall cease for any of the reasons given in (c) below.

(b) The effective date of termination shall be the last day of the coverage period corresponding to the payroll period or month in which the last payroll deduction was made from the employee's salary for coverage, if any are required, or the last charge shall have been paid by the State for the employee's and/or the employee's dependents' coverage or by the local employer for the employee and/or the employee's dependents, as the case may be.

(c) Coverage for the employee and the employee's dependents will terminate if:

1. The subscriber voluntarily terminates coverage;
2. The employee terminates employment;
3. The employee's hours are reduced so the employee no longer qualifies for coverage as a full-time employee. An employee whose coverage terminated as a result of a change from full-time to part-time status cannot be reenrolled until the employee has reestablished eligibility for coverage by serving the normal waiting period prescribed for new enrollees. In no event will the waiting period include any part-time service rendered by the employee;
4. The employee is on a leave of absence and the employee does not make required premium payments. The coverage of an eligible employee and of an employee's dependents

during any period of authorized leave of absence without pay shall terminate on the last day of the second coverage period following the last payroll period or month for which the employee received a salary payment if the total charge for the coverage is not paid by the employee;

5. The employee enters the Armed Forces, is eligible for government-sponsored health services and is not receiving differential pay from the State or local employer;

6. The subscriber's employer ceases to participate in the SHBP;

7. The subscriber dies;

8. The employee is suspended; or

9. The employee is on a furlough or extended furlough and fails to make required premium payments in advance.

(d) In addition to the above, coverage for dependents will end if:

[N.J.A.C. 17:9-7.2; emphasis added.]

Rutgers asserts that HPAAE's grievance is preempted by N.J.S.A. 52:14-17.26 because it requires an employee to have at least two months of eligible service for SHBP eligibility. It argues that because the grievant was terminated from one position and not hired into a different position until six months later, she was considered a new employee for SHBP purposes and had to undergo the two-month waiting period before re-enrolling in SHBP and receiving health benefits.

HPAAE asserts that the SHBPA is silent on whether a former employee needs to wait two months for health benefits eligibility

when rehired, and therefore the issue remains negotiable. It argues that the statute does not define "continuous service" so it does not clearly provide that a laid off employee who is later rehired has had a disqualifying break in service that precludes immediate re-enrollment in the SHBP.

N.J.S.A. 52:14-17.31 and N.J.S.A. 52:14-17.26(c) (2) make SHBP coverage effective once an employee has appeared on the State's regular payroll working full-time for at least two months. See also, N.J.A.C. 17:9-1.8; N.J.A.C. 17:9-4.3. Once an employee ceases full-time employment, s/he is no longer eligible for SHBP, and SHBP coverage terminates on the last day of the coverage period for which premiums have been paid. N.J.S.A. 52:14-17.32.a. and 52:14-17.32b.; N.J.A.C. 17:9-7.2(b) and 17:9-7.2(c)2. In the instant case, the grievant was terminated from employment on May 19, 2016 via layoff, which ended both her status as an employee and her eligibility for SHBP coverage. When the grievant was rehired on November 21, 2016, she was not immediately eligible for re-enrollment into the SHBP because her layoff created a break in service such that she no longer met the N.J.S.A. 52:14-17.26(c) (2) definition of employee as someone who has at least "two months of continuous service." Once she met the statute's definition of being a regular full-time employee continually for at least two months, she became eligible for re-enrollment on January 21, 2017.

Given the very specific criteria for SHBP eligibility and termination of enrollment contained in the SHBPA and its regulations, we find it unnecessary, as the HPAE argues, for the SHBPA to have a separate definition of "continuous service" in order to be preemptive of the grievant's challenge to the two month re-enrollment waiting period. The statute's only exceptions to the employee/eligibility criteria cover situations such as how long employees may continue SHBP coverage during different types of leaves of absence, and who pays for the premiums. See, e.g., N.J.S.A. 52:14-17.32d. (SHBP coverage paid by State for up to 3 months for authorized leave of absence for illness without pay); N.J.S.A. 52:14-17.32e. (SHBP coverage paid by employee for up to 9 months for authorized leave of absence without pay); N.J.S.A. 52:14-17.32g. (health benefits for certain education employees may be continued during leave of absence with or without pay for up to two years).

