

P.E.R.C. NO. 2018-12

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF WESTFIELD,

Petitioner,

-and-

Docket No. SN-2017-046

SUPERIOR OFFICERS ASSOCIATION,  
PBA LOCAL 90A,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Town's request for a restraint of binding arbitration of a grievance contesting the discontinuation of health insurance opt-out payments. The Commission concluded that N.J.S.A. 40A:10-17.1 preempts opt-out payments for waiving coverage under a private health insurance plan and that unit members' resulting loss of income is not a "severable claim."

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, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (Arthur R. Thibault, of counsel; Timothy D. Cedrone, on the brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys (Samuel B. Wenocur, of counsel)

DECISION

On May 26, 2017, the Town of Westfield (Town) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Superior Officers Association, PBA Local 90A (PBA). The grievance alleges that the Town violated the parties' collective negotiations agreement (CNA) when it discontinued health insurance opt-out payments.

The Town filed a brief, exhibits, and the certification of its attorney. The PBA filed a brief, exhibits, and the certification of its President. The Town also filed a reply brief. These facts appear.

The PBA represents police officers employed by the Town in the ranks of sergeant, lieutenant, and captain. The Town and the PBA are parties to a CNA in effect from January 1, 2015 to December 31, 2018. The grievance procedure ends in binding arbitration.

Article 31 of the parties' CNA, entitled "Insurance," Section 4, provides in pertinent part:

An employee may choose to "opt out" of (not participate in) the Town's health insurance plan provided in this Article so long as the employee choosing to opt out presents written certification of alternative and comparable health insurance coverage. Employees who opt out of the Town's health insurance coverage will receive a designated payment in return through the bi-weekly payroll, prorated as may be applicable.

Any employee electing to "opt out" will be paid the amount of 25% or \$5,000, whichever is less of the amount saved by the Town because of the employee's waiver of coverage.

The opt out program will be reviewed periodically and its continuance will be based on the medical carrier's agreement to participation with no adverse impact to medical premiums for the Town.

Article 32 of the parties' CNA, entitled "Savings Clause," Section 2, provides in pertinent part:

In the event any provision of this Agreement shall conflict with any federal or state law, the appropriate provision or provisions of this Agreement shall be deemed amended or nullified to conform to such law in which event such provision may be negotiated by the parties.

In the fall of 2016, the Town Council elected to end health insurance opt-out payments for all employees effective January 1, 2017. According to the certification of the PBA President, the PBA first became aware in October 2016, when members received revised employee handbooks for 2017, that the opt-out payments would be terminated. The PBA President also certifies that because the Town's twice yearly open enrollment periods ended before October 2016, unit members who had opted out of coverage could not re-enroll in the Town's insurance plan before January 2017.<sup>1/</sup>

In early 2017, the PBA filed a grievance contesting the Town's decision.<sup>2/</sup> In a memorandum to the PBA President dated May 4, 2017 denying the grievance at Step 4, the Town Mayor noted that employees may complete an application to revoke their waiver of coverage and that re-enrollments take effect the first day of the next month.<sup>3/</sup>

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1/ The PBA President does not certify that as a result, the officers who had opted out were left without health insurance coverage.

2/ The memorandum that appears to serve as the grievance is undated.

3/ The Mayor also noted that while employees who opt out of the Town's plan will no longer receive an opt out payment, they will secure the "significant financial benefit" of not having to contribute a percentage of their salaries toward the cost of employer-provided coverage.

The PBA President also certifies that affected unit members "refrained from joining [the Town's] health insurance plans in 2017" based upon "their understandings that the payouts ... would be addressed through the grievance process." He further certifies that the affected unit members intend to re-enroll in the Town's plan for 2018 due to the Town's refusal to reconsider the cessation of opt-out payments.

On May 15, 2017, the PBA filed a Request for Submission of a Panel of Arbitrators (AR-2017-536). 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 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, 92-93 (1981), 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.

Arbitration is permitted if the subject of the grievance is mandatorily or permissively negotiable. See Middletown Tp. and Middletown PBA, P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶1111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

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 Town argues that negotiations regarding health insurance opt-out payments are preempted by N.J.S.A. 40A:10-17.1, which specifies that the decision of a municipality to allow its employees to waive coverage and the amount of consideration to be paid shall be non-negotiable.<sup>4/</sup> The Town also cites Clinton Tp., P.E.R.C. No. 2013-33, 39 NJPER 212 (¶70 2012) and Local Finance Notice No. 2016-10 in support of its position.

