

I.R. NO. 2019-13

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF FAIRFIELD,

Petitioner,

-and-

Docket No. SN-2019-011

WEST ESSEX PBA LOCAL 81,

Respondent.

SYNOPSIS

A Commission Designee denies the Township'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 Township violated the parties' collective negotiations agreement by continuing to make deductions for health benefits contributions at the Chapter 78 tier four level after Chapter 78 had been fully implemented in the previous agreement. Finding that N.J.S.A. 40A:10-21.2 provides that health benefits contributions become negotiable again for the next contract after full implementation and thus Chapter 78 is no longer preemptive, the Designee finds that the Township failed to demonstrate a substantial likelihood of prevailing in a final Commission decision.

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Appearances:

For the Petitioner, Cleary, Giacobbe, Alfieri & Jacobs LLC, attorneys (Adam S. Abramson-Schneider, of counsel)

For the Respondent, Loccke, Correia & Bukosky, attorneys (Corey M. Sargeant, of counsel)

DECISION

On August 8, 2018, the Township of Fairfield (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the West Essex PBA Local 81 (PBA). The grievance alleges that the Township violated the parties' collective negotiations agreement (CNA) by making excessive deductions for health benefits contributions. On December 10, 2018, the Township filed the instant application for interim relief seeking a temporary restraint of a binding arbitration scheduled for March 20, 2019 pending disposition of the underlying scope of negotiations petition.

PROCEDURAL HISTORY

On December 14, 2018, I signed an Order to Show Cause directing the PBA to file any opposition by January 8, 2019 and setting January 15, 2019 as the return date for oral argument. On January 8, the PBA filed its opposition to the application for interim relief. On January 15, counsel engaged in oral argument during a telephone conference call. In support of the application for interim relief, the Township submitted a brief, exhibits, and the December 7, 2018 certification of Joseph Catenaro, Township Administrator. In opposition, the PBA submitted a brief, exhibits, and the October 2, 2018 certification of Ralph J. Casendino, PBA Local 81 President.

FINDINGS OF FACT

The PBA represents all police officers employed by the Township's Police Department, excluding the Chief of Police. The Township and PBA are parties to a CNA effective January 1, 2018 through December 31, 2020. The parties' previous two CNAs were effective from 2012-2014 and 2015-2017.

Article 7 of the CNA is entitled "Pension and Insurance." Section A of Article 7 provides, in pertinent part:

Section A. The Employer shall provide to members and their families the following insurance protection to the members: Additionally, all members shall contribute to health benefits pursuant to State law.

1. The Horizon Blue Cross/Blue Shield Direct Access 8, or equivalent, at no cost to

the members of the PBA Local #81.

Upon expiration of the parties' 2009-2011 CNA, PBA members began contributing to their health benefits premiums in compliance with P.L. 2011, c. 78 (Chapter 78), as codified in N.J.S.A. 40A:10-21.1 and N.J.S.A. 52:14-17.28c. Those statutes require employees to contribute a percentage of the cost of health benefits premiums at levels to be phased in over four years (commonly referred to as the four Chapter 78 "tiers"), with full implementation reached in the fourth year.^{1/} In accordance with Chapter 78, the PBA members contributed towards health benefits at tier one levels in 2012, tier two in 2013, tier three in 2014, and tier four in 2015. As the fourth tier contribution level was reached in the first year of the parties' 2015-2017 CNA, the PBA continued contributing at the fully implemented fourth tier level through the remaining years of that CNA.

