P.E.R.C. NO. 2000-53

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUDSON,

Petitioner,

-and-

Docket Nos. SN-99-101
SN-99-102

AFSCME, COUNCIL 52,
LOCALS 1697 and 2306,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies a request for a restraint of binding arbitration filed by Hudson County. The County seeks to restrain AFSCME, Council 52, Locals 1697 and 2306 from proceeding to arbitration concerning changes in prescription drug coverage and major medical reimbursements effective July 1, 1999. The Commission finds that the County could have legally agreed to provide prescription drug benefits different from that offered by the State plan and that an arbitrator may determine whether such an agreement was in fact made and violated.

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
(Esther Suarez, on the brief)

For the Respondent, Kathleen A. Mazzouccolo, attorney

DECISION

On June 23, 1999, the County of Hudson filed two scope of negotiations petitions. The County seeks to restrain AFSCME, Council 52, Locals 1697 and 2306 from proceeding to binding arbitration concerning changes in prescription drug coverage and major medical reimbursements effective July 1, 1999.

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

Local 1697 represents supervisory employees and Local 2306 represents non-supervisory clerical and social services employees in the County's Department of Human Services, Division of Social Services. The County and Local 1697 are parties to a collective negotiations agreement effective from July 1, 1989 to June 30, 1992, as are the County and Local 2306. The terms of the

agreements have been carried forward in several memoranda of agreement. The last memorandum for Local 2306 is effective from July 1, 1999 to June 30, 2001 and that for Local 1697 is effective from July 1, 1996 through June 30, 1999. The grievance procedure in both agreements ends in binding arbitration.

Sometime in or around 1998, the County re-enrolled in the State Health Benefits Program (SHBP), after a hiatus in which it had provided health benefits through a self-insurance program.[1/] AFSCME states that, at the time of re-enrollment, benefits remained the same.

Article XXII of the Local 1697 agreement is entitled Health and Welfare. Paragraph D provides:

> The parties agree that the County shall have the unilateral right to select the insurance carrier and program and/or self insure in its sole and absolute discretion. Any dispute dealing with the selection of the insurance carrier, program or decision to self insure shall not be subject to the Grievance Procedure. No reduction in benefit level shall result.

The Local 2306 agreement contains identical language.

On February 19, 1999, the Division of Pensions and Benefits advised all local employers participating in the SHBP, including the County, of approved rates and benefit changes that would take effect on July 1, 1999. The memorandum advised that, under the State Prescription Drug Program, each prescription order

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1/ The record does not indicate the dates of the County's prior participation or the date it re-entered the program.

would be limited to a 30-day supply and would have to be refilled after 30 days if still appropriate; previously there had been no limit. In addition, the Division stated that a $5.00 co-payment for brand name drugs and a $1.00 co-payment for generic drugs were being reinstated for the mail order component of the program, after having been waived for several years. Finally, the memorandum stated that employees enrolled in the Traditional Plan and NJPLUS would not be reimbursed for prescription drug co-payments under Major Medical Benefits, except for approved In Vitro Fertilization drugs.

On April 28, 1999, AFSCME filed a demand for arbitration alleging that the County had violated its agreements with Locals 2306 and 1697 by reducing health benefits. These petitions ensued.2/

Citing State of New Jersey, (OER), P.E.R.C. No. 99-40, 24 NJPER 522 (¶29243 1998)(P.E.R.C. No. 99-40), the County argues that this matter is preempted by statutes authorizing the SHBP to enter into contracts to provide health care coverage and to adjust benefits. It maintains that the actions of the State Health Benefits Commission (SHBC) cannot be challenged through binding arbitration with a local employer, but instead must be contested by appeal to the SHBC or the courts. Further, the County asserts

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2/ The County has requested oral argument. We deny that request because the matter has been fully briefed.

that the change in benefits does not constitute an unfair practice because the SHBC, not it, made the changes.

AFSCME counters that the County is not required to participate in the SHBP and is not precluded from terminating its participation and selecting another program or carrier that will maintain benefit levels. It asserts that if an arbitrator determines that the County violated the parties' agreement, the County could be required to withdraw from the SHBP; petition the SHBC for approval of a supplemental plan; provide some other form of compensation to the affected employees; or negotiate with it over the impact in the change of benefit levels if the County wishes to stay in the SHBP. It distinguishes State of New Jersey because it involved the State, which is required to participate in the SHBP.

In response to the County's argument that no unfair practice occurred, AFSCME states that it has not filed an unfair practice charge concerning health benefits, although it reserves its right to do so. Finally, AFSCME asserts that the change in the level of benefits has had an unexpected economic impact on employees and that the impact is severable from the question of whether the County must comply with the SHBP changes. Piscataway Tp. Bd. of Ed. v. Piscataway Tp. Ed. Ass'n, 307 N.J. Super. 263 (App. Div. 1998). AFSCME maintains that it has not waived its right to demand negotiations over this impact in the event arbitration is restrained.

