

P.E.R.C. NO. 2016-87

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WEST ORANGE BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2016-065

WEST ORANGE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Board of Education's request for a restraint of binding arbitration of a grievance filed by the Association contesting the unilateral termination of retiree-paid health care insurance benefits for retirees. The Commission finds that neither N.J.S.A. 18A:16-18 nor N.J.S.A. 18A:16-19(b) preempt negotiations over retiree-paid health insurance coverage.

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, Cleary, Giacobbe, Alfieri & Jacobs, LLC, attorneys (Matthew J. Giacobbe, of counsel and on the brief; Gregory J. Franklin, of counsel and on the brief)

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

DECISION

On April 15, 2016, the West Orange Board of Education filed a scope of negotiations petition seeking to restrain binding arbitration of a grievance filed by the West Orange Education Association. The grievance alleges that the Board violated the parties' collective negotiations agreement (CNA) and past practice when it unilaterally terminated retiree-paid coverage to current and future retirees.

The Board filed a brief and the Association filed a response brief. Neither party filed a certification.<sup>1/</sup> The following facts are gleaned from the petition and briefs.

The Association represents a unit of all certificated employees, administrative assistants, computer technicians, and paraprofessionals. The Board and Association are parties to a CNA effective from July 1, 2012 through June 30, 2015 and are in negotiations for a new CNA. The grievance procedure ends in binding arbitration.

Article II.F. of the CNA provides:

Unless otherwise provided in this Agreement, nothing contained herein shall be interpreted and/or applied so as to eliminate, reduce or otherwise detract from any employee benefit existing prior to its effective date.

The Board and Association agree that they have a past practice whereby retired unit members can purchase Board-provided health insurance coverage (medical, prescription, and dental). On February 26, 2016, the Board notified affected retirees that effective July 1, 2016 they would no longer be permitted to purchase health insurance coverage from the Board.

On March 2, 2016, the Association filed a grievance alleging that the Board violated Article II.F. of the CNA and past practice by unilaterally and without negotiations eliminating the

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<sup>1/</sup> N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

option of retiree-paid health insurance coverage to current and future retirees.<sup>2/</sup> This petition ensued.

The Commission's inquiry on a scope of negotiations petition is quite narrow. We are addressing a single issue in the abstract: whether the subject matter in dispute is within the scope of collective negotiations. The merits of the union's claimed violation of the agreement, as well as the employer's contractual defenses, are not in issue, because those are matters for the arbitrator to decide if the Commission determines that the question is one that may be arbitrated. 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 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

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<sup>2/</sup> On March 18, 2016, the Association filed an unfair practice charge alleging that the Board unilaterally changed retiree health coverage while in negotiations for a successor agreement. That case is pending, Docket No. CO-2016-192.

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].

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

The Board asserts that arbitration is preempted by N.J.S.A. 18A:16-16 because it provides that health insurance coverage shall cease upon termination of employment unless a contract provides otherwise. The Board contends that the CNA does not contain a contract provision providing for retiree health insurance coverage, and therefore the issue does not fall within the exception to the general prohibition contained in N.J.S.A. 18A:16-16. The Board also argues that N.J.S.A. 18A:16-19(b) preempts negotiations over some retirees' health benefits because it prohibits employer-paid coverage for retirees with more than twenty-five years of service with the Board who have elected to take State-paid coverage under the School Employees Health Benefits Plan (SEHBP).

The Association responds that N.J.S.A. 18A:16-16 does not preempt retiree-paid health insurance coverage because it concerns insurance contracts for coverage, not collective negotiations agreements, while N.J.S.A. 18A:16-18 and 18A:16-19 expressly permit the retiree health insurance coverage at issue

here. The Association argues that even under the Board's erroneous interpretation of N.J.S.A. 18A:16-16, the parties' past practice of retiree health coverage is on par with a contractual term and the Board's argument over what the parties agreed to is for the arbitrator to determine and not for the Commission to decide within a scope of negotiations petition. With regard to N.J.S.A. 18A:16-19(b), the Association contends it is irrelevant to the issue at hand because not only have none of the retirees elected State-paid coverage through SEHBP, but the coverage at issue is paid for by retirees, not the Board.

