

P.E.R.C. NO. 2001-19

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTHERN BURLINGTON COUNTY
REGIONAL BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2000-97

NORTHERN BURLINGTON COUNTY
REGIONAL TEACHERS' ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Northern Burlington County Regional Board of Education for a restraint of binding arbitration of a grievance filed by the Northern Burlington County Regional Teachers' Association. The grievance alleges that the Board violated the parties' collective negotiations agreement when it discontinued dental and prescription drug benefits for certain retired employees. The Commission concludes that arbitration of this grievance is preempted by N.J.S.A. 18A:16-19b which prohibits retirees who take State-paid coverage under the State Health Benefits Program from receiving employer-paid coverage.

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, Cassetta, Taylor, Whalen & Hybbeneth,
consultants (William F. Hybbeneth, Jr., on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys
(Steven R. Cohen, of counsel; Kenneth Waldman, on the
brief)

DECISION

On April 5, 2000, the Northern Burlington County Regional Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Northern Burlington County Regional Teachers' Association. The grievance alleges that the Board violated the parties' collective negotiations agreement when it discontinued dental and prescription drug benefits for certain retired employees.

The parties have filed briefs and exhibits. The Association has filed nineteen certifications. These facts appear.

The Association represents teachers and other certified staff. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1997 through June 30, 2000. The grievance procedure ends in binding arbitration.

Schedule B of the parties' agreement is entitled Fringe Benefits. Section E, Medical and Dental After Retirement, provides:

1. The Board of Education agrees that any teacher after fifteen (15) years of continuous employment within the district and who retires from the teaching profession, said Board of Education will pay for the Blue Cross/Blue Shield, Rider "J", Major Medical, Dental Program, and Prescription Plan for a five (5) year period.
2. The Board of Education further agrees to allow any teacher the right to reimburse the Board of Education for all medical and dental insurance paid on their behalf for a total of five (5) additional years or for a period of time until a teacher reaches 65 years of age after retirement.
3. If a teacher chooses to enroll in the State benefits program, the Board of Education will pay for the dental and prescription program for a fifteen (15) year period.

The Board does not participate in the State Health Benefits Program (SHBP), N.J.S.A. 52:14-17.25 et seq. Instead, for its active employees, it provides a stand-alone New Jersey Blue Cross/Blue Shield Blue Select program for basic benefits; a stand-alone New Jersey Blue Cross Dental program; and a stand-alone New Jersey Blue Cross Prescription Plan with co-payments of \$5.00 brand, \$0.00 generic and \$0.00 mail order.

Prior to January 1, 1999, the dental and prescription drug plans also covered certain retirees who, pursuant to N.J.S.A. 18A:16-19, qualified and opted for State-paid benefits under the SHBP. As discussed later, that statute allows certain retired school board employees to elect SHBP coverage even though their former employer is not an SHBP participant.

In May 1996, the Board became aware of a September 27, 1993 decision of the State Health Benefits Commission (SHBC) in Hamilton Tp. Bd. of Ed. and Hamilton Tp. Ed. Ass'n. That decision explained that SHBC guidelines barred employers participating in the SHBP from providing prescription drug and dental coverage to retirees. The SHBC reasoned that while it could approve some deviations from the guidelines, it was not authorized to approve the extension of dental and prescription coverage to retirees.

The SHBC noted that the Hamilton Board had purchased its dental and prescription drug contracts under the authority of the SHBP statute, N.J.S.A. 52:14-17.29(F), not Title 18A. But it opined that even if the Hamilton Board had not been an SHBP participant, retired employees who opted for State-paid SHBP coverage were, under N.J.S.A. 18A:16-19, ineligible for employer-paid coverage. The Appellate Division affirmed the SHBC determination in an unpublished decision, Hamilton Tp. Ed. Ass'n v. Hamilton Tp. Bd. of Ed., App. Div. Dkt. No. A-1421-93T1, (6/15/95).

