P.E.R.C. NO. 2019-48

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CLIFTON,

Petitioner,

-and- Docket No. SN-2019-032

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1158,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Clifton for a restraint of binding arbitration over the retraction of previously granted retiree health benefits. The Commission holds that an arbitrator may consider the IBEW's equitable estoppel claims to potentially overcome the Commission's finding that retiree health benefits were preempted by N.J.S.A. 40A:10-23. An arbitrator may determine whether the grievants were contractually entitled to the retiree health benefits they had been receiving, and, if so, whether principles of equitable estoppel apply to prevent the employer from terminating such benefits.

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, DeCotiis, Fitzpatrick, Cole & Giblin, LLP, attorneys (Katie Mocco, on the brief)

For the Respondent, Jameson, Esq., LLC, attorneys (Curtiss T. Jameson, on the brief)

DECISION

On October 25, 2018, the City of Clifton (City) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the International Brotherhood of Electrical Workers, Local 1158 (IBEW). The grievance asserts that the City violated Article VIII(E)(4) of the parties' collective negotiations agreement (CNA) when it rescinded medical insurance coverage for four retirees.

The City filed briefs, exhibits, and the certification of its Personnel and Equal Employment Opportunity Officer, Doug Johnson. The IBEW filed a brief. These facts appear.

The IBEW represents all regular full-time non-uniformed and civil service employees employed by the City of Clifton, excluding managerial executives, confidential employees and supervisors. The City and IBEW are parties to a CNA effective from January 1, 2014 through December 31, 2017. The grievance procedure ends in binding arbitration.

Article VIII of the parties' CNA is entitled "Hospitalization and Insurance," and provides in pertinent part:

> E. Retiree Coverage
>
> 4. Employees eligible for retirement in concordance with the Public Employees Retirement System shall only be eligible for ten (10) years of health insurance coverage beginning at age 55 after reaching ten (10) years of employment with the City of Clifton.

Johnson certifies that on December 19, 2017, the City passed a Resolution authorizing health benefit rates to be charged to retired employees commencing on January 1, 2018. F.G., a member of IBEW and employee of the City complained and threatened a lawsuit contesting an imposed cost for contribution of medical benefits. The City, in response to the complaint, initiated an inspection of F.G.'s contribution. Upon inspection, the City realized that F.G. was not eligible to receive medical benefits in retirement from the City. The discovery of this oversight prompted an audit of the health benefits and contributions being provided by the City. The audit revealed that there were four members of IBEW and employees of the City who were receiving

medical benefits in their retirement. The three additional employees are D.S., G.H., and R.F.

F.G. began his employ with the City on December 18, 2006 and retired on February 1, 2017. Upon his retirement he was sixty-eight years old and had completed eleven years of service with the City. D.S. began her employ with the City on April 11, 2005 and retired on May 1, 2015. Upon retirement she was sixty-four and had completed ten years of service with the City. G.H. began her employ with the City on February 24, 1997 and retired on January 1, 2018. Upon retirement she was sixty years old and had completed twenty-one years of service with the City. R.F. began her employ with the City on March 31, 2003 and retired on January 1, 2015. Upon her retirement she was sixty-seven years old and had completed twelve years of service with the City.

According to Johnson, the majority of the City's employees were properly advised upon retirement that they were not eligible to receive medical benefits because they had not met the statutory requirements. Upon discovery that the grievants did not meet the requirements set forth in N.J.S.A. 40A:10-23, the grievants were so notified but were not expected to return any value for the past benefits that they received.

On January 24, 2018, F.G. filed a grievance where he alleged that the City breached the CNA in failing to provide him and his wife with continued medical benefits. On February 5, 2018, R.F.,

G.H., and D.S. filed grievances alleging that they were told they were eligible to retire with continued medical benefits for ten years after their retirement. On April 18, 2018, the IBEW filed a Request for Submission of a Panel of Arbitrators. 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 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 City asserts that the receipt of medical benefits for the four retirees is preempted by N.J.S.A. 40A:10-23. It argues that the exceptions to N.J.S.A. 40A:10-23, which permit local governmental employers to assume the cost of medical benefits for a limited class of retirees based on factors such as years of service, age, and disability retirement, do not apply to these retirees. Therefore, the City contends, these retirees must pay the entire cost of medical benefits because N.J.S.A. 40A:10-23 does not give the City discretion to waive or reduce the qualifications for employer payment of retiree medical benefits. The City also asserts that it violates the "uniformity clause" of N.J.S.A. 40A:10-23 to allow these four retirees to continue to receive employer-paid medical benefits while other retirees who did not meet the requisite years of service do not.

The IBEW asserts that retiree health benefits are mandatorily negotiable and the City cannot avoid arbitration

based on N.J.S.A. 40A:10-23 because the four retirees met the CNA's negotiated eligibility requirements and then were approved for those benefits by the City upon their retirements. It argues that had the City attempted to deny those health benefits upon retirement, the four retirees could have stayed on as active employees until meeting all the requirements of N.J.S.A. 40A:10-23. The IBEW contends that the arbitration thus involves equitable estoppel, and per Middletown Twp. PBA Local No. 124 v. Twp. of Middletown, 162 N.J. 361 (2000), the City can be equitably estopped from terminating retiree health benefits approved and received by a unit member that would otherwise have been precluded by N.J.S.A. 40A:10-23.