A majority representative may seek arbitration to enforce a contract on behalf of retirees because it has a cognizable interest in ensuring that the terms of its collective negotiations agreements are honored. Voorhees Tp. and Voorhees Police Offrs Assn, Voorhees Sgts Assn and Sr Offrs Assn of FOP Lodge 56 and FOP, NJ Labor Counsel, P.E.R.C. No. 2012-13, 38 NJPER 155 (¶44 2011), aff'd 39 NJPER 69 (¶27 2012); City of Union City and PBA Local No. 8, P.E.R.C. No. 2011-73, 37 NJPER 165 (¶52 2011). Where a contract is silent on an issue, a past practice can establish terms and conditions of employment and be enforced through arbitration. See Elkouri and Elkouri, How Arbitration Works, Ch. 12.1 (7th Ed., 2012), cited with approval, Passaic County Regional High School District No. 1, P.E.R.C. No. 91-11, 16 NJPER 446 (¶21192 1990); See also County of Sussex, P.E.R.C.

No. 83-4, 8 NJPER 431 (¶13200 1982) and cases cited therein; and Borough of East Rutherford v. East Rutherford PBA Local 275, 213 N.J. 190 (2013) (the Supreme Court sustained an arbitration award wherein the arbitrator concluded that based on past practice the employer must maintain the prior existing co-payment level).

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, thereby eliminating the employer's discretion to vary that condition. Council of N.J. State College Locals, NJSFT-AFT/AFL-CIO v. State Bd. of Higher Ed., 91 N.J. 18, 30 (1982); Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

N.J.S.A. 18A:16-16 provides:

18A:16-16. Termination of coverage

The coverage of any employee, and of his dependents, if any, shall cease upon the discontinuance of his employment or upon cessation of active full-time employment in the classes eligible for coverage subject to such provision as may be made in any contract made by the local board of education for limited continuance of coverage during disability, part-time employment, leave of absence other than leave for military service, and for continuance of coverage after retirement.

The statute clearly allows for "continuance of coverage after retirement" if such provision was made in a contract. But the reference to "such provision as may be made in any contract made by the local board of education" concerns insurance contracts entered into by the Board, not collective negotiations agreements between the Board and Association. N.J.S.A. 18A:16-16 was enacted as part of P.L. 1979, c. 391, which in its various provisions uses the term "contract" to refer to various insurance contracts a board of education may make, while union contracts are referred to as "collective negotiations agreements." For example, N.J.S.A. 18A:16-13 (P.L. 1979, c. 391, amended P.L. 1995, c. 74) provides (emphasis added):

18A:16-13. Entering into group life, hospitalization, health and accident insurance contracts

Any local board of education may directly or indirectly through a trust fund or otherwise enter into contracts of group life, accidental death and dismemberment, hospitalization, medical, surgical, major medical expense, minimum premium insurance policy or health and accident insurance with any insurance company or companies authorized to do business in this State, or may contract with a nonprofit hospital service, medical service or health service corporation with respect to the benefits which they are authorized to provide respectively. Such contract or contracts shall provide any one or more of such coverages for the employees of the local board of education and may include their dependents. A local board of education may enter into a contract or contracts to provide drug prescription and other health care benefits, or enter into a



contract or contracts to provide drug prescription and other health care benefits as may be required to implement a duly executed collective negotiations agreement, or as may be required to implement a determination by a local board of education to provide such benefit or benefits to employees not included in collective negotiations units. Nothing herein contained shall be deemed to authorize coverage of dependents of an employee under a group life insurance policy or to allow the issuance of a group life insurance policy under which the entire premium is to be derived from funds contributed by the insured employee.

For purposes of this section, "minimum premium insurance policy" means a group insurance policy issued by an insurer licensed to do business in this State under which the policyholder agrees to directly fund specified claims of insureds covered under the policy, in lieu of payment of a portion of the premium.

More recent amendments to the education law health insurance benefits legislative framework also maintain the distinction between a health insurance contract and a collective negotiations agreement:

18A:16-17.1 Contributions by employees of a local board of education toward cost of health care benefits coverage.