On June 14, 1998, the Northern Burlington County Regional Board sought an opinion from the SHBC as to whether it could, under SHBP regulations and Hamilton, continue to provide dental and prescription drug benefits to retired employees. The Board specifically asked for an opinion on the following:

- [1] The primary issue upon which the Board seeks an opinion from the S.H.B.C. is that the Board believes that it is ultra vires for it to provide dental and prescription benefits to retired employees who are enrolled in the State Health Benefits Plan as a benefit of their retirement. The Board relies on the September 27, 1993 Final Administrative Determination of the State Health Benefits Commission Re: Prescription Drug and Dental Plan of the Hamilton Township board of Education, issued over the signature of Secretary of the State Health Benefits commission.

The Association avers that the clear decision of the SHBC in the aforementioned determination is not applicable to the retired employees of the Board, who, after having qualified with the requisite 25 years of service, elect State Health Benefits as part of their retirement. The reasoning advanced by the Association for the inapplicability of the S.H.B.C. regulations as cited in the determination in Hamilton is that the Board does not participate in the State Health Benefits Plan for its active employees, thus, any additional benefits during retirement, fully paid for by the Board of Education, are not governed by the rules of the S.H.B.C.

- [2] The additional issue upon which the Board seeks a determination from the S.H.B.C. is the position advanced by the Association that a retiring employee, with 25 years of service in the T.P.A.F. or P.E.R.S., can waive participation in the State Health Benefits Plan at the actual time of

retirement, avail themselves of the five (5) years of Board paid stand alone health benefits under E.1. of the contract language, and subsequent to the expiration of that five year time period, then elect to enroll in the State Health Benefits Plan paid for by the State as a benefit of their retirement. The Board believes that subject to the regulations of the S.H.B.C. an employee must make the election to participate in paid State Health Benefits as a benefit of retirement at the time of actual retirement. The Board avers that a decision not to participate in such benefits at the actual time of retirement is irrevocable under the regulations, thus, under the scenario outlined by the Association, an employee who chose Board paid health benefits subject to the contractual language could not also participate in State paid health benefits and would forfeit his/her right to participate in State paid health benefits as part of retirement should he/she waive participation at the actual time of retirement.

This letter was referred to a Principal Research Analyst. On July 9, 1998, the analyst responded. She wrote that the Hamilton decision did not fully apply to Northern Burlington because it did not participate in the SHBP. However, the analyst informed the Board that N.J.S.A. 18A:16-19(b) prohibited the Board from providing its retirees who participate in the SHBP with prescription drug and dental benefits.

N.J.S.A. 18A:16-19 provides:

a. Except as otherwise prescribed by P.L. 1979, c. 391 (C. 18A:6-12 et seq.), retired employees shall be required to pay for the entire cost of coverage for themselves and their dependents at rates which are deemed adequate to cover the benefits, as affected by Medicare, of such retired employees and their

dependents on the basis of the utilization of services which may be reasonably expected of such older age classification; provided, however, that the total rate payable by such a retired employee for himself and his dependents, for coverage under the contract and for Part B of Medicare, shall not exceed by more than 25%, the total amount that would have been required to have been paid by the employee and the local board of education for the coverage maintained had he continued in office or active employment and he and his dependents were not eligible for Medicare benefits.

b. The local board of education may, in its discretion, assume the entire cost of such coverage and pay all of the premiums for employees who have retired after 25 years or more service with the local board of education, including the premiums of their dependents, if any, under such uniform conditions as the local board of education shall prescribe, except that retired employees and dependents who are eligible for and elect at the time of retirement to take State-paid coverage under the State Health Benefits Program pursuant to paragraph (2) of subsection b. of section 7 of P.L. 1964, c. 125 (C. 52:14-17.38) shall not be eligible for employer-paid coverage under this subsection.

In October 1998, the Board sent a letter to retired employees indicating that as of January 1, 1999, it would no longer pay for dental and prescription drug benefits. On December 23, the Association filed a grievance asserting that the Board violated Schedule B, Section E(3) when it cancelled dental and prescription drug coverage for retirees. The grievance was denied at all levels and on December 6, 1999, the Association demanded arbitration. The arbitration demand seeks an order restoring dental and prescription drug coverage and making affected employees whole.

The Board contends that the subject of the grievance is preempted by statutes and regulations and cannot be decided by an arbitrator.

