

P.E.R.C. NO. 2019-36

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BERLIN,

Petitioner,

-and-

Docket No. SN-2019-016

PBA LOCAL 362,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Borough's request for a restraint of binding arbitration of the PBA's grievance contesting the Borough's termination of the grievant's health benefits while he was suspended without pay. The Commission holds that N.J.A.C. 17:9-7.2(c)8 preempts the issue because it expressly requires the termination of SHBP coverage when an employee is suspended.

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, Brown & Connery, LLP, attorneys  
(Laurel B. Peltzman, on the brief)

For the Respondent, Mets Schiro & McGovern, LLP,  
attorneys (Brian J. Manetta, on the brief)

DECISION

On August 28, 2018, the Borough of Berlin (Borough) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 362 (PBA). The grievance asserts that the Borough violated Article XVII of the parties' collective negotiations agreement (CNA) when it terminated the grievant's health benefits while he was suspended without pay.

The Borough filed briefs, exhibits, and the certification of its Chief, Michael Miller. The PBA filed a brief, exhibits, and the certifications of its President, Jason Christy and the grievant. These facts appear.

The PBA represents all full-time police officers of the Borough Police Department, with the exception of the Chief of Police. The Borough and PBA are parties to a CNA in effect from January 1, 2018 to December 31, 2021. The grievance procedure ends in binding arbitration.

Article XVII of the CNA, entitled "Health Benefits & Sick Leave," provides in pertinent part:

A. The Borough shall provide officers, their spouses/civil PBA/domestic partners and their eligible dependents with the New Jersey State Health Benefits Plan [(SHBP)], or a comparable health plan. Effective January 1, 2010, all bargaining unit members shall enroll in the Direct 15 Plan or an HMO plan at no cost to the employee, unless premium sharing is required by applicable law, or by contract (Tier 4, see below). If the employee elects to enroll in the Direct 10 Plan he/she shall be obligated to pay the difference between the Direct 10 or another plan that has a premium that is greater than Direct 15, he/she shall be obligated to pay the difference between the selected plan's premium and the Direct 15 premium.

The grievant began employment as a police officer with the Borough on November 7, 2010. Miller certifies that on February 6, 2018, the Borough filed departmental charges against the grievant, based upon his conduct during a November 18, 2017 investigation and his statements during an internal affairs investigation. The departmental charges stated that the Borough was seeking to terminate the grievant's employment pursuant to N.J.S.A. 40A:14-147. Also on February 6, the grievant was

notified that he was suspended without pay pending the outcome of a hearing on the charges. Miller further certifies that on February 7, the grievant was notified that his health benefits would terminate March 1, 2018 due to his suspension, and that he would need to obtain benefits through the COBRA program or the healthcare marketplace.

The grievant certifies that he appealed the Borough's disciplinary charges and requested a hearing. The grievant further certifies that on September 14, 2018, he was terminated from employment and has since appealed his termination to Superior Court.<sup>1/</sup> He further attests that he had to obtain alternative benefits for himself and his family and has incurred numerous out of pocket costs.

Christy certifies that on or about July 3, 2018, he initiated a Step 1 grievance regarding the termination of grievant's health benefits "during his improper suspension." Also on July 3, the Lieutenant responded that he was unable to render a decision, and referred the grievance to the next step of the grievance procedure. On July 9, the grievance was submitted to Miller pursuant to Step 2 of the grievance procedure, who denied it on July 10. The grievance was advanced to the Police Committee at Step 3 on July 11, who denied it on July 12.

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<sup>1/</sup> The Borough is not a Civil Service jurisdiction, therefore grievant's appeal of his termination is made to the Superior Court. N.J.S.A. 40A:14-150.

On July 17, 2018, Christy advanced the grievance to Step 4 and on July 24, a Request for Submission of a Panel of Arbitrators was filed. This petition ensued.

The Borough argues that, as a participant in the SHBP, it is required to comply with the statutes and rules adopted by the State Health Benefits Commission (Commission), including N.J.A.C. 17:9-7.2(a), which preempts this matter. The PBA responds that even if the grievant's coverage under the SHBP was properly terminated as a result of his suspension, the grievant "still remained an officer while he awaited the outcome of his departmental hearing," and the CNA "does not specifically limit health benefits to those provided by the SHBP." Therefore, the PBA contends, the Borough was contractually obligated by Article XVII of the CNA to provide the grievant with "a comparable health plan" until he was formally separated from employment.

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 Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in *Local 195, IFPTE v. State*, 88 N.J. 393, 404-405 (1982):

[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 managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

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 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.*, P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), *aff'd* NJPER Supp.2d 130 (¶111 App. Div. 1983). Thus, if a grievance is either mandatorily or permissively negotiable, and negotiation is neither preempted nor would substantially limit government's policy-making powers, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson, supra, Local 195, supra.

Parties may not agree to contravene specific statutes or regulations setting particular terms and conditions of public employment. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978). Where a statute is alleged to preempt an otherwise negotiable term or condition of employment, negotiation is preempted only if the statute fixes the term "expressly, specifically, and comprehensively." Council of New Jersey State College Locals v. State Bd. of Higher Ed., 91 N.J. 18, 30 (1982).

