P.E.R.C. NO. 2014-78

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Petitioner,

-and-

Docket Nos. SN-2014-084
SN-2014-085
SN-2014-086

NEW JERSEY DIVISION OF CRIMINAL JUSTICE
NON-COMMISSIONED OFFICERS ASSOCIATION,

-and-

NEW JERSEY DIVISION OF CRIMINAL JUSTICE
SUPERIOR OFFICERS ASSOCIATION,

-and-

FRATERNAL ORDER OF POLICE, LODGE 91,

Respondents.

SYNOPSIS

The Commission Chair issues an expedited scope of negotiations ruling on disputed proposals in pending interest arbitration proceedings between the State of New Jersey and the following three unions: the New Jersey Division of Criminal Justice Non-Commissioned Officers Association (NCOA); the New Jersey Division of Criminal Justice Superior Officers Association (SOA); and the Fraternal Order of Police, Lodge 91 (FOP). The ruling finds that proposals concerning work incurred injury, health insurance premium contributions and opt-out reimbursements, retiree benefits, and group benefits co-pays are preempted by statute and therefore not mandatorily negotiable. The order provides that these proposals may not be submitted to the interest arbitrator for inclusion in contracts between the State and Unions.

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, Jackson Lewis LLP, attorneys (Jeffrey J. Corradino, of counsel and on the brief; James J. Gillespie, on the brief)

For the Respondent, Pellettieri Rabstein & Altman, attorneys (Frank M. Crivelli, of counsel)

DECISION

This decision is issued under the Commission's Pilot Program to make expedited scope of negotiations rulings on disputed proposals in a pending interest arbitration proceeding.[1/]

1/ N.J.A.C. 19:16-5.7(I) gives interest arbitrators jurisdiction to make negotiability determinations in their awards, "[u]nless the Commission Chair directs otherwise." See State of New Jersey, P.E.R.C. No. 2014-21, 40 NJPER 210
(continued...)

On March 26, 2014, the New Jersey Division of Criminal Justice Non-Commissioned Officers Association (NCOA), New Jersey Division of Criminal Justice Superior Officers Association (SOA), and Fraternal Order of Police, Lodge 91 (FOP) (hereinafter, collectively referred to as ("the Unions") each submitted a petition to initiate compulsory interest arbitration to resolve their respective negotiations impasses with the State of New Jersey over the terms of first contracts between the State and each of the Unions.[2/]

On April 4, 2010, the State responded to each interest arbitration petition by filing a petition for scope of negotiations determination asserting that certain proposals, or portions thereof, made by each Union were not mandatorily negotiable and could not be submitted to interest arbitration for inclusion in the first contracts between the State and the Unions. The proposals concern: work incurred injury leave; medical, dental and prescription coverage for current employees including premium costs and co-pays; and retiree health coverage at no cost to retirees with at least 25 years of State service

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1/ (...continued)
(¶81 2013). The exception allows expeditious resolution of negotiability disputes that are unresolved at the start of interest arbitration, under a pilot program described at: http://www.perc.state.nj.us/perc/Pilot_Program_Notice.pdf

2/ On December 8, 2010, the Unions were each certified by the Commission as the representative for collective negotiations for their respective units.

who enroll in a wellness program administered by the State Health Benefits Plan. The State also requested that its petitions be decided under the Commission's expedited procedure for resolving scope of negotiations disputes arising during interest arbitration. It submitted a brief along with its request. On April 8, the Unions filed a brief. The Commission Chair approved the request to have these petitions resolved under the expedited procedure.

This is the second scope of negotiations decision generated by proposals that are the subject of collective negotiations between the State and the Unions to set the terms of initial contracts. On January 30, 2014, the Commission issued P.E.R.C. No. 2014-50, 40 NJPER 346 (¶126 2014), involving these same parties.[3/] That decision was made on issues, other than the ones raised in these petitions, that were presented during collective negotiations between the State and the Unions. At that point petitions to initiate compulsory interest arbitration had not yet been filed.[4/]

The State argues that the Union proposals identified in its scope of negotiations petition and supporting brief may not be

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3/ An appeal is pending before the Appellate Division of the Superior Court.