The Association responds that the Board is equitably estopped from discontinuing dental and prescription drug coverage to retirees who, in deciding when to retire, detrimentally relied on the Board's promise to provide such insurance. It cites Middletown Tp. PBA v. Middletown Tp., 162 N.J. 361 (2000), where the Court held that the Township was equitably estopped from discontinuing medical insurance to a former employee even though, at the time the employee retired, the Township was not statutorily authorized to provide the coverage because the employee did not have the required 25 years of service with the employer. Based on Middletown, the Association urges us to enter an order declaring that there is no need to arbitrate the claims of those retirees who detrimentally relied on the Board's promise to reimburse dental and prescription costs, since the Board is precluded from reneging on its agreement.

The Association observes that we have applied estoppel principles in the past and can do so here. It also maintains that we must at times go beyond the abstract issue and make factual findings. It has submitted 19 certifications of retirees who relied on the Board's promise to provide benefits.

In the alternative, the Association argues that we should allow arbitration of the retirees' claims, a result which it also

urges with respect to those employees who have not yet retired and who have not relied on the Board's promise. In that vein, it maintains that the Board's preemption arguments should be rejected since SHBC regulations do not expressly prohibit reimbursement; the SHBC has made no formal ruling; and the Board has not applied for a waiver of SHBC guidelines.

The Board rejects the Association's reliance on Middletown Tp. It asserts that unlike N.J.S.A. 40A:10-23, the statute involved in Middletown, N.J.S.A. 18A:16-19 prohibits the Board from providing supplemental dental and prescription drug benefits to retired employees who have State-paid SHBP coverage. It maintains that this prohibition makes the extension of such benefit ultra vires in the primary sense and, therefore, makes equitable estoppel inapplicable.^{1/}

The Board also asserts that the eight retiree certifications are irrelevant because the individuals either retired with less than 25 years of service or were not in the unit represented by the Association. The Board further responds that

^{1/} In Middletown, the Court held that the provision of benefits to the employee involved in the lawsuit was ultra vires in the secondary, not primary, sense because it was merely an irregular exercise of the Township's power rather than an act "utterly beyond its jurisdiction." Id. at 371. In support of this conclusion, the Court noted that, after the employee retired, N.J.S.A. 40A:10-23 was amended to allow non-school board local employers to pay for medical benefits for individuals who, like the employee, retired after 25 years service credit in a State-administered pension system. Id. at 369-370.

because the retirees had prescription drug coverage under the major medical portion of their SHBP coverage, they did not lose all prescription coverage as of January 1, 1999 -- only the supplemental stand-alone benefit that the Board was providing. The Board also notes that as of January 1, 2000, the SHBC instituted its own prescription drug coverage for retirees which is substantially equivalent to the coverage the Board discontinued.

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 contractual merits of the grievances 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]

The level of health benefits is a mandatorily negotiable subject. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975); Middlesex Cty., P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979), aff'd in relevant pt. 6 NJPER 338 (¶11169 App. Div. 1980). However, all or part of a generally negotiable subject area may be set by statute or regulation and thereby removed from the scope of negotiations. State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978). 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 Supervisory at 80-82. The existence of authority in an agency to regulate concerning a subject is not preemptive by itself; that authority must actually be exercised. State Supervisory at 80-81.

Within this framework, we conclude that N.J.S.A. 18A:16-19 preempts arbitration of the grievance to the extent it seeks restoration of, or reimbursement for, dental and prescription drug coverage for individuals who retired with 25 or

more years of service with the Board and who opted for State-paid coverage under the SHBP.

N.J.S.A. 18A:16-13 authorizes a board to enter into contracts for hospitalization, medical, surgical, and major medical expense insurance, as well as contracts to provide prescription drug and "other health care benefits," a term which presumably includes dental benefits. N.J.S.A. 18A:16-17 empowers a board to pay all or part of the premiums for such contracts and authorizes deductions for any employee payments toward "such coverage." N.J.S.A. 18A:16-18 provides that the continuance of "coverage" after retirement shall be at such rates and under such conditions as prescribed in the insurance contract, subject to the requirements of N.J.S.A. 18A:16-19. As noted, N.J.S.A. 18A:16-19a first sets forth the rule that retired employees shall be required to "pay for the entire cost of coverage," while N.J.S.A. 18A:16-19b goes on to state that a board may, in its discretion, assume the entire cost of "such coverage." N.J.S.A. 18A:16-19b then includes an exception to that discretionary authority: retirees who elect to take "State-paid coverage" under the SHBP shall not be eligible for "employer-paid coverage under this subsection."