President Casendino certifies that the parties discussed health benefits, and specifically Chapter 78 contributions, at every negotiations meeting for the 2018-2020 CNA. Administrator Catenaro certifies that the PBA failed to demand or request negotiations over employee health benefit contributions during negotiations for the 2018-2020 CNA. President Casendino

^{1/} N.J.S.A. 52:14-17.28c sets forth the full contribution amounts based on salary range and coverage selected, and N.J.S.A. 40A:10-21.1a provides that 25% of the contribution be made in year one, 50% in year two, 75% in year three, and the full contribution in year four.

certifies that both the Township and PBA were aware that Chapter 78 tiered contributions had expired and had now become negotiable. Article 7, Section A remained unchanged in the 2018-2020 CNA, retaining the language from the 2015-2017 CNA that "all members shall contribute to health benefits pursuant to State law." President Casendino certifies that the PBA understood that language to mean that Chapter 78 had sunset, so now the only contribution required under state law was 1.5% per N.J.S.A. 40A:10-23. He certifies that had the language stated otherwise and included reference to the Chapter 78 tiers, the PBA would not have agreed to the contract provisions. The 2018-2020 CNA was executed on February 13, 2018.

President Casendino certifies that the PBA met with Administrator Catenaro in March 2018, and that Administrator Catenaro knew that the Chapter 78 contribution issue was on the table and that is why he specifically negotiated contracts for the other units to make it clear and specific that Chapter 78 contributions would continue. The Township's 2018-2020 contracts with the IBEW AFL-CIO and AFSCME AFL-CIO differed from the language agreed to with the PBA in that they stated the following: "Employee contributions towards health care, at Tier 4 Chapter 78, shall be continued during the term of this contract."

In 2018 the Township continued deducting health benefits contributions from PBA members at the Chapter 78 tier four

levels. On March 8, 2018, the PBA filed a grievance contesting the deductions as violating Article 7, Section A of the CNA. On March 15, the Township denied the grievance. On April 17, the PBA filed a request for grievance arbitration. The Township's scope of negotiations petition and this interim relief application ensued.

LEGAL ARGUMENTS

The Township asserts that its application for interim relief should be granted because, absent contract negotiations, employee contributions to health benefits are expressly controlled by N.J.S.A. 40A:10-21.1 and N.J.S.A. 40A:10-21.2. The Township acknowledges that upon the expiration of the 2015-2017 CNA during which the PBA reached full Chapter 78 tier four implementation, the parties were free to negotiate health care contributions to as little as 1.5% of base salary.^{2/} However, it asserts that per N.J.S.A. 40A:10-21.2, the PBA's alleged failure to negotiate over health benefits contributions for the successor CNA meant that the Chapter 78 tier four level contributions were the status quo and would therefore continue into the new CNA regardless of the health benefits contribution language contained in the new CNA. The Township further asserts that the wasted time, energy, and resources of proceeding to arbitration would cause it to suffer

^{2/} P.L. 2010, c. 2, codified at N.J.S.A. 40A:10-21b (employees) and N.J.S.A. 40A:10-23b (retirees), mandates health benefits contributions of at least 1.5% of base salary.

irreparable harm; that the hardship to the Township if interim relief is not granted outweighs the hardship to the PBA if interim relief is granted; and that an interim relief order would not cause substantial injury to the public interest but that the public's resources would be wasted by proceeding to arbitration on a scope petition that the Commission will restrain.

The PBA asserts that the Township has failed to demonstrate a reasonable probability of success on the merits of the scope of negotiations issue because Chapter 78 no longer preempts negotiations over health benefits contributions. The PBA notes that N.J.S.A. 40A:10-21.2 provides that contribution levels become subject to collective negotiations after full implementation of the Chapter 78 tiers. It argues that the 2018-2020 CNA contains no reference to Chapter 78, but only notes that "all members shall contribute to health benefits pursuant to State law." The PBA asserts that the intentions of the parties in the 2018-2020 CNA can be inferred by reference to the Township's contracts with other unions, which specifically stated that Chapter 78 tier four rates would be continued. The PBA contends that the only applicable state laws that preempt negotiations of health benefits contributions are N.J.S.A. 40A:10-21 and N.J.S.A. 40A:10-23, which mandate minimum employee contributions of 1.5% of base salary. It asserts that the Township cannot have a reasonable chance of success on its

interpretation of the Chapter 78 sunset provisions because the application of those provisions under these factual circumstances has not been interpreted by the Commission.

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).