4/ The State's request to hold the interest arbitration petitions in abeyance pending a decision in the appeal from P.E.R.C. No. 2014-50 was denied.

submitted to interest arbitration because they have been preempted by statutes and regulations. The Union responds that the State is focusing on proposals made at the outset of negotiations, the language of which has either been or will be modified by the Unions or might not be included in the Unions' final offers. It asserts that the petitions are premature.

A party submitting a scope of negotiations petition is required to advise the Commission if any disputed proposals have been withdrawn or have been modified to meet the negotiability objections of the petitioning party. See City of Newark, P.E.R.C. No. 2006-44, 31 NJPER 399 (¶158 2005), declining to rule on the negotiability of withdrawn proposals. The party that withdrew the challenged proposal is also free to clarify which proposals remain on the table.

While the Unions contend that their final offers may ultimately withdraw or modify one or more of the proposals challenged by the State, given the tight timetable that has been set by the amendments to the interest arbitration law, a ruling on the scope petitions cannot be delayed to allow the dynamic envisioned by the Unions to play out.

Under Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), a subject is mandatorily negotiable if it is not preempted by statute or regulation and it intimately and directly affects employee work and welfare without significantly

interfering with the determination of governmental policy.[5/] Preemption must be express, specific and comprehensive. See Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). And, a majority representative cannot negotiate over the terms and conditions of employment who have already retired. It may only advance proposals concerning benefits that current employees may receive on retirement, provided the benefits have not been preempted. See New Jersey Turnpike Authority, P.E.R.C. No. 2006-013, 31 NJPER 284, 285 (¶111 2005). The language and analysis of each disputed proposal follows.[6/]

1. WORK INCURRED INJURY

The unions propose:

> A. Where an employee covered under this Agreement suffers a work related injury or disability as defined in Section C below, the Employer shall continue such employee at full pay during the continuance of such employee's inability to work for a maximum period of up to twelve (12) months to be computed from date of injury or disability. The Employer retains the right, in his discretion, to extend the period of this payment for such work connected injury beyond twelve (12) months. During this period of time, all temporary disability benefits accruing under the provisions of the Workmen's Compensation Act shall be paid over to the Employer. In

5/ As this dispute arises during collective negotiations, the inquiry is only whether the issues are mandatorily negotiable. See Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).

6/ Where the State only challenges a portion of the proposal, the disputed language is underlined.

> the event the injury is determined to permanently disable the employee preventing him from continuing his employment, he shall apply for permanent disability status within forty five (45) days of being notified that he can no longer perform the duties associated with his employment. During the time that the employee is applying for disability pension benefits and waiting for a decision to be rendered by the Board of Trustees for the pension system that he has membership in, he will be paid his salary at the rate of compensation he previously received from the authorized workers compensation carrier.
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> * * *
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> C. For the purpose of this Article, injury or illness incurred while the employee is acting in any law enforcement activity in the line of duty shall be covered by the States' Workmen's Compensation Insurance Carrier or equivalent.
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> D. In the event a dispute arises as to whether an absence shall be designated as sick leave or as an injury on duty, (as outlined in Section C), the parties agree to be bound by the decision of an appropriate Workmen's Compensation Judgment or, if there is an appeal there from, the final decision of the last reviewing court.
>
> E. An injury on duty (as outlined in Section C, requiring time off for treatment, recuperation or rehabilitation shall not be construed as sick leave under the terms of the sick leave policy heretofore agreed upon between the parties.

The State cites our prior, and to date, only, "pilot program" scope of negotiations ruling to argue that the Unions' proposal is preempted by civil service statutes and regulations.

The Unions' proposed language is not substantially different

from the contract and proposed new language considered in State of New Jersey, supra., holding:

> The language of the amendments to N.J.S.A. 11A:6-8 is clear. The law provides that [Sick Leave Injury] SLI benefits for classified, unclassified, and senior executive service, State employees are no longer available after May 21, 2010 or after the expiration date of any CNA still in effect on that date. And, the Association's proposal is encompassed by the end of the SLI program as it states on its face that the cause of the illness, injury or disability must be job-related. Thus, both Article XXI and the Association's proposal are preempted and may not be submitted to interest arbitration for inclusion in a successor agreement.