The County responds that while participation in the SHBP is voluntary, once a local employer enrolls, it must abide by SHBC rules. With respect to AFSCME's suggestion that the County could request approval of contracts which would maintain benefit levels, the County contends that only the SHBC, not an employer, may purchase such contracts, and that AFSCME should appeal to the SHBC for any remedy regarding contracting with additional insurance carriers.

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 or any contractual defenses the parties 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 generally, and co-payments specifically, is mandatorily negotiable unless preempted. See, e.g., Stratford Tp. Bd. of Ed., P.E.R.C. No. 94-65, 20 NJPER 55 (¶25019 1993); Newark Bd. of Ed., P.E.R.C. No. 94-52, 19 NJPER 588 (¶24282 1993); Tenafly Bd. of Ed., P.E.R.C. No. 93-83, 19 NJPER 210 (¶24100 1993); West Orange Bd. of Ed., P.E.R.C. No. 92-114, 18 NJPER 272 (¶23117 1992), aff'd NJPER Supp.2d. 291 (¶232 App. Div. 1993); Middlesex Cty., P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979), aff'd in relevant part, 6 NJPER 338 (¶11169 App. Div. 1980). However, all or part of a generally negotiable subject 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.

No SHBP statute or regulation specifically sets prescription drug co-payments; addresses the supply of

prescription drugs a prescription order may cover; or addresses reimbursement for prescription drug co-payments under the major medical benefits portions of NJPLUS or the Traditional Plan. Nor does any statute or regulation of general application address these points. However, the County contends that these grievances are not legally arbitrable because, in making the changes outlined in the February 1999 memorandum, the SHBP exercised its authority under N.J.S.A. 52:14-17.29(B) to purchase health benefits contracts and to adjust benefits.

To provide a framework for analyzing this case, we review pertinent SHBP statutes and regulations -- including those governing SHBP participation by local employers -- as well as two recent decisions that considered claims that an employer violated agreements to maintain health benefits.

Section 27 of the New Jersey State Health Benefits Act, N.J.S.A. 52:14-17.25 et seq., creates the SHBC and charges it with establishing a health benefits program for State employees and with adopting reasonable and necessary rules and regulations. Sections 35 through 38 allow local employers, including counties, to participate in the SHBP, at their election, in accordance with SHBP rules and regulations. N.J.S.A. 52:14-17.37; New Jersey State PBA v. State Health Benefits Comm'n, 153 N.J. Super. 152, 155 (App. Div. 1977). The SHBP mandates a uniform level of basic, statutorily-required benefits for all participating employers, state and local. New Jersey School Bds. Ass'n v. State Health Benefits Comm'n, 183 N.J. Super. 215, 218 (App. Div. 1981).

Sections 28 and 29 specify those statutorily-mandated hospital, surgical, obstetrical, medical and major medical expense benefits (hereafter "basic" benefits or coverage); authorize the SHBC to enter into contracts with insurance carriers; and specify the coverage that must be included in such contracts. However, subsection 29(F) also authorizes the SHBC to purchase contracts for what have been referred to as optional or supplemental coverages. New Jersey State PBA, 153 N.J. Super. at 157; State of New Jersey, P.E.R.C. No. 2000-36, __ NJPER ___ (¶____ 1999), mot. for recon. pending. Subsection 29(F) states that the SHBC may:

> [P]urchase a contract or contracts to provide drug prescription and other health care benefits or authorize the purchase of a contract or contracts to provide drug prescription and other health care benefits as may be required to implement a duly executed collective negotiations agreement or as may be required to implement a determination by a public employer to provide such benefit or benefits to employees not included in collective negotiations units.

Uniformity is not required in supplemental health benefits, either as between State and local employers or as between different employee units of the same employer. New Jersey Sch. Bds. Ass'n, 183 N.J. Super. at 222; New Jersey State PBA, 153 N.J. Super. at 157; see also N.J.A.C. 17:9-2.15.

Pursuant to subsection 29(F), enacted in 1976, the SHBC adopted the State of New Jersey Prescription Drug Program. Effective July 1, 1993, coverage was extended to participating local employers who file a resolution to participate. Pensions

and Benefits Administration Manual, Chapter 9.5, p. 213 (State Of New Jersey, Department of the Treasury, Division of Pensions and Benefits, January 1997). The February 1999 memorandum that triggered the AFSCME grievances primarily concerned this program.