ANALYSIS

N.J.S.A. 40A:10-21.2 provides that during negotiations for the next CNA to be executed after employees in a unit have reached the full Chapter 78 fourth tier contributions levels, the parties "shall conduct negotiations concerning contributions for health care benefits as if the full premium share was included in the prior contract." N.J.S.A. 40A:10-21.2 also provides that: "After full implementation [of Chapter 78 contribution levels], those contribution levels shall become part of the parties' collective negotiations and shall then be subject to collective negotiations in a manner similar to other negotiable items between the parties." See Clementon Bd. of Ed., P.E.R.C. No. 2016-10, 42 NJPER 117 (¶34 2015), appeal dismissed as moot, 43 NJPER 125 (¶38 2016) (Chapter 78 mandates that the tier four contribution levels become the status quo for negotiations for the successor CNA); City of Hoboken, P.E.R.C. No. 2019-22, 45

NJPER ____ (¶__ 2018) (during negotiations for the successor CNA after full Chapter 78 implementation, the employer complied with N.J.S.A. 40A:10-21.2 by maintaining the percentage of premium contribution levels set by Chapter 78, tier four, as the status quo pending completion of negotiations).

Consistent with Commission precedent, PBA members continued contributions at Chapter 78 fourth tier levels in the succeeding years of the 2015-2017 CNA after they reached full implementation in the first year of that agreement. Gloucester Tp., P.E.R.C. No. 2019-4, 45 NJPER 82 (¶21 2018), app. pending; Ridgefield Park Bd. of Ed., P.E.R.C. No. 2018-14, 44 NJPER 167 (¶49 2017), app. pending; and Clementon, supra. Following expiration of the 2015-2017 CNA, if the parties had not agreed to a successor CNA, then Chapter 78 would have required that the tier four contribution levels continue and arbitration over contribution levels would be preempted. See Hoboken, supra.

However, the parties did negotiate a successor CNA to follow the one in which full Chapter 78 implementation was reached. The language of N.J.S.A. 40A:10-21.2 is clear that health benefits premiums "shall then be subject to collective negotiations." Therefore, for the new 2018-2020 CNA, Chapter 78 no longer preempted negotiations over health benefits contributions, so the parties could have agreed to contribution levels of more, less, or equal to the Chapter 78 fourth tier levels. The only

preemptive floor for the 2018-2020 CNA that remained applicable after the sunset of the Chapter 78 contribution levels was that set by P.L. 2010, c. 2, which mandates health benefits contributions of at least 1.5% of base salary (or the full premium cost if less than 1.5%). See Ocean Cty. Voc. Bd. of Ed., P.E.R.C. No. 2014-53, 40 NJPER 405 (¶137 2014) (employer did not commit unfair practice by unilaterally deducting 1.5% of base salary for health benefits because it was required to do so by P.L. 2010, c. 2); Town of Morristown, P.E.R.C. No. 2013-11, 39 NJPER 149 (¶46 2012) (arbitration restrained over employer's 1.5% deduction for dental coverage based on preemption by P.L. 2010, c. 2 (N.J.S.A. 40A:10-21), except that the 1.5% deductions cannot exceed premium costs).

Both parties agree that health benefits contributions for the 2018-2020 were negotiable to the extent they did not conflict with the 1.5% floor set by P.L. 2010, c. 2. The parties also agree that they executed a new CNA that includes a provision on health benefits contributions. Whether or not the parties intended that language to continue Chapter 78 tier four levels, apply only the 1.5% floor, or utilize some other contribution amount, is not for the Commission to decide in a scope of negotiations proceeding. Ridgefield Park, supra. It is for the arbitrator to interpret the meaning of Article 7, Section A of the 2018-2020 CNA and determine whether the Township violated it

by continuing health benefits deductions equivalent to the Chapter 78 tier four contribution levels.

Given the legal precepts set forth above, I find that the Township 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. This case will be referred to the Commission for final disposition.

ORDER

The request of the Township of Fairfield for an interim restraint of binding arbitration is denied pending the final decision or further order of the Commission.

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

DATED: January 16, 2019
Trenton, New Jersey

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