

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF CLINTON,

Petitioner,

-and-

Docket No. SN-2012-006

FOP LODGE NO. 182 (SUPERIOR
OFFICERS' ASSOCIATION),

Respondent.

Appearances:

For the Petitioner, Law Office of Ellen O'Connell, LLC,
attorneys (Ellen O'Connell, of counsel)

For the Respondent, The Cushane Law Firm, LLC,
attorneys (Thomas A. Cushane, of counsel)

DECISION

On August 16, 2011, the Township of Clinton petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by Clinton Township FOP Lodge No. 182 (Superior Officers' Association). The grievance challenges the Township's interpretation and application of P.L. 2010, c. 2, to employees who have chosen to decline medical insurance coverage (or "opt-out") in the State Health Benefits Program ("SHBP") when the employer is covered by another group plan in return for receiving a stipend.^{1/} We grant the Township's request to restrain arbitration.

^{1/} P.L. 2010, c. 2 became effective May 10, 2010.

The Township has filed briefs, exhibits and the certification of counsel. The FOP has filed a brief and exhibits. The following facts appear.

The parties have a collective negotiations agreement ("CNA") that covers the period from January 1, 2009 through December 31, 2013. The grievance procedure ends in binding arbitration.

Article XIV, covering the stipend procedure, provides in pertinent part:

D. When an Officer is eligible to enroll himself/herself, his/her spouse, domestic partner or family, as the case may be, in the Township group medical insurance plan and declines coverage because he or she enrolled in another group plan, the Township will pay the officer a stipend equal to forty (40) percent of the cost savings realized by the Township for such declined medical plan (that is, single, husband/wife, family) at the rate of the least expensive plan covering his status. The Township will pay in the first pay period in December in the year the coverage was declined and the savings realized.

A Sergeant, who had declined coverage during 2010 because his spouse was a public employee who was covered by the SHBP, was not paid his opt-out stipend in the first pay period in December as set forth in the CNA. The FOP filed a grievance on December 22, 2010. The Township passed a Resolution on April 13, 2011 denying the grievance. The FOP demanded binding arbitration. This petition ensued.

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 merits of these grievances or any contractual defenses the Board may have.

The scope of negotiations for firefighters and police officers 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. Compare Local 195, IFPTE v. State, 88 N.J. 393 (1982). Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police officers:

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.

[87 N.J. at 92-93; citations omitted]

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 v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

The Township asserts that P.L. 2010, c. 2 eliminated the ability for employees to have multiple coverage under the SHBP and that the procedure for allowing the payments of a stipend for an employee who declines coverage is not within the scope of collective negotiations.

The FOP responds, relying on P.L. 2010, c. 2 §1, codified as N.J.S.A. 52:14-17.28b,^{2/} that the Legislature intended for the

^{2/} The Statute states in pertinent part regarding the date that
(continued...)

entirety of P.L. 2010, c. 2 to be implemented only upon the expiration of any applicable CNA in effect at the time the legislation was enacted, and as a result, the petition for a restraint of binding arbitration must be denied.

P.L. 2010, c. 2 §12, codified as N.J.S.A. 52:14-17.31, prohibited dual coverage under the SHBP:

Multiple coverage in the program as an employee, dependent, or retiree shall be prohibited and the prohibition shall be implemented in accordance with the rules and regulations promulgated by the commission. The provisions of this paragraph shall be applicable to the State Health Benefits Program. . .

P.L. 2010, c. 2 §11, codified as N.J.S.A. 52:14-17.31a, authorized employers to pay employees for waiving SHBP coverage in the sole discretion of the employer. The pertinent part of this statute was in effect prior to January 1, 2009, and not added to or modified by P.L. 2010, c. 2 §11. The statute states

2/ (...continued)
mandatory employee contributions for SHBP coverage would begin:

"Commencing on the effective date [May 21, 2010] of P.L.2010, c. 2 and upon the expiration of any applicable binding collective negotiations agreement in force on that effective date, the amount of the contribution required pursuant to paragraph (1) of this subsection by State employees and employees of an independent State authority, board, commission, corporation, agency, or organization for whom there is a majority representative for collective negotiations purposes shall be 1.5% of base salary, notwithstanding any other amount that may be required additionally pursuant to this paragraph by means of a binding collective negotiations agreement."

as follows: "The decision of an employer to allow its employees to waive coverage and the amount of consideration to be paid therefor shall not be subject to the collective bargaining process."

Here, N.J.S.A. 52:14-17.31a, as it existed from its enactment in 1995 (prior to the enactment of P.L. 2010, c. 2), clearly preempts the subject matter area regarding the payment of stipends for waiving coverage in the SHBP by stating: "[S]hall not be subject to the collective bargaining process." This language was in the statute prior to the CNA which was effective January 1, 2009. Therefore, Article XIV, Section D should have never been negotiated and placed in the CNA in the first place.

As a result, we do not need to reach the issue of whether the Legislature intended for the entirety of P.L. 2010, c. 2 to be implemented only upon the expiration of any applicable CNA in effect at the time the legislation was enacted.

ORDER

The request of the Township of Clinton for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Voos and Wall voted in favor of this decision. Commissioner Jones voted against this decision.

ISSUED: October 25, 2012

Trenton, New Jersey