In addition to the State prescription drug program, the SHBC has adopted guidelines for prescription drug, vision care, and dental expense benefits which may be negotiated between public employers and majority representatives. Pensions and Benefits Administration Manual, Appendix J, p. 318. N.J.A.C. 17:9-1.7 states that "when local employers purchase insurance contracts" for drug, dental expense and vision care coverage, they must adhere to these guidelines unless they have obtained approval to deviate from them.

Finally, subsection 29(B), on which the County relies, provides:

> (B) Benefits under the contract or contracts purchased as authorized by this act may be subject to such limitations, exclusions, or waiting periods as the commission finds to be necessary or desirable to avoid inequity, unnecessary utilization, duplication of services or benefits otherwise available,... or for other reasons....

Within this statutory framework, we have recently considered claims that employers had not adhered to contractual agreements to maintain basic or supplemental health benefits. In P.E.R.C. No. 99-40, we relied on section 28 and subsection 29B in restraining arbitration of a grievance, filed on behalf of State college employees, that challenged the SHBC's authority to

equalize co-pays for HMO visits and eliminate an allegedly duplicative vision care benefit for certain HMOs.[3/] We also restrained arbitration of another grievance that alleged, among other things, that SHBC contracts with health care providers did not include provisions that would ensure enforcement of a maintenance of benefits clause in the parties' negotiated agreement.

We noted that while no statute or regulation set HMO co-pays or HMO reimbursement for eyeglasses, the SHBC had the statutory authority to enter into contracts with insurance companies to provide health benefits, subject to statutory minimums, and to establish limitations to avoid inequity, unnecessary utilization, duplication of services, or for other reasons. We reasoned that, given these statutes, the SHBC's specific actions in equalizing co-pays and avoiding duplication could not be challenged in binding arbitration with the employer and instead must be made to the SHBC or the courts. We also held that any challenges to SHBC's contracts with insurance carriers must be made to the SHBC or in court.

P.E.R.C. 99-40 did not involve a form of the supplemental coverage authorized by subsection 29(F), and we therefore noted, but did not discuss, a contention in that case that 29(F)

3/ These actions involved adjustments to the basic benefits packages for participants in the affected HMOs.

authorized arbitration of the grievance. Our more recent decision in State of New Jersey, P.E.R.C. No. 2000-36, did involve supplemental dental coverage and discussed the interplay between subsections 29(B) and 29(F) in the unfair practice context. That case considered a charge that the State violated its negotiations duty when the SHBC approved a Dental Plan Organization (DPO) renewal package increasing certain co-payments. The charge was filed on behalf of State employees in four statewide negotiations units.

By way of factual background, P.E.R.C. No. 2000-36 found that after the parties negotiated for a DPO program, the SHBC unilaterally set the initial DPO co-pays, which remained the same from 1984 to 1998, when the SHBC made the changes that triggered the charge. P.E.R.C. No. 2000-36 also found that the parties' contracts did not expressly address DPO co-pays or the SHBC's power to set them; and that the parties had never directly negotiated over DPO co-pays as opposed to prescription drug co-pays. It concluded that the union might (or might not) have a contractual claim, but that it was not clear enough to demonstrate a bad faith repudiation within our unfair practice jurisdiction. Of significance to this matter, the decision declined to consider, because the issue was not presented, whether the union could legally seek an arbitral determination that the employer had contractually agreed to maintain co-payment levels.

P.E.R.C. No. 2000-36 held that subsections 29(B) and 29(F) must be read harmoniously, and it rejected interpretations

that would always require or prohibit negotiations over DPO co-pay increases. In that vein, it noted the State's position that section 28 and subsection 29(F) always authorize the SHBC to change co-payments even if a negotiated agreement expressly mandates specific co-payment levels. We expressed our reservations about that approach, commenting that it would arguably nullify subsection 29(F) and permit repudiation of negotiated agreements. But we did not resolve the question since the case did not evidence a repudiation.

This case implicates some of the issues considered in both P.E.R.C. No. 99-40 and P.E.R.C. No. 2000-36, along with the provisions governing local employer participation in the SHBP. To the extent the AFSCME grievances contend that the changes in the State prescription drug program violated the parties' agreement, this case presents the question left open by P.E.R.C. No. 2000-36: whether a union may seek an arbitral determination that an employer -- in this case a local employer -- had contractually agreed to maintain supplemental health care benefits despite an SHBP-initiated change in such benefits. To the extent the grievances seek an arbitral determination that the changes in the reimbursement provisions of the Traditional Plan and NJPLUS pertaining to prescription drug co-pays violated the parties' agreement to maintain benefits, the case is similar to P.E.R.C. 99-40, which also involved SHBC changes in co-pays for basic benefits. However, unlike that case, this case centers on

prescription co-pays rather than HMO co-pays. Further, AFSCME does not challenge the SHBC actions themselves and contends instead that, despite SHBC-initiated changes, the County may be required to abide by its alleged agreement to maintain benefits by, for example, requiring it to compensate unit members for losses incurred.