However, none of these exceptions to the SHBPA's general eligibility rules apply to unit members who became ineligible due to a termination of employment; they concern employees who have not separated from employment but who would otherwise have been ineligible for coverage because they are no longer working full-time. In contrast, here the grievant was separated from employment and, though on a layoff recall list, was no longer on the payroll or on any of the enumerated types of paid or unpaid

leaves for which the SHBPA might allow continued SHBP coverage with certain limitations and conditions. Neither she nor the employer paid for her SHBP premiums during her layoff because there is no provision in the statute for continuation of those benefits that is applicable to her employment status.

Although N.J.S.A. 52:14-17.32.a., supra, allows the State Health Benefits Commission to promulgate regulations providing for "limited continuance of coverage during disability, part-time employment, leave of absence or layoff, and for continuance of coverage after retirement," HPAE has not identified any regulations providing for coverage during layoff. In the absence of such laws or regulations, which as noted above have been made for other circumstances such as leaves of absence, N.J.S.A. 52:14-17.32.a. explicitly preempts continuation of coverage once an employee has discontinued employment, saying it "shall" cease:

The health care benefits coverage of any employee, and the employee's dependents, if any, shall cease upon the discontinuance of the term of office or employment or upon cessation of active full-time employment subject to such regulations as may be prescribed by the commission for limited continuance of coverage during disability, part-time employment, leave of absence or layoff, and for continuance of coverage after retirement . . .

The language of N.J.A.C. 17:9-7.2(c)3. further underscores our conclusion that the grievant's break in service due to layoff required her to meet the SHBPA's employee/eligibility

requirements (e.g., two month waiting period) when re-hired to a full-time position. N.J.A.C. 17:9-7.2(c)3. clarifies that even continuously employed employees whose hours are temporarily reduced below the full-time threshold have their SHBP coverage terminated and must resume full-time employment for the full two month waiting period again before regaining eligibility.^{2/} We do not find it plausible that a laid off employee who has ceased employment completely would enjoy the right of immediate re-enrollment while a continuously employed unit member must serve "the normal waiting period prescribed for new enrollees" after a brief period of service below the full-time hours threshold. We find that no similar explanatory language is necessary for layoffs, as the SHBPA and regulations are already clear enough regarding termination or cessation of employment altogether. Moreover, the SHBPA contains only one exception to the two month waiting period to start or resume SHBP benefits:

An employee paid on a 10-month basis, pursuant to an annual contract, will be deemed to have satisfied the two-month waiting period if the employee begins

^{2/} "(c) Coverage for the employee and the employee's dependents will terminate if: . . . 3. The employee's hours are reduced so the employee no longer qualifies for coverage as a full-time employee. An employee whose coverage terminated as a result of a change from full-time to part-time status cannot be reenrolled until the employee has reestablished eligibility for coverage by serving the normal waiting period prescribed for new enrollees. In no event will the waiting period include any part-time service rendered by the employee; . . ." N.J.A.C. 17:9-7.2(c)3.

employment at the beginning of the contract year.

[N.J.S.A. 52:14-17.26(c)(2).]

Again, no such exception is made for any other new employee or any category of employee returning after a termination.^{3/}

Accordingly, in the absence of any law or regulation providing that layoffs should not be considered a break in "continuous service," we must apply the plain language of the statute to require a two month waiting period for resumption of SHBP benefits following separation from employment.

^{3/} The HP AE's brief notes that the SHBP Summary Program Description Guidebook allows for immediate re-enrollment of employees returning from leaves of absence. As discussed earlier, the SHBPA and regulations have carved out exceptions to its employee and eligibility requirements that cover various leaves of absence and other situations. However, as we noted, no exceptions to the two month waiting period have been made for former employees such as those who were fired, laid off, or resigned. Contrary to the HP AE's assertion, the topic does not become mandatorily negotiable just because the SHBP allows immediate re-enrollment in other situations. This is not a case of legislative silence allowing for negotiations to fill in the blanks, but a case of legislative mandates with some explicit exceptions and silence as to other exceptions (sought by HP AE) to the specific statutory requirements for SHBP enrollment.

ORDER

The request of Rutgers, The State University of New Jersey, for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau and Eskilson voted in favor of this decision. None opposed. Commissioner Voos recused herself. Commissioner Jones was not present.

ISSUED: December 21, 2017

Trenton, New Jersey