2. HEALTH INSURANCE PREMIUM CONTRIBUTIONS

The unions propose:

> A. Medical Insurance Coverage
>
> 1. Medical coverage will be provided pursuant to coverage provided through the State Health Benefits Program.
>
> 2. Employees utilizing state medical coverage will be required to pay 1.5% of salary towards health benefits.

The Unions seek to cap employee contributions toward health insurance premiums at 1.5 per cent of employee salary. The State argues that the proposed cap violates P.L. 2011 c. 78, setting the percentage of employee premium contributions based upon a graduated scale depending on base salary, with increases in percentages over four years. It cites Borough of Point Pleasant, P.E.R.C. No. 2013-28, 39 NJPER 203 (¶65 2012).

The 1.5 per cent proposed cap is preempted by the subsequent statutory changes. Thus this proposal may not be submitted to interest arbitration.

3. HEALTH INSURANCE OPT-OUT PROPOSAL

The unions propose:

F. Opt-Out Program

1. Any employee covered by this Agreement may choose, in writing, at any time to participate in the "Optional Health Benefits Program." Participation in this program is voluntary and is intended for those employees who are covered by health insurance through a working spouse or who choose not to maintain the Employer's health coverage.

2. If an employee chooses to participate in this program and drops employee and/or spouse and/or dependent coverage, the employee shall receive a monetary incentive as set forth below.

3. Employees who opt to participate in this program must do so for a minimum of one (1) year. However, if an employee chooses to participate in the Opt-Out Program and then the spouse's coverage is terminated, upon proper verification of termination, the employer will restore the employee, his spouse and/or dependents to coverage under the SHBP for the remainder of that year, effective the first day of the following month. If the employee desires to reinstate coverage he will be required to wait until the next open enrollment period. The employee can opt out anytime during the year but must remain in the program for one full year.

4. Procedures

(a). If an employee chooses to participate in this Opt-Out program and selects one of the options, the employee shall receive 50% of the average premium.

(b). Employees shall be permitted to "opt out" of the Prescription Plan, and shall receive 50% of the average premium.

©. New employees shall be eligible for the Opt-Out Program immediately upon employment.

(d). Retirees will be eligible for the Opt-Out Program.

(e). The incentive payments for the Opt-Out Program shall be paid in equal monthly payments.

(f). The optional health benefits program shall be available to all new employees on their hire date and shall be available to all current and prospective retirees under the same terms and conditions applicable to active employees.

(g). The optional health benefits program shall be applicable to the Employer's prescription program and employees who drop such coverage shall be entitled to an incentive of the annual premium cost and paid in equal monthly installments, under the same terms and conditions as are applicable to participation in the remainder of the optional health benefits program.

(h). The incentive shall begin to be paid to the employee no later than one month after the effective date of the option.

> (i). There shall be no opt out for spouses or relatives where one is a dependent if both are on the State of New Jersey payroll and would otherwise be eligible for benefits. The two employees must choose one type of coverage only.

The Unions proposed language would allow an employee, eligible for coverage under a spouse's or partner's health insurance, to decline State provided benefits. An employee opting out of State-provided health benefits would receive a payment of 50 per cent of the average employee health care premium. The State asserts that the proposal is preempted by N.J.S.A. 52:14-17.31a, capping opt-out payments at the lower of 25% of premium cost or $5,000.00.[7/]

Clinton Tp., P.E.R.C. No. 2013-33, 39 NJPER 212 (¶70 2012) holds that the statute, in particular the language of subsection

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7/ N.J.S.A. 52:14-17.31a., provides in pertinent part:

> b. [T]he State as an employer . . . may allow any employee who is eligible for other health care coverage that is not under the State Health Benefits Program to waive the coverage under the State Health Benefits Program to which the employee is entitled by virtue of employment with the employer. . .
>
> c. [A]n employer may pay to the employee annually an amount . . . which shall not exceed 25%, or $5,000, whichever is less, of the amount saved by the employer because of the employee's waiver . . . 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.

c., first adopted in 1995, that the terms of a waiver program are not subject to collective negotiations, preempted enforcement of contract language providing a 40 per cent of premium cost payment to an employee who waives employer-provided coverage. All of the Unions' proposals under Section F "Opt Out Program," including "Procedures" subsections 4(a) through (i), are preempted and may not be submitted to interest arbitration for inclusion in first contracts with the State.[8/]

4. RETIREE MEDICAL, DENTAL & LIFE INSURANCE FOR 25 YEAR EMPLOYEES

The unions propose:

> Upon retirement from State service after 25 years, the state shall provide medical coverage, dental and life insurance administered by the SHBP, at no cost to the retiree provided he enrolls in a wellness program established by the SHBP for such purposes.

