P.E.R.C. NO. 2015-5

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TRENTON BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2014-027

TRENTON EDUCATION SECRETARIES ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part and denies in part the request of the Trenton Board of Education for a restraint of binding arbitration of a grievance filed by the Trenton Education Secretaries Association. The grievance asserts that the Board violated the parties' collective negotiations agreement (CNA) by deducting the full amount of health care contributions required by N.J.S.A. 18A:16-17.1(a) in year one in which employees were recalled, rather than deducting the full amount over the course of a four-year phase in. Finding that the statute provides the phase-in benefit only for those recalled employees who were employed by the Board on the date after the most recent CNA expired, the Commission declines to restrain arbitration for those employees and restrains arbitration for recalled employees who were re-employed after that date.

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, Parker McCay, P.A., attorneys (Elizabeth M. Garcia, of counsel)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (Richard A. Friedman, of counsel)

DECISION

On October 16, 2013, the Trenton Board of Education filed a scope of negotiations petition seeking restraint of binding arbitration of a grievance filed by the Trenton Education Secretaries Association. The grievance asserts that the Board violated the parties' collective negotiations agreement (CNA) by deducting the full amount of health care contributions required under N.J.S.A. 18A:16-17.1(a) for recalled employees instead of giving such employees the benefit of a phase-in of the full amount over four years.

The Board has filed briefs, exhibits, and the certifications of its Comptroller, Human Resources Director and Executive

Director of Family and Community Engagement. The Association has filed a brief, exhibits, and the certification of its Vice-President. We glean the following facts from the record presented.

The Association represents a negotiations unit of secretarial personnel employed by the Board. The Board and the Association are parties to a CNA effective from July 1, 2009 through June 30, 2012. The grievance procedure ends in binding arbitration.

The Board's Human Resources Director certifies that the Board instituted a reduction in force (RIF) of 31 employees represented by the Association, placing each on a recall list. She further certifies that between July 1, 2012 and July 1, 2013, the Board rehired 23 of those employees.

The Board's Comptroller certified that he determined that the recalled employees were not entitled to the phase-in of health care contributions required under N.J.S.A. 18A:16-17.1(a) and instead had to pay the full healthcare premium contribution upon their return to work.

The Board's Executive Director of Family and Community Engagement certifies that each recalled employee received unemployment benefits during their entire RIF period, and that none of them received Board-paid health or workers compensation benefits. She further certifies that the Board unilaterally

determined when positions would become available in the District, and that upon each employee's return to the District, they received the appropriate salary, vacation leave, sick leave and other benefits that are established in the CNA.

The Association's Vice President certifies that unlike new employees, recalled employees have the right to be recalled and rehired by the District, irrespective of the District's preference or lack of preference for that employee. She further certifies that upon each recalled unit member's return to employment, they have their sick and vacation leave restored, and they are placed on the next step of the salary guide after the step that they were on at the time of the RIF.

On April 8, 2013, the Association filed a grievance asserting that the Board violated Articles 1, 2, 8, 9, 15[1/], of the CNA and wrongfully administered the health insurance premium contributions law in violation of the CNA by not phasing in the health care contributions/deductions of RIF'ed unit members who were rehired from the recall list. The Association seeks for the Board to cease taking health insurance premiums in excess of any deductions authorized by law, and refund all monies improperly

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1/ These Articles are entitled, respectively, Recognition, Modification of Agreement and Negotiation of Successor Agreement, Seniority and Job Security, Salary and Medical Benefits.

deducted. On August 9, 2013, the Association demanded arbitration. This petition ensued.

N.J.S.A. 18A:16-17.1 became effective on June 28, 2011. It provides, in pertinent part, as follows:

> Contributions by employees of a local board of education toward cost of health care benefits coverage
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> a. Notwithstanding the provisions of any other law to the contrary, public employees, as specified herein, of a local board of education shall contribute, through the withholding of the contribution from the pay, salary, or other compensation, toward the cost of health care benefits coverage for the employee and any dependent provided pursuant to P.L.1979, c.391 (C.18A:16-12 et seq.). . . in an amount that shall be determined in accordance with section 39 of P.L.2011, c.78 (C.52:14-17.28c), except that, employees employed on the date on which the contribution commences, as specified in subsection c. of this section, shall pay:
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> during the first year in which the contribution is effective, one-fourth of the amount of contribution;
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> during the second year in which the contribution is effective, one-half of the amount of contribution; and
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> during the third year in which the contribution is effective, three-fourths of the amount of contribution, as that amount is calculated in accordance with section 39 of P.L.2011, c.78 (C.52:14-17.28c).
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> * * *
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> c. The contribution under subsection a. of this section shall commence: (1) upon the effective date of P.L.2011, c.78 for employees who do not have a majority representative for collective negotiations purposes, notwithstanding that the terms of a collective negotiations agreement binding on the employer have been applied or have been deemed applicable to those employees by the

> employer, or have been used to modify the respective payment obligations of the employer and those employees in a manner consistent with those terms, before that effective date; and (2) upon the expiration of any applicable binding collective negotiations agreement in force on that effective date for employees covered by that agreement with the contribution required for the first year under subsection a. of this section commencing in the first year after that expiration, or upon the effective date of P.L.2011, c.78 if such an agreement has expired before that effective date with the contribution required for the first year under subsection a. of this section commencing in the first year after that effective date.

