

P.E.R.C. NO. 2017-74

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF BARNEGAT,

Petitioner,

-and-

Docket No. SN-2017-019

BARNEGAT TOWNSHIP POLICEMAN'S
BENEVOLENT ASSOCIATION, LOCAL 296,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, the Township's request for a restraint of binding arbitration of a grievance alleging that the Township unilaterally changed health insurance carriers, thereby increasing the costs of PBA members' Chapter 78 contributions. The Commission holds that the PBA's claim concerning increased health insurance contributions is preempted by N.J.S.A. 52:14-17.28c to the extent the increases are solely due to the costs of dental and/or vision coverage. The Commission also holds that arbitration of the grievance is preempted to the extent that the parties' collective negotiations agreement provides an opt-out or waiver payment in excess of the maximum set by N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a.

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, Dasti, Murphy, McGuckin, Ulaky,
Koutsouris & Connors, P.C., attorneys (Christopher K.
Koutsouris, of counsel and on the brief)

For the Respondent, Alterman & Associates, LLC,
attorneys (Stuart J. Alterman, of counsel and on the
brief)

DECISION

On November 28, 2016, the Township of Barnegat (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by Barnegat Township Policemen's Benevolent Association, Local 296 (PBA). The demand for arbitration, dated October 25, 2016, alleges that after the parties' collective negotiations agreement (CNA) expired but before the negotiation of a successor agreement, the Township unilaterally changed insurance carriers, going from NJ Direct 10, a plan under the State Health Benefits Program (SHBP), to Horizon

Direct Access, and that as a result of this change, employee Chapter 78 contributions have increased.

The Township filed a brief and exhibits. The PBA filed a brief and exhibits.^{1/2/} These facts appear.

The PBA represents all police officers below the rank of sergeant. The most recent CNA between the parties covered the period from January 1, 2011 through December 31, 2013 and provides for binding arbitration of grievances.

Article XIII, "Health Benefits," provides that as of June 1, 2011, employees agreed to "a hospital and medical benefits plan through the State of NJ Health Benefit Plan Direct 10," but that "[n]othing in this article shall prevent the township from changing the current insurance carrier so long as the benefits are no less than those currently in effect." Another provision

1/ The parties did not submit certifications. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

2/ On April 17, 2017, the Township requested an evidentiary hearing pursuant to N.J.A.C. 19:13-3.7. The regulation requires such a request to be filed within 5 days of receipt of the respondent's brief and to "set forth in detail the substantial and material disputed factual issues that the requesting party contends necessitate an evidentiary hearing." The Commission received the PBA's brief on December 27, 2016. The Township's request, in addition to being untimely, did not specify the factual issues claimed to be in dispute. Given these deficiencies and the fact that the parties had the opportunity to present facts through certifications but elected not to file such documents, we deny the Township's request for an evidentiary hearing.

provides for dental coverage through the SHBP but, like the hospital/medical plan, states, "[n]othing in this article shall prevent the township from changing the current insurance carrier so long as the benefits are no less than those currently in effect."

The article also provides that employees who forego coverage will be reimbursed "50% [of] the value of what the health care would cost the employer" and "if the employee is enrolled into the SHBP then reimbursement shall conform to those guidelines." The next clause states that the "health care contribution mandated by state law shall be based upon the value of the prescription and medical coverage."

On or about October 14, 2016, the PBA President filed a grievance "requesting that the township comply with the most current collective bargaining agreement and reimburse all employees who voluntarily do not take the health care benefits 50% [of] the value of what the health care would cost the employer." By letter dated October 20, 2016, the Township Administrator advised the PBA President that the grievance was denied because "N.J.S.A. 40A:10-17.1 ... renders the topic of health care reimbursement non-negotiable," placing the subject "into the sole discretion of the Township."