The PBA argues that the Town cannot demonstrate that health insurance opt-out payments are outside the scope of collective negotiations given that it agreed to - and complied with - related contractual provisions specified in the parties' CNA for two years. The PBA maintains that granting the Town's scope petition would reward bad faith negotiations and asserts that "[t]he only justifiable treatment of the opt out payment language is to keep it enforceable through the end of the current CNA," with affected unit members being offered the payment for 2018.

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<sup>4/</sup> N.J.S.A. 40A:10-17.1, which was enacted in 1995 and amended as recently as 2010, provides in pertinent part:

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.

The PBA also argues that even if the Town has a managerial prerogative to end health insurance opt-out payments, the severable impact of that decision (i.e., reducing affected unit members' income by up to \$5,000 per year) is mandatorily negotiable according to Article 32, Section 2 of the parties' CNA.

In reply, the Town reiterates its position and argues that ignorance of the law is no defense. The Town maintains that it simply agreed to the PBA's proposal to incorporate existing policy regarding health insurance opt-out payments into the parties' CNA and that it is not acting in bad faith, but instead complying with a clear statutory mandate. The Town also asserts that the relief requested by the PBA "is extraordinary in nature and not justiciable within the context of this proceeding."

Initially, we note that N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a<sup>5/</sup> are companion statutes that were originally enacted as §§ 36-37 of P.L. 1995, c. 259. While N.J.S.A. 40A:10-17.1 permits municipal employees to waive employer-provided coverage under a private health insurance plan, N.J.S.A. 52:14-

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5/ N.J.S.A. 52:14-17.31a, which was enacted in 1995 and amended as recently as 2010, provides in pertinent part:

(c) 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.



17.31a(a) permits municipal employees to waive employer-provided coverage under the State Health Benefits Program (SHBP). Both statutes include identical language specifying that a public employer's decision to allow municipal 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. 40A:10-17.1; N.J.S.A. 52:14-17.31a(c).

The Commission has held that "N.J.S.A. 52:14-17.31a . . . clearly preempts the subject matter area regarding the payments of stipends for waiving coverage in the SHBP" and contract provisions regarding waiver payments "should have never been negotiated and placed in [a] CNA" after the statute was enacted in 1995. Clinton Tp., P.E.R.C. No. 2013-33, 39 NJPER 212 (¶70 2012); accord State of New Jersey, P.E.R.C. No. 2014-78, 40 NJPER 547 (¶177 2014) (holding that N.J.S.A. 52:14-17.31a, "in particular the language of subsection c . . . 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").

Given that the statutory language analyzed in Clinton Tp. and State of New Jersey is identical to the applicable statutory language at issue here, we find that N.J.S.A. 40A:10-17.1 clearly preempts opt-out payments for waiving coverage in the

Town's health insurance plan and should not have been negotiated and/or included in the parties' CNA.

We also find that unit members' loss of income as a result of the Town's decision to discontinue the waiver option effective January 1, 2017 does not amount to a severable claim that would be negotiable upon demand. Severable claims are those that flow from the exercise of a managerial prerogative. In order for an asserted "impact" issue to be severable from the managerial prerogative, it may not significantly encroach upon the managerial prerogative; otherwise, it would render the "managerial prerogative" a hollow shell without substance or meaning. Communications Workers of Am. v. State of New Jersey (Rowan Univ.), App. Div. Dkt. No. A-1500-98T5, 26 NJPER 30, 32 (¶31009 1999), aff'g, State of New Jersey (Rowan Univ.), P.E.R.C. No. 99-26, 24 NJPER 483 (¶29224 1998). See also, e.g., City of Atlantic City, P.E.R.C. No. 87-161, 13 NJPER 586 (¶18218 1987); Clark Tp., P.E.R.C. No. 2016-55, 42 NJPER 372 (¶105 2016), aff'd 43 NJPER 147 (¶44 App. Div. 2016)). Here, we deal not with a managerial prerogative per se, but a preemptive statute that takes the issue out of the scope of negotiability. Moreover, allowing negotiations and arbitration over the asserted monetary impact would circumvent N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a(c). Lastly, the PBA has not produced any evidence that affected unit members were precluded from re-enrolling in the

Town's health insurance plan on January 1, 2017 after opt-out payments were discontinued.

Accordingly, we grant a restraint of binding arbitration.

ORDER

The request of the Town of Westfield for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: September 28, 2017

Trenton, New Jersey