The Borough argues that this dispute is preempted by N.J.A.C. 17:9-7.2, entitled "Termination of eligibilty" under the SHBP. That regulation states as follows:

- (a) The coverage of an employee and such employee's eligible dependents shall terminate whenever such employee's eligibility shall cease for any of the reasons given in (c) below.
- (b) The effective date of termination shall be the last day of the coverage period corresponding to the payroll period or month in which the last payroll deduction was made from the employee's salary for coverage, if any are required, or the last charge shall have been paid by the State for the employee's and/or the employee's dependents' coverage or by the local employer for the employee and/or the employee's dependents, as the case may be.
- (c) Coverage for the employee and the employee's dependents will terminate if:
  - 1. The subscriber voluntarily terminates coverage;
  - 2. The employee terminates employment;



3. The employee's hours are reduced so the employee no longer qualifies for coverage as a full-time employee. An employee whose coverage terminated as a result of a change from full-time to part-time status cannot be reenrolled until the employee has reestablished eligibility for coverage by serving the normal waiting period prescribed for new enrollees. In no event will the waiting period include any part-time service rendered by the employee;

4. The employee is on a leave of absence and the employee does not make required premium payments. The coverage of an eligible employee and of an employee's dependents during any period of authorized leave of absence without pay shall terminate on the last day of the second coverage period following the last payroll period or month for which the employee received a salary payment if the total charge for the coverage is not paid by the employee;

5. The employee enters the Armed Forces, is eligible for government-sponsored health services and is not receiving differential pay from the State or local employer;

6. The subscriber's employer ceases to participate in the SHBP;

7. The subscriber dies;

8. The employee is suspended; or

9. The employee is on a furlough or extended furlough and fails to make required premium payments in advance.

[N.J.A.C. 17:9-7.2 (emphasis supplied.)]

We agree with the Borough that N.J.A.C. 17:9-7.2(c)8 "expressly, specifically and comprehensively" required the termination of the grievant's SHBP coverage during his suspension.<sup>2/</sup>

We next turn to the PBA's argument that even if N.J.A.C. 17:9-7.2 is preemptive, the Borough should have provided the grievant with a comparable health plan outside the SHBP. We reject this argument. Some context on how the SHBP operates is warranted. Participation in the SHBP by local government units is voluntary, and is controlled by the New Jersey State Health Benefits Program Act (SHBP Act) and implementing regulations. N.J.S.A. §§ 52:14-17.25 – 52:14-17.46.12; N.J.A.C. §§ 17:9-1.1 – 17:9-13.6.

Once a local government employer has elected to participate in the SHBP, it is "a participating employer under the program, subject to and in accordance with the rules and regulations of the commission relating thereto." N.J.S.A. 52:14-17.37(a). Those rules and regulations dictate that the "basic" coverage options for health insurance (including hospital and major medical benefits) available to its employees are set by the Commission. N.J.S.A. 52:14-17.29.

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<sup>2/</sup> We also note that N.J.A.C. 17:9-4.3(a)9 defines "ineligible employees" under the SHBP as "[a]ny person suspended from work without pay for more than one full coverage period as the result of disciplinary action for the period of suspension."

The SHBP itself is not an insurance "carrier," but a program that provides basic health benefits to eligible State and local employees through contracts negotiated between the Commission and carriers, i.e. employers electing to participate in the SHBP are not a party to the negotiations. N.J.S.A. 52:14-17.28(a), N.J.S.A. 52:14-17.26(b). The contracts "may be subject to such limitations, exclusions, or waiting periods as the commission finds to be necessary." N.J.S.A. 52:14-17.29(D).

The procurement of such contracts is controlled by a competitive public bidding process set forth in N.J.A.C. 17:9-10.1 through -10.23. See also, N.J.A.C. 17:9-10.10(i). However, local government employers who participate in the SHBP may offer their employees a free-standing prescription drug plan other than the State Employee Prescription Drug Plan. Such plans are subject to the same rules for eligibility and must be comparable in design to the State plan. N.J.A.C. 17:9-8.1(c)(2)(ii). The SHBP and its implementing regulations do not have a provision permitting participating local employers to provide basic coverage (i.e. hospitalization and major medical) through contracts not purchased by the Commission. N.J.S.A. 52:14-17.29(A)(1) and (2).

To a narrow extent, the SHBP Act allows participating local employers to engage in collective negotiations regarding plan

options, but only with regard to plans "within" the SHBP. More specifically, N.J.S.A. 52:14-17.37(b) states:

Notwithstanding the provisions of any other law to the contrary, the availability of plans within the program may be limited for employees of a participating employer other than the State pursuant to a binding collective negotiations agreement between the employer and its employees or pursuant to the application by the employer, in its sole discretion, of the terms of any collective negotiations agreement binding on the employer to employees for whom there is no majority representative for collective negotiations purpose. The commission shall implement the terms of such an agreement, and the application of such terms, with regard to plan availability for employees of the employer. The commission may impose such restrictions on the terms as the commission may deem necessary to ensure the effective and efficient operation of the program. This subsection shall apply to the State Health Benefits Program and the School Employees' Health Benefits Program.

[N.J.S.A. 52:14-17.37(b) (emphases added).]

The SHBP Act and its implementing regulations do not have a provision permitting participating local employers to agree to provide basic health coverage through plans that are not "within" the SHBP program.

In summary, we conclude that N.J.A.C. 17:9-7.2(c)8 preempts the issue of the Borough providing health insurance to the grievant while he was suspended without pay. Moreover, the SHBP Act and its implementing regulations, N.J.S.A. §§ 52:14-17.25 – 52:14-17.46.12, and N.J.A.C. §§ 17:9-1.1 – 17:9-13.6, do not

allow for the Borough to have provided the grievant with coverage outside of the SHBP during his suspension.

ORDER

The request of the Borough of Berlin for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni and Boudreau voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Papero recused himself. Commissioner Voos was not present.

ISSUED: March 20, 2019

Trenton, New Jersey