In its brief, the Township asserts that the grievance does not relate to the "Statement Identifying Grievance(s)" in the

PBA's "Request for Submission of a Panel of Arbitrators." It argues that as a result, the matter cannot be submitted to arbitration and, alternatively, that the request for reimbursement in the grievance is preempted by New Jersey statutes.

In its reply brief, the PBA denies that its grievance and demand for arbitration were defective and asserts that an alleged procedural defect in the grievance process does not render the matter non-arbitrable. In addition, the PBA states, "While the waiver issue may be incorporated into the grievance, the instant grievance was filed complaining about the fact that the Township changed health benefits without negotiations," which "increased the costs of PBA member Chapter 78 contributions." With respect to the Township's preemption argument, the PBA states that "it is only the decision to permit waivers, and the amount of consideration, that are not negotiable."

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 contractual merits of the grievance or any contractual defenses the employer may have.

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

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.

[Id. at 92-93.]

Thus, arbitration is permitted, and an arbitrator may determine whether or not to sustain a grievance, if the subject of the grievance 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 policy-making powers.

Negotiation is preempted "only if the [statute or] regulation fixes a term and condition of employment 'expressly, specifically and comprehensively.'" Bethlehem Twp. Bd. of Ed., 91 N.J. 38, 44 (1982) (citing Council of New Jersey State College Locals v. State Bd. of Higher Ed., 91 N.J. 18, 30 (1982)). "The legislative provision must 'speak in the imperative and leave nothing to the discretion of the public employer.'" Id. (citing Local 195, 88 N.J. 393, 403-404 (1982); see also, State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978)).

N.J.S.A. 40A:10-17.1 provides in relevant part:

Notwithstanding the provisions of any other law to the contrary, a county, municipality or any contracting unit ... which enters into a contract providing group health care benefits to its employees pursuant to N.J.S.40A:10-16 et seq., may allow any employee who is eligible for other health care coverage to waive coverage under the ... plan In consideration of filing such a waiver, a county, municipality or contracting unit may pay to the employee annually an amount, to be established in the sole discretion of the county, municipality or contracting unit, which shall not exceed 50%

of the amount saved by the county, municipality or contracting unit because of the employee's waiver of coverage, and, for a waiver filed on or after [May 21, 2010], which shall not exceed 25%, or \$ 5,000, whichever is less, of the amount saved by the county, municipality or contracting unit because of the employee's waiver of coverage.... The decision of a county, municipality or contracting unit 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.

N.J.S.A. 52:14-17.31a contains the same restrictions but applies to coverage provided through the SHBP.

In Hillsborough Bd. of Ed., P.E.R.C. No. 2005-54, 31 NJPER 99 (¶43 2005), we noted that under N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a, decisions of municipalities and counties to permit waivers and the amount of consideration are not negotiable. Accordingly, to the extent that the Township and the PBA's CNA provides an opt-out payment in excess of the statutory maximum (the lower of 25% of the employer's premium cost or \$5,000), it is unenforceable and not arbitrable.

As for the Township's argument that the parties' dispute was not, in the PBA's words, "properly grieved" and is therefore not arbitrable, we typically decline to consider issues of procedural arbitrability in scope determinations, finding them to be within the purview of an arbitrator. See generally, University Hospital (UMDNJ), P.E.R.C. No. 2017-34, 43 NJPER 236 (¶73 2016). Thus,

the Township's argument does not serve as a basis to restrain arbitration.

Turning to the issue of Chapter 78 contributions, in Readington Twp. Bd. of Ed., P.E.R.C. No. 2017-18, 43 NJPER 128 (¶40 2016), we restrained binding arbitration of a grievance challenging the inclusion of the cost of dental insurance coverage in determining the employee contribution mandated by P.L. 2011, c. 78 after the board unilaterally left the School Employees' Health Benefits Program (SEHBP) and went to a private carrier. We noted that under Chapter 78, employee contributions are based, in part, on the "cost of coverage," the definition of which depends upon whether the employer participates in the SHBP/SEHBP or not. In that regard, N.J.S.A. 52:14-17.28c defines the term as follows:

[T]he premium or periodic charges for medical and prescription drug plan coverage, but not for dental, vision, or other health care, provided under the State Health Benefits Program or the School Employees' Health Benefits Program; or the premium or periodic charges for health care, prescription drug, dental, and vision benefits, and for any other health care benefits, provided pursuant to P.L.1979, c.391 (C.18A:16-12 et seq.), N.J.S.40A:10-16 et seq., or any other law by a local board of education, local unit or agency thereof, and including a county college, an independent State authority ..., and a local authority ..., when the employer is not a participant in the State Health Benefits Program or the School Employees' Health Benefits Program.

In other words, Chapter 78 does not mandate that employees contribute toward the cost of dental, vision, or any health care other than medical and prescription for SHBP participants; for non-SHBP participants, however, the statute mandates that employees contribute toward the cost of any dental and vision coverage. We held in Readington that N.J.S.A. 52:14-17.28c preempted negotiations over employee contribution levels for dental coverage, the only health care at issue in that case, because the statute expressly, specifically and comprehensively specifies that the "cost of coverage" includes the premium for that benefit when the employer is not a SEHBP/SHBP participant. See Bethlehem Tp. Bd. of Ed., 91 N.J. at 44.

While the PBA does not flesh out its claim that "the switching of the health benefits increased the costs of PBA members Chapter 78 contributions," the claim is preempted by N.J.S.A. 52:14-17.28c to the extent it rests solely upon the inclusion of the cost of dental and/or vision coverage.^{3/} To the extent, however, the claim is not based on the inclusion of those coverages in the calculation of employee contributions, it is not preempted. If the PBA's claim is that Chapter 78 contributions

3/ Likewise, to the extent Chapter 78 contribution levels have not been fully implemented, which we surmise from this dispute to be the case, the CNA provision stating that the "health care contribution mandated by state law shall be based upon the value of the prescription and medical coverage" is preempted by N.J.S.A. 52:14-17.28c for coverage not provided through the SHBP.

increased due to the change in plans and for reasons not attributable to vision or dental care premium costs, and should the arbitrator so find, then he or she may also determine whether the increased costs constituted a breach of a contractual benefit level. Rockaway Borough Board of Education, P.E.R.C. No. 2010-9, 35 NJPER 293 (¶102 2009) (where parties have agreed to permit an employer to change carriers consistent with the CNA, arbitrator may determine the contractual level of benefits and whether that benefit level had been breached).

Lastly, we note that given the long expiration of the parties' CNA, we asked the parties to file supplemental briefs and/or certifications advising of their efforts to negotiate a successor agreement, including the dates the parties met for that purpose, the dates scheduled for such meetings, and whether the parties had invoked any of the impasse resolution procedures set forth in N.J.A.C. 19:16-1.1 or intended to do so. Neither party replied by identifying any meeting or meetings held or scheduled for negotiations or their intentions with regard to conducting negotiations or invoking impasse resolution procedures. Therefore, we remind the parties that "Negotiations ... shall begin at least 120 days prior to the day on which their collective negotiation agreement is to expire" and "[t]he parties shall meet at least three times during that 120-day period." N.J.S.A. 34:13A-16a(1). In addition, either party may request

the appointment of a mediator, fact-finding, or interest arbitration as provided in our regulations. See N.J.A.C. 19:16-3.1, N.J.A.C. 19:16-5.1, and N.J.A.C. 19:16-5.1.

ORDER

The request of the Township of Barnegat for a restraint of binding arbitration is granted to the extent that the parties' collective negotiations agreement provides an opt-out or waiver payment in excess of the maximum set by N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a (25% of the amount saved by the Township because of the employee's waiver or \$5,000, whichever is less) and to the extent that any increase in employee Chapter 78 contributions is based upon the inclusion of the cost of dental and/or vision coverage; otherwise, the request is denied.

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.

ISSUED: June 29, 2017

Trenton, New Jersey