[N.J.S.A. 18A:16-17.1 (emphasis added)].

The Department of Community Affairs published Local Finance Notice 2011-34 (LFN 2011-34) on November 23, 2011 as guidance on implementing the reforms in health care contributions.[2/] Under the heading "Existing Employment", LFN 2011-34 states:

> The date the c.78 contribution commences varies; it is on the effective date for employees not under a CNA and the day after a CNA ends for CNAs in effect on June 28, 2011. Employees employed on the date the health care contribution commences are subject to a four year phase-in of the full contribution amount. The following describes employment circumstances that may affect whether the phase-in applies to certain employees.

2/ With leave of the Commission, the Board submitted a supplemental brief regarding the potential relevance of Paterson Police PBA Local 1 v. City of Paterson, 433 N.J. Super. 416 (App. Div. 2013), which it asserts supports the position that Local Finance Notices are practical statutory interpretations that may indicate legislative intent. The Association agreed that the Commission should consider Local Finance Notices in interpreting the health care contribution law.

> An employee is someone who appears on the employer's regular payroll and receives a salary or wages. (N.J.S.A. 52:14.-17.26).
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> * * *
>
> [A]n employee is not an existing employee when terminated for economic reasons and the determination to return is the employer's, not the employee's, notwithstanding that the employee makes COBRA payments. Similarly, an employee who ceases employment over the summer and there is a formal break in the employment relationship, i.e., the employee receives unemployment compensation, would not be treated as an existing employee.
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> The employer needs to review the individual circumstances involved for each employee and make decisions based on those facts. In these cases, if the employee is represented by a collective negotiations agreement, a dispute over the employer's action on the matter may be the subject of an appropriate filing with the Public Employment Relations Commission.[3/]
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> [LFN 2011-34 (emphasis added)].

Our jurisdiction is narrow. We consider the negotiability of this dispute in the abstract. We express no opinion about the contractual merits of the grievance or any contractual defenses the Board may have. Ridgefield Park Ed. Ass’n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

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

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3/ Identical language is also found in LFN 2011-20R.

> 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 Board asserts that N.J.S.A. 18A:16-17.1 is preemptive because it provides for the phased in health care contributions only for those employed on the date on which the contribution commenced. The Board asserts that LFN 2011-34 supports its application of the statute because employees terminated for economic reasons or who receive unemployment compensation are not considered an "existing employee."

The Association responds that LFN 2011-34 supports that the recalled employees should be considered "employees" since that notice states that an employee "...is not an existing employee when terminated for economic reasons and the determination to return is the employer's, not the employee's...", and that in the instant case the determination of whether the employees would return was the employees, not the employers. The Association argues that the employees were entitled to recall (given their respective seniority rights) and that the employer had no

discretion, once the positions were established, to offer the positions to others. The Association notes that the recalled employees were not otherwise treated like new employees based on their restoration of vacation and sick time, and their placement on the salary guide at one step above where they were at the time of the RIF.

The Board responds that the operative portion of the health care contribution law does not depend on an employee's status as a "new employee," but depends on whether the individual is receiving regular payroll, salary or wages. It contends that the recalled employees do not meet any of the definitions of "existing employee" supplied by LFN 2011-34 and disputes the Association's contention that the employees determine whether to return since the Board has the sole discretion to establish and make the positions available.

Where a statute or regulation is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically and comprehensively. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). N.J.S.A. 18A:16-17.1(a) expressly provides that only employees "employed on the date on which the contribution commences" will receive the benefit of the multi-year phase-in of the full amount of required health care contributions. N.J.S.A. 18A:16-17.1(c) sets forth that for employees who are subject to a CNA in effect

on its June 28, 2011 effective date, the payment of health care contributions will commence the day after the CNA expires. The parties' CNA has a term of July 1, 2009 through June 30, 2012. Thus, the contributions commenced for Board employees on July 1, 2012. 23 of the 31 RIF'ed employees were re-employed by the Board between July 1, 2012 and July 1, 2013. The record does not reflect the specific dates each recalled employee began re-employment. LFN 2011-34 defines employee as "someone who appears on the employer's regular payroll and receives a salary or wages." Therefore, we decline to restrain arbitration for any of the recalled employees who were re-employed by the Board and appeared on its payroll and started to receive a salary on July 1, 2012 since they were "employed on the date on which the contribution commence[d]." N.J.S.A. 18A:16-17.1(a). We restrain arbitration for any of the recalled employees who were re-employed by the Board after July 1, 2012 since they were not employees appearing on the Board's payroll and receiving a salary "on the date on which the contribution commence[d]." Ibid.

ORDER

The request of the Trenton Board of Education for a restraint of binding arbitration is denied for any of the recalled employees who were re-employed by the Board, appeared on its payroll and started to receive a salary on July 1, 2012. The

request is granted for any of the recalled employees who were re-employed by the Board, appeared on its payroll and started to receive a salary after July 1, 2012.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Voos voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Wall was not present.

ISSUED: August 14, 2014

Trenton, New Jersey