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b. A board of education may enter into a contract or contracts to provide health care benefits including prescription drug benefits and other health care benefits, as may be required to implement a duly executed collective negotiations agreement . . .

[P.L. 2011, c. 78, section 41]

Therefore, the Association's interpretation is consistent with how "contract" is used in the legislation. N.J.S.A. 18A:16-16 allows boards of education to contract with insurance companies for retiree health coverage and does not preempt such benefits from being negotiated or arbitrated.

The following statutes cited by the Association further support its position that the education laws do not preempt negotiations over retiree health benefits, but permit the Board to contract for retiree-paid health insurance coverage:

18A:16-18. Coverage after retirement

The continuance of coverage after retirement of any employee shall be provided at such rates and under the conditions as shall be prescribed in the contract subject, however, to the requirements set forth in section 8 of P.L. 1979, c. 391 (C. 18A:16-19). The contribution required of any retired employee toward the cost of such coverage may be paid by the employee to the local board of education or in such other manner as the local board of education shall direct.

18A:16-19. Payment for coverage

a. Except as otherwise prescribed by P.L. 1979, c. 391 (C. 18A:16-12 et seq.), retired employees shall be required to pay for the entire cost of coverage for themselves and their dependents at rates which are deemed adequate to cover the benefits, as affected by Medicare, of such retired employees and their dependents on the basis of the utilization of services which may be reasonably expected of such older age classification; provided, however, that the total rate payable by such a retired employee for himself and his dependents, for coverage under the contract and for Part B of

Medicare, shall not exceed by more than 25%, the total amount that would have been required to have been paid by the employee and the local board of education for the coverage maintained had he continued in office or active employment and he and his dependents were not eligible for Medicare benefits.

The Association also discussed and attached to its brief a decision of the State Board of Education holding that a retired school nurse was entitled to participate in the school board's group health insurance plan pursuant to the terms of N.J.S.A. 18A:16-18. See Miller v. Bd. of Ed. of Southern Regional High School, SB#50-93 (State Board of Education 1995).

Even assuming, arguendo, the Board's position that the reference to contracts in N.J.S.A. 18A:16-16 includes collective negotiations agreements, then the Board has conceded that retiree health insurance coverage is not preempted from collective negotiations. At that point, the issue has already been found mandatorily negotiable because it is not specifically preempted, so the Board's contractual interpretation and past practice arguments go to the merits of the grievance and are for the arbitrator to decide. Ridgefield Park.

Finally, the Board's contentions regarding N.J.S.A. 18A:16-19(b) are unconvincing. That section of the statute provides:

b. The local board of education may, in its discretion, assume the entire cost of such coverage and pay all of the premiums for employees who have retired after 25 years or more service with the local board of

education, including the premiums on their dependents, if any, under such uniform conditions as the local board of education shall prescribe, except that retired employees and dependents who are eligible for and elect at the time of retirement to take State-paid coverage under the State Health Benefits Program pursuant to paragraph (2) of subsection b. of section 7 of P.L. 1964, c. 125 (C. 52:14-17.38) shall not be eligible for employer-paid coverage under this subsection.

N.J.S.A. 18A:16-19(b) provides the parameters under which the Board may choose to pay for the health benefits of certain eligible retirees. The allegedly preemptive section underscored by the Board concerns only the relationship between the state health benefits program and such employer-paid coverage. The Board's brief states, without supporting evidence or certifications, that some retirees elected coverage under the State-paid plan. The Association disputes that contention and responds, also without supporting evidence or certifications, that no retirees have elected coverage under the State-paid plan. Regardless of whether any retirees elected State-paid plans, N.J.S.A. 18A:16-19(b) is inapplicable to this dispute because it only concerns requirements for employer-paid coverage. It is undisputed that the retiree health benefits that the Board recently terminated are retiree-paid benefits. Accordingly, N.J.S.A. 18A:16-19(b) does not preempt the issue.

ORDER

The request of the West Orange Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Eskilson, Jones and Voos voted in favor of this decision. None opposed. Commissioners Bonanni, Boudreau and Wall were not present.

ISSUED: June 30, 2016

Trenton, New Jersey