The State asserts that this proposal is preempted by N.J.S.A. 52:14-17.28d, as amended in 2011. The law requires State employees, who retire after June 28, 2011, with 25 years of service, to make contributions toward their retiree health benefit coverage. Thus the Unions' proposal that employees with

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8/ The Unions' proposed F.4.(f) would apply to "new employees on their hire date and shall be available to all current and prospective retirees under the same terms and conditions applicable to active employees." (Emphasis supplied). Even absent preemption, a proposal that would alter the terms and conditions of employment or benefits of already retired employees is not mandatorily negotiable. See New Jersey Turnpike Authority, supra.

25 years of service make no payments towards retiree health coverage is preempted by this law. The proposal may not be submitted to the interest arbitrator.

5. GROUP DENTAL, ORTHODONTIC COVERAGE & PRESCRIPTION CO-PAYS

The unions propose:

B. Dental Care Program

1. Full-time employees and eligible dependents shall be eligible for the State administered Dental Care Program.

2. Participation in the Program shall be voluntary with a condition of participation being that each participating employee authorizes a bi-weekly salary deduction.

3. Each employee shall be provided with a brochure describing the details of the Program, enrollment information and the required forms.

4. The optional Group Dental program which provides services through specific dental clinics or DPOs will be continued for employees in this unit. Participation in this program shall be voluntary with a condition that each participating employee authorizes a biweekly salary deduction. Employees may enroll in only one of the two programs or in no program at all.

5. Orthodontic benefits will be provided by the SHBP.

D. Prescription Drug Program

It is agreed that the State shall continue the Prescription Drug Benefit Program during the period of this Agreement. The program shall be funded and administered by the State. It shall provide benefits to all eligible unit employees and their eligible dependents. Each prescription required by

> competent medical authority for Federal legend drugs shall be paid for by the State from funds provided for the program subject to a deductible provision which shall not exceed $5.00 per prescription or renewal of such prescription and further subject to specific procedural and administrative rules and regulations which are part of the program.

The State asserts that these proposals are preempted by N.J.S.A. 52:14-17.27(b) providing that:

> The State Health Benefits Plan Design Committee shall have the responsibility for and authority over the various plans and components of those plans, including for medical benefits, prescription benefits, dental, vision, and any other health care benefits, offered and administered by the program. The committee shall have the authority to create, modify, or terminate any plan or component, at its sole discretion. Any reference in law to the State Health Benefits Commission in the context of the creation, modification, or termination of a plan or plan component shall be deemed to apply to the committee.

These proposals are preempted. See State of New Jersey, P.E.R.C. No. 99-40, 24 NJPER 522 (¶29243 1998).[9/]

9/ Because these are proposals made during collective negotiations, the context is different from a situation where the amount of a prescription co-pay existing at the beginning of a contract is later raised mid-term. The Supreme Court sustained an arbitration award allowing employees to recover the difference between the contractual co-pay and the higher amount. Borough of East Rutherford v. East Rutherford PBA Local 275, 213 N.J. 190 (2013).

ORDER

For the reasons set forth in the foregoing opinion, the proposals, or the challenged portions thereof, submitted by the New Jersey Division of Criminal Justice Non-Commissioned Officers Association (NCOA), New Jersey Division of Criminal Justice Superior Officers Association (SOA), and Fraternal Order of Police, Lodge 91 (FOP) concerning:

- Work Incurred Injury;
- Health Insurance Premium Contributions;
- Health Insurance Opt-out;
- Retiree Medical, Dental & Life Insurance for 25 Year Employees; and
- Group Dental, Orthodontic Coverage & Prescription Co-pays;

are not mandatorily negotiable and may not be submitted to interest arbitration for inclusion in contracts between the Unions and the State of New Jersey.

BY ORDER OF THE COMMISSION

P. Kelly Hatfield, Chair

ISSUED: May 6, 2014

Trenton, New Jersey