

P.E.R.C. NO. 2007-25

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF BERKELEY,

Respondent,

-and-

Docket No. SN-2007-007

BERKELEY TOWNSHIP POLICE S.O.A.,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission determines that a proposal made by the Township of Berkeley during negotiations with the Berkeley Township Police S.O.A. is not mandatorily negotiable and may not be submitted to interest arbitration. The proposal modifies a health benefits provision to include premium sharing for dependent coverage similar to a provision negotiated with other Township unions. The Commission holds that the cost of dependent coverage is mandatorily negotiable unless preempted by statute or regulation. The Commission concludes that this proposal is preempted by a State Health Benefits Program requirement that any employer who elects to pay any portion of the cost for dependent coverage must pay the same proportion of the cost of such coverage for all employees. The regulation does not give the Township the discretion to pay different proportions of the cost of dependent coverage depending on the employee's date of hire or years of 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 Respondent, Eric M. Bernstein & Associates,
LLC, attorneys (Eric Martin Bernstein, on the brief)

For the Petitioner, Klatsky, Sciarrabone & DeFillippo,
attorneys (David J. DeFillippo, on the brief)

DECISION

On July 31, 2006, the Berkeley Township Police S.O.A. petitioned for a scope of negotiations determination. The SOA seeks a determination that a health benefits proposal made by the Township of Berkeley during successor contract negotiations is not mandatorily negotiable because it violates a State Health Benefits Program regulation.

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

The SOA represents lieutenants and captains. The parties are in negotiations for a successor to a collective negotiations agreement that expired on December 31, 2004. The SOA has petitioned for interest arbitration.

The Township is a participant in the New Jersey State Health Benefits Program ("SHBP"). Article XVI, Paragraph B of the parties' contract provides:

The Township shall provide to all employees covered by this Agreement and their families an insurance plan equal to or better than 1420 Series Blue Cross/Blue Shield 365 days' Plan including Rider "J" and Major Medical benefits. The premiums shall be paid by the Township.

During negotiations, the Township proposed to modify the provision to include premium sharing for dependent coverage similar to provisions negotiated with its other unions. The SOA states that if this proposal is awarded, the following classes of employees - each with its own separate entitlement to paid dependent coverage - would be created:

1. Employees hired prior to January 1, 2006
- Respondent pays 100% of cost of dependent coverage;
2. Employees hired after January 1, 2006
and in 1st through 6th year of
employment - Respondent pays 85% of cost
for dependent coverage;
3. Employees hired after January 1, 2006
and in 7th year (or more) of employment
- Respondent pays 100% of cost for
dependent coverage.

It asserts that such a result would violate a SHBP regulation, so it filed this petition. See Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981) (parties may not negotiate over contract term that contravenes a statute or regulation).

N.J.A.C. 17:5-3, the regulation in question, provides, in relevant part:

(a) The statute requires the employer to pay the employee's cost of the coverage and may pay any portion of the cost for the dependent coverage.

(b) Any employer who elects to pay any portion of the cost for dependent coverage shall pay the same proportion of the cost of such dependent coverage for all employees covered in the program.

The SOA argues that N.J.A.C. 17:9-5.3(b) preempts negotiations over the Township's proposal because that regulation expressly requires that the employer pay the same proportion of the cost for dependent coverage for all of its employees without regard for date of hire, years of service or any other criteria.

The Township responds that a similar provision has been negotiated with other Township employee unions and that N.J.S.A. 42:14-17.25 et seq. and N.J.A.C. 17:9-5.3(b) do not preclude negotiations. It contends that the SHBP statute and regulations authorize negotiations over the level of benefits to be paid; but to the extent N.J.A.C. 17:9-5.3(b) is construed to preclude negotiations, the regulation is discriminatory, illegal and contrary to the public interest.

The cost of dependent health coverage is mandatorily negotiable unless preempted by statute or regulation. Borough of Watchung, P.E.R.C. No. 2000-93, 26 NJPER 276 (¶31109 2000). 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).

N.J.S.A. 52:14-17.25 et seq. is the New Jersey State Health Benefits Program Act. The State Health Benefits Commission is authorized to establish rules and regulations for the administration of the SHBP. N.J.S.A. 52:14-17.27.

