

P.E.R.C. NO. 2009-40

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF BAYONNE,

Petitioner,

-and-

Docket No. SN-2009-018

BAYONNE POLICE SUPERIOR  
OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the City of Bayonne's request for a restraint of binding arbitration of a grievance filed by the Bayonne Police Superior Officers. The grievance asserts that the parties' collective negotiations agreement requires the City to pay the cost of increased maximum out-of-pocket expenses for employees moved from the Traditional Plan to the NJ Direct Plan of the State Health Benefits Program. 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 within 30 days.

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, Apruzzese, McDermott, Mastro & Murphy, attorneys (Robert J. Merryman, on the brief)

For the Respondent, Lindabury, McCormick, Estabrook & Cooper, P.C., attorneys (Eric B. Levine, on the brief)

DECISION

On October 3, 2008, the City of Bayonne petitioned for a scope of negotiations determination. The employer seeks a restraint a binding arbitration of a grievance filed by the Bayonne Police Superior Officers Association ("SOA"). The grievance asserts that the parties' collective negotiations agreement requires the employer to bear the cost of increased maximum out-of-pocket expenses for employees moved from the Traditional Plan to the NJ Direct Plan of the State Health Benefits Program ("SHBP"). We decline to restrain binding arbitration, but will permit the City to refile its petition within 30 days of an arbitration award should the arbitrator find

a contractual violation and a dispute arise over the negotiability of any remedy issued.

The parties have filed briefs, exhibits and certifications. These facts appear.

The parties entered into a collective negotiations agreement effective from July 1, 2003 through June 30, 2008. The grievance procedure ends in binding arbitration. Article 7 is a Retention of Benefits provision.

Article 9, Health Insurance, provides, in pertinent part:

The City shall assume the full cost for maintaining the present State Health Benefits for each employee and eligible dependents of that employee. The City may change carriers so long as the benefit levels are equal to or better than the current coverage. Should the City consider changing the Health Insurance program, it shall obtain from the proposed Health provider a letter guaranteeing that the level of benefits and dollar reimbursements will be at least equal to or better than in every respect to the present plan. This letter must be on company stationary and signed by an officer of the organization who is authorized to make such representations. A copy of this letter and all relevant documents shall be provided to the SOA sixty (60) days prior to implementation of the plan. For Officers hired by the City on or after January 1, 2004, if such Officer elects to participate in a health insurance plan that exceeds the cost of NJ Plus, the Officer must pay the difference between the cost of dependant coverage for the selected plan and NJ Plus.

The City also provides family prescription drug and dental plans.

Effective April 1, 2008, the SHBP eliminated its Traditional Plan. The Traditional Plan was an indemnity plan that provided reimbursement of expenses for treatment of illness and injury.<sup>1/</sup> Employees enrolled in the Traditional Plan were automatically enrolled in NJ Direct 10. NJ Direct is a Preferred Provider Organization with both in-network and out-of-network medical care.<sup>2/</sup>

On April 1, 2008, the SOA filed a grievance concerning the changes made to maximum out-of-pocket expenses for either an individual or for family coverage in the new plan for those members previously enrolled in the Traditional Plan. The SOA asserts that Article 7 states that the employer is contractually required to maintain all working conditions during the term of the agreement and, as such, the City should bear the cost of the increase in out-of-pocket expenses.

The grievance was not resolved and on May 30, 2008, the SOA sought binding arbitration. The SOA asserted that a dispute has arisen concerning the changes in health benefits under Article 7 and that the City continues to violate the contract by refusing

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1/ We take administrative notice of the Traditional Plan Handbook on the SHBP web site at:  
<http://www.state.nj.us/treasury/pensions/epbam/exhibits/handbook/tradplanbook.pdf>

2/ We take administrative notice of the NJ Direct Plan Handbook on the SHBP web site at:  
<http://www.state.nj.us/treasury/pensions/epbam/exhibits/handbook/njdirectbk.pdf>

to rescind its unilateral action in making these changes. No date has been set for the arbitration.

Our 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, 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. Preemption will not be found unless a statute or regulation speaks in the imperative by fixing an employment condition and eliminating the employer's discretion to

vary it through negotiations. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

The City argues that all employers that participate in the SHBP are subject to the rate structure and level of benefits set by the State Health Benefits Commission ("SHBC"). It asserts that once the SHBC sets rates and benefit levels, a local employer has no discretion over how to implement the co-pays, deductibles and maximum out-of-pocket expenses. The City also argues that the parties' contract does not specify the level of benefits, costs, or out-of-pocket expenses.

The SOA responds that it is neither seeking any change to the SHBP nor any rollback in SHBP co-payments. It seeks only to have an arbitrator determine whether the City has a contractual obligation to maintain a certain level of health benefits and, if so, whether the City has violated that obligation. If a violation is found, the SOA seeks to have the arbitrator determine how the SOA will be made whole for the change in the level of health benefits.

The City replies that the parties did not agree to a specific level of health coverage. Instead they agreed to the SHBP as the health plan the City will provide to its employees. It asserts that it has complied with its obligation to pay the full cost of SHBP coverage.

This case is a cousin of our recent decisions in 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); and 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. Although those decisions involved earlier changes to co-pays established by the SHBP, the analysis is applicable to this more recent change.

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). An arbitrator may determine whether the parties made an agreement over benefit levels and whether the employer violated such an agreement. Rockaway. However, 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). Finally, 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).

Within this framework, we address this dispute that has arisen after the SHBP eliminated the Traditional Plan and established the NJ Direct Plans.

The SOA seeks to arbitrate claims that come within the framework of permissible claims under Rockaway and its progeny. The SOA may argue that the City has a contractual obligation to maintain a certain level of benefits, in this instance, out-of-pocket maximums. The City argues that the contract merely requires it to pay the full cost of the SHBP and does not specify maximum out-of-pocket expenditures. That, however, is an argument on the merits of the grievance that must be made to the arbitrator. East Rutherford.

Should the PBA prevail on its first claim, it may also pursue its claim that the City violated that contractual obligation after the SHBC eliminated the Traditional Plan and replaced it with NJ Direct. As in the Rockaway line of cases, if the arbitrator finds a contractual violation and orders the employer to make employees whole through reimbursement, that action may be inconsistent with the employer's obligations as a participant in the SHBP. Perhaps the SHBC will not permit the City to remain a participant and reimburse. Perhaps it will permit the City to reimburse and remain a participant pending the



next round of negotiations when the contract can be conformed to the higher out-of-pocket maximums. Perhaps the City would rather change providers than incur a reimbursement obligation.

Thus, this grievance may proceed to arbitration. We need not decide at this juncture whether an arbitrator can issue a remedial order requiring the employer to reimburse employees for increased out-of-pocket expenses. As we stated in Rockaway, should the arbitrator find a contractual violation and a dispute arise over the negotiability of any remedy issued, the City may re-file its scope petition within 30 days of an award. Any speculation about possible remedies is premature.

ORDER

The request of the City of Bayonne for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, Fuller and Joanis voted in favor of this decision. None opposed. Commissioners Branigan, Colligan and Watkins recused themselves.

ISSUED: January 29, 2009

Trenton, New Jersey