We turn first to those portions of the grievances triggered by the changes in the State prescription drug program. Preliminarily, we hold that subsection 29(B) does not bar arbitration of all grievances contending that a local employer was obligated to maintain an existing level of supplemental benefits despite SHBC changes in such benefits. As we suggested in P.E.R.C. 2000-36, such a reading would effectively nullify 29(F), which allows the SHBC to purchase, or authorize purchase of, contracts that implement, and thus conform to, negotiated agreements concerning supplemental benefits. We are also satisfied that, in the circumstances of this case, AFSCME may legally seek an arbitral determination that the County was obligated to maintain prescription drug benefits and co-payments even though the SHBC changed benefits in the State drug prescription program.

We recognize that the County had no control over the SHBC decisions concerning the State prescription drug program and agree that an arbitrator cannot review those actions. But SHBP statutes and regulations do not prohibit a local employer that participates in the SHBP from agreeing to provide a level of prescription drug

coverage different from that offered by the State prescription drug plan: uniformity of benefits with respect to State and local employers is required only for basic benefits. See New Jersey Sch. Bds.; New Jersey State PBA. Moreover, local employers must separately elect to participate in the State prescription program and subsection 29(F) authorizes the SHBC to purchase contracts to implement negotiated agreements concerning prescription drug benefits. By directing local employers to adhere to SHBP guidelines "when" they purchase drug, vision and dental insurance contracts, N.J.A.C. 17:9-1.7 reflects that local employers may contract for drug prescription coverage other than through the State prescription drug plan.

Based on the foregoing statutes, regulations, and case law, we find that the County could have legally agreed to provide prescription drug benefits different from those offered by the State plan and that an arbitrator may determine whether such an agreement was in fact made. P.E.R.C. No. 99-40 does not weigh in favor of a different result because it held only that subsection 29(B) precluded arbitration of grievances contesting the SHBC's authority to change basic benefits. By contrast, the portions of the AFSCME grievances triggered by the changes in the State prescription drug program involve supplemental coverage, which the Legislature contemplated would be a subject of negotiations. Further, AFSCME does not challenge the SHBC actions, but instead seeks an arbitral determination that the County is required to

abide by its alleged agreement. It suggests several ways, should an arbitrator find a contract violation, that a violation could be remedied without requiring an arbitrator to review or displace SHBC actions.

At this juncture, we decline to address what remedies might be available should an arbitrator find a contractual violation, although we note that grievance arbitrators, and the Commission in unfair practice cases, have ordered non-SHBP employers to compensate unit members for losses incurred as a result of health benefit changes. Compare Borough of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984); Borough of Closter, P.E.R.C. No. 86-95, 12 NJPER 202 (¶17078 1986); City of Atlantic City v. Atlantic City Firefighters, Local 198, NJPER Supp.2d 304 (¶238 App. Div. 1993). Should the arbitrator issue an award that is not permitted under the statutes or regulations governing the SHBP, the County may refile its petition.

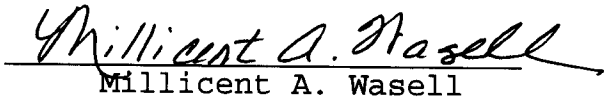
We turn next to those portions of the AFSCME grievances triggered by the SHBP changes in the reimbursement provisions of the Traditional Plan and NJPLUS pertaining to prescription drug co-pays. New Jersey Sch. Bds. Ass'n observed that local employers are not forced to participate in the SHBP and that, if the benefits under the program exceed those negotiated with employees or provided for in a budget, the employer may withdraw from the SHBP at any time consistent with its obligation under existing negotiations agreements. 183 N.J. Super. at 224.

Given the employer's discretion to participate or not participate in the SHBP or its prescription drug program; given the general negotiability of maintenance of benefits clauses and prescription drug co-pays; and given that we are not persuaded that any statute or regulation specifically prohibits application of a maintenance of benefits clause to reimbursement for prescription drug co-pays under major medical benefits, we decline to restrain arbitration. The parties will be proceeding to arbitration in any event. Should the arbitrator find a contractual violation and issue an award that is not permitted under the statutes or regulations governing the SHBP, the County may refile its petition.

ORDER

Hudson County's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato and Ricci voted in favor of this decision. None opposed.

DATED: December 16, 1999
Trenton, New Jersey
ISSUED: December 17, 1999