The SHBP requires local participating employers to pay the employee's cost of coverage and permits employers to pay a portion of the cost of dependent coverage. N.J.A.C. 17:9-5.3(a). However, any employer who elects to pay any portion of the cost for dependent coverage must pay the same proportion of the cost of such dependent coverage for all employees covered in the program. N.J.A.C. 17:9-5.3(b). This SHBP regulation speaks in the imperative and does not grant the Township the discretion to pay different proportions of the cost of dependent coverage depending upon the employee's date of hire or years of service. Accordingly, the Township's proposal may not be submitted to interest arbitration.

We reject the Township's argument that its proposal complies with the regulation because the Township would be paying the full cost of dependent coverage to the SHBP and the employees would be reimbursing the Township for their different shares. N.J.S.A.

52:14-17.40 provides that employee contributions for dependent coverage will be withheld from the employee's salary and that the employer's contribution will be paid out of the employer's funds. The employer transmits the total contributions to the SHBP and late payments are subject to interest penalties. N.J.A.C. 17:9-5.2(c). This payment system is independent of the requirement under N.J.A.C. 17:9-5.3(b) that the employer's portion of the cost of dependent coverage must be the same for all covered employees.

N.J.S.A. 52:14-17.28b authorizes negotiations over premium sharing under the SHBP, but only for the State of New Jersey, not for local government employers.^{1/} N.J.S.A. 52:14-17.38b(2) authorizes negotiations over premium sharing for local employers, but only for retiree health benefits. Neither statute permits different dependent contribution levels depending on date of hire or years of service.^{2/}

1/ For State employees for whom there is no majority representative, N.J.A.C. 17:9-5.9 sets different employee contribution rates depending on the plan the employee chooses to enroll in for health coverage. That regulation does not apply to local government employers.

2/ N.J.S.A. 52:14-17.31a grants a municipality the discretion to allow employees eligible for other health care coverage to waive coverage under the SHBP. It also provides that the decision to allow waiver and the amount of consideration to be paid shall not be subject to the collective negotiations process. Absent the explicit ban, these discretionary decisions would have been subject to negotiations. However, the Legislature's decision to restrict negotiations in this
(continued...)

Finally, we must reject the Township's arguments that N.J.A.C. 17:9-5.3(b) is discriminatory, illegal and contrary to the public interest. We have no authority to invalidate an SHBP regulation. The Township's public interest argument should more appropriately be directed to the State Health Benefits Commission, which has the authority to amend the preemptive regulation, or the courts, which can determine the validity of a regulation.^{3/}

2/ (...continued)
situation where employer discretion has been granted does not mean that the Legislature authorized employers to negotiate over other provisions that would contravene SHBP regulations.

3/ On October 18, 2006, the SOA submitted a letter from the Assistant Director of the State Health Benefits Commission. The letter states, in part, that:

the State Health Benefits Commission recently voted to approve the publication for comment in the New Jersey Register of a proposed amendment deleting [N.J.S.A. 17:9-5.3] subsection (b). If ultimately adopted by the Commission the deletion of subsection (b) would remove the uniformity requirement and permit local employers the latitude to implement separate dependent coverage premium sharing arrangements with each union representing local employees. The proposed amendment is presently with the Office of Administrative Law awaiting publication for comment in the New Jersey Register.

The SOA asks that notwithstanding the proposed amendment, its petition be decided because subsection (b) remains in effect.

(continued...)

ORDER

The dependent health benefits proposal of the Township of Berkeley is not mandatorily negotiable and may not be submitted to interest arbitration.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners DiNardo, Fuller and Watkins voted in favor of this decision. Commissioners Buchanan and Katz were not present. None opposed.

ISSUED: October 26, 2006

Trenton, New Jersey

3/ (...continued)

The Township has responded that if the proposed amendment is adopted, the scope petition would be rendered moot. It thus asks that the petition not be decided until the proposed amendment is approved or rejected.

We deny the Township's request. A proposed regulation does not affect the preemptive effect of a regulation. State of New Jersey, P.E.R.C. No. 98-114, 24 NJPER 173, 175 n. 1 (¶29086 1998).