

P.E.R.C. NO. 2010-66

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH,

Petitioner,

-and-

Docket No. SN-2010-009

PBA LOCAL 4,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the City of Elizabeth's request for a restraint of binding arbitration of a grievance filed by PBA Local 4. The grievance claims that the City violated the parties' collective negotiations agreement when it unilaterally changed medical insurance carriers resulting in a decreased level of health coverage. The Commission holds that 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. An arbitrator may determine whether the parties made such an agreement and whether the employer violated such an agreement.

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, Genova Burns, attorneys (Brian W. Kronick, on the brief)

For the Respondent, Mets Schiro & McGovern, LLP, attorneys (James M. Mets, on the brief)

DECISION

On July 29, 2009, the City of Elizabeth petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by PBA Local 4. The grievance claims that the City violated the parties' collective negotiations agreement when it unilaterally changed medical insurance carriers resulting in a decreased level of health coverage. We decline to restrain arbitration.

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

The PBA represents the City's full-time police officers below the rank of sergeant. The parties entered into a collective negotiations agreement effective from July 1, 2005

through June 30, 2009. The grievance procedure ends in binding arbitration.

Article XXV is entitled Insurance. It provides, in pertinent part:

1. All employees covered by this Agreement and eligible members of their families shall be entitled to full coverage of Blue Cross and Blue Shield hospitalization plans, including Rider "J" of the New Jersey Blue Cross and Major Medical Insurance, the premiums of which shall be paid for by the City.

* * *

7. Any proposed change in the insurance program(s) sought or initiated by the City shall have as the condition precedent a sixty (60) day notice period given to the PBA. At the time of the initial notice of the intended change, the City shall supply the PBA with full details of the proposed change including, but not limited to, the full insurance plan document and all materials necessary to fully evaluate the program. This provision shall not apply to proposed changes sought or initiated by the insurance carrier; in which case, the City shall provide notice to the PBA as soon as possible.
8. In the event that there are legislative changes covering health benefits during the contract period for which the City may give notice of re-opener for health benefits, then the PBA shall have the right to re-open the salary increases (percentages) for the remaining years of the contract.

The City participates in the State Health Benefits Program ("SHBP"). On September 25, 2007, the City notified its employees

that the State Health Benefits Commission ("SHBC") would be implementing changes to the SHBP, including the elimination of the Traditional Plan. The City informed employees that the prospective effective date was April 1, 2008.

On January 15, 2008, the City distributed additional information about the changes, which included the addition of two Preferred Provider Organizations: NJ Direct 10 and NJ Direct 15. Employees in the Traditional Plan would be automatically transferred to NJ Direct 10. Employees in NJ PLUS would be automatically transferred to NJ Direct 15. Employees in AmeriHealth, Health Net or Oxford Health Plans HMOs had to choose another plan or they would automatically be transferred to NJ Direct 15.

On January 22, 2008, the PBA wrote to the City that it had heard about the notice to employees of the impending change. The PBA stated that Article XXV provides that in the event there are legislative changes covering health benefits, the City may give notice of a reopener for health benefits and the PBA then has the right to re-open salary increases for the remaining years of the contract. The PBA further stated that it had not received any notice of a reopener from the City, that the contract requires a 60-day notice of any change, and that the PBA might wish to exercise its right to re-open the contractual wage provision.

On February 1, 2008, the City responded that employees had been given more than six-months' notice of the effective date of the change; the contractual notice period does not apply because the City did not seek or initiate the changes; and the reopener provision is not triggered by the changes.

On September 5, 2008, the PBA filed a grievance alleging that the City changed carriers without the agreement of the PBA.^{1/} The PBA asserted that the new plan has proven to be substantially inferior to the contracted-for plan. It further asserted that a non-doctor gatekeeper has been inserted and that unit members are being denied care and diagnostic tests prescribed by their treating physicians. The PBA demanded that the City arrange for the immediate reinstatement of the previous insurance plan or take whatever action is necessary to amend the coverage in place to ensure that the recommendation of officers' doctors are implemented.

On March 26, 2009, the PBA demanded arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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

^{1/} The grievance was jointly filed with the Elizabeth Superior Officers Association.

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.

[Id. at 154]

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have.

Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

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 and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire fighters, 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 fire fighters, 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.

[Id. at 92-93; citations omitted]

Arbitration will be permitted if the subject of the dispute 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 bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers. Where a statute or regulation is alleged to preempt a negotiable term and condition of employment, it must do so expressly, specifically and comprehensively. See Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Assn, 91 N.J. 38, 44-45 (1982).

The City argues that arbitration should be restrained because negotiations over fundamental changes to the SHBP are preempted.

The PBA responds that the City's obligation to maintain a certain level of health benefits is a legally arbitrable issue.

The City replies that it implemented changes that were mandated by the SHBC and that it cannot provide access to a Plan that no longer exists. The City asserts that once an employer becomes a part of the SHBP, it must accept the terms of its primary medical benefits. The City further asserts that it was

statutorily required to eliminate the Traditional Plan and that we should therefore restrain binding arbitration.

Borough of East Rutherford, P.E.R.C. No. 2009-15, 34 NJPER 289 (¶103 2008), aff'd ___ NJPER ___ (¶__ App. Div. 2010), App. Div. Dkt. No. A-1260-08T2 (3/4/10), governs the claim that the City is contractually obligated to maintain the level of health benefits. As we said in that case, 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 such an agreement and whether the employer violated such an agreement.

We add that an arbitrator cannot order the employer to continue the State Health Benefits Program Traditional Plan. That portion of the SHBP was eliminated by statute. See N.J.S.A. 52:14-17.26(j); City of Bayonne, P.E.R.C. No. 2008-41, 34 NJPER 9 (¶4 2008) (arbitrator could not order the employer to continue the previous co-pay levels since the SHBC had exercised its authority to set higher levels).

As for any other remedial issues, such as whether the City can be required to re-open the salary provisions of the contract, we need not decide them at this juncture. Should the arbitrator find a contractual violation and a dispute arise over the

negotiability of any remedy issued, the Township may re-file its scope petition within 30 days of an award. East Rutherford (Court noted that Commission's decision expressly preserved Borough's right to refile its scope petition if the arbitrator concluded that the Borough had violated the contract and a dispute arose over negotiability of any remedy issued).

ORDER

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

BY ORDER OF THE COMMISSION

Commissioners Eaton, Fuller, Krengel and Voos voted in favor of this decision. None opposed. Commissioner Colligan recused himself. Commissioner Watkins was not present.

ISSUED: March 25, 2010

Trenton, New Jersey