We believe that "employer-paid coverage" means payment for any retiree health coverage, since that is what the subsection authorizes. Stated another way, N.J.S.A. 18A:16-19b does not

allow a retired employee to elect to receive some employer-paid coverage and some State-paid coverage. Our interpretation is supported by the fact that "coverage" in N.J.S.A. 18A:16-19 is the same term used in N.J.S.A. 18A:16-17 and -18 to collectively refer to the medical, surgical, prescription drug and other health care benefits which N.J.S.A. 18A:16-13 and N.J.S.A. 18A:16-17 authorize a board to contract and pay for.

Our preemption analysis rests on N.J.S.A. 18A:16-19 and is consistent with the SHBC's construction of that statute. However, because the legal arbitrability of the grievance turns on the scope of a board's authority under N.J.S.A. 18A:16-19, it is not pertinent that the SHBC has not issued a formal determination in this matter or that SHBP regulations do not prohibit boards from paying for dental and prescription drug coverage for retirees who have opted for State-paid SHBP coverage. Similarly, since Title 18A governs the Board's ability to pay for dental and prescription drug coverage for these retirees, it is not significant that the Board did not apply for a waiver of SHBC guidelines: there would be no basis for the Board to do so.

Based on the foregoing, N.J.S.A. 18A:16-19b preempts arbitration of the Association's grievance to the extent it seeks restoration of employer-paid dental and prescription drug coverage for retired employees who have opted for State-paid SHBP coverage. While the Association's brief refers to "reimbursement" for such coverage, we think that such reimbursement would also

constitute proscribed "employer-paid" coverage. Compare Montclair Tp., P.E.R.C. No. 97-82, 23 NJPER 118 (¶28056 1997) (rejecting argument that proposal to reimburse police retirees for expenses not covered by the SHBP related merely to compensation).

Montclair noted that the Township was an SHBP participant; that it did not reimburse non-police retirees for medical expenses; and that SHBP regulations prohibited an employer from providing medical benefits for any retirees unless it did so for all. It then found that the reimbursement proposal was integrally related to the rights, duties, and obligations in or associated with the SHBP and, as such, N.J.S.A. 34:13A-18 barred an interest arbitrator from considering it. By analogy, a claim for reimbursement for health coverage which N.J.S.A. 18A:16-19 prohibits a board from paying for directly also implicates that statute.

Our jurisdiction is limited to the abstract issue of whether the grievance is legally arbitrable, Ridgefield Park, and we have concluded that it is not. Therefore, we do not consider whether equitable estoppel could or should be applied against the Board. See Hudson Cty., P.E.R.C. No. 90-6, 15 NJPER 495 (¶20203 1989) (grievance alleging that County violated the parties' agreement when it restricted the use of accumulated vacation days was preempted by DOP regulation, which DOP declined to waive regardless of whether the County had previously enforced it; given the nature of our scope jurisdiction, we declined to consider

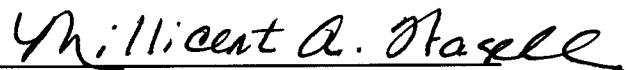
whether equitable estoppel could or should be applied against the County).

While the Association argues that we have often applied principles of estoppel or res judicata, the cases it cites considered claims that, based on a party's position in a prior agency proceeding, the party was barred from raising a particular issue in a subsequent proceeding. See, e.g., City of Hoboken, P.E.R.C. No. 95-23, 20 NJPER 391 (¶25197 1994); City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394 (¶21164 1990). The estoppel issues that the Association raises are intertwined with the scope of a governmental entity's authority, see Middletown, and are more appropriately resolved in a judicial forum, as they were in that case. See also Wood v. Borough of Wildwood Crest, 319 N.J. Super. 650 (App. Div. 1999).

ORDER

The request of the Northern County Regional Board of Education for a restraint of arbitration is granted.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Buchanan was not present.

DATED: September 28, 2000
Trenton, New Jersey
ISSUED: September 29, 2000