Health benefits for future retirees are mandatorily negotiable as long as the particular benefit at issue is not preempted by statute or regulation. Essex Cty. Sheriff, P.E.R.C. No. 2006-86, 32 NJPER 164 (¶73 2006); Watchung Bor., P.E.R.C. No. 2000-93, 26 NJPER 276 (¶31109 2000); Atlantic Cty., P.E.R.C. No. 95-66, 21 NJPER 127 (¶26079 1995). Health benefits for current retirees are not mandatorily negotiable, but are permissively negotiable, both for public safety employees and civilian employees. See Union City, P.E.R.C. No. 2011-73, 37 NJPER 165 (¶52 2011); Middletown Tp., P.E.R.C. No. 2006-102, 32 NJPER 244 (¶101 2006); New Jersey Turnpike Auth., P.E.R.C. No. 2006-13, 31 NJPER 284 (¶111 2005); and Borough of Bradley Beach, P.E.R.C. No.

2000-17, 25 NJPER 412 (¶30179 1999). A majority representative may thus seek to enforce, including through binding arbitration, alleged contractual obligations on behalf of retired employees because it has a cognizable interest in ensuring that the terms of its collective negotiations agreements are honored. Id.; See also City of Jersey City and Jersey City PSOA, POBA, Jersey City Public Employees Local 246, IAFF Locals 1066 and 1064, P.E.R.C. No. 2013-38, 39 NJPER 223 (¶75 2012), aff'd, 41 NJPER 31 (¶7 2014) (retirees could arbitrate change to contractual health benefit costs); and 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) (retirees could arbitrate over elimination of contractual prescription co-pay benefit).

Here, the IBEW has a cognizable interest in ensuring that retired employees receive whatever retirement benefits were contracted for in the agreement that was in effect at the time an employee retired. Although the parties dispute the meaning of Article VIII, E.4. of the CNA, it is undisputed that the four grievants were all at least 55 years old and had at least 10 years of service with the City when they retired and began receiving medical benefits from the City. Those eligibility criteria for retiree medical benefits align with the IBEW's interpretation of Article VIII, E.4. The City acknowledges that

the grievants "were receiving medical benefits in their retirement that they were not legally entitled to receive," but argues that the provision of such benefits complied with neither N.J.S.A. 40A:10-23 nor the CNA. We do not determine whether the CNA supports the grievants' claims of entitlement to retiree medical benefits based on their respective ages and years of service with the City, as that is a question for the arbitrator.

It is within our jurisdiction to determine whether N.J.S.A. 40A:10-23 preempts the City from arbitrating over the provision of retiree medical benefits under the circumstances by which the grievants received such benefits as allegedly agreed to in Article VIII, E.4. Where a statute is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically, and comprehensively. 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).

A public employer's discretion per N.J.S.A. 40A:10-23 to pay all, part, or none of retiree's health premiums must be exercised through the negotiations process, but N.J.S.A. 40A:10-23 specifies the minimum conditions under which retirees may be eligible for employer paid health benefits. Essex Cty. Sheriff, P.E.R.C. No. 2006-86, 32 NJPER 164 (¶73 2006); Watchung Bor.,

P.E.R.C. No. 2000-93, 26 NJPER 276 (¶31109 2000); Atlantic Cty., P.E.R.C. No. 95-66, 21 NJPER 127 (¶26079 1995). There are three ways (applicable in this case) for employees to qualify under the statute. They are: 25 years of service credit in a State or local retirement system and up to 25 years of service with the employer at the time of retirement (40A:10-23(a)b.); reach 65 years of age and have 25 years of service credit in a Sate or local retirement system and up to 25 years with the employer at the time of retirement (40A:10-23(a)c.); or reach 62 years of age with at least 15 years of service with the employer (40A:10-23(a)d.) Some of the criteria set forth in N.J.S.A. 40A:10-23(a)b. and c., like the minimum of 25 years of service credit in a State or locally administered retirement system, are non-negotiable, while the requirement of service of up to 25 years with the employer is mandatorily negotiable. Middletown Tp. PBA Local 124 v. Township of Middletown, 193 N.J. 1 (2007); Pemberton Tp., P.E.R.C. No. 2000-5, 25 NJPER 369 (¶30159 1999).

Here, Article VIII, E.4. of the CNA discusses "reaching ten (10) years of employment with the City of Clifton" but does not reference any of the other N.J.S.A. 40A:10-23 requirements to qualify for retiree health coverage.[1/] The grievants all reached at least 10 years of employment with the City upon retirement,

1/ The City's contractual defense is that other parts of Article VIII E. incorporate N.J.S.A. 40A:10-23 by reference.

but they did not have either the requisite age or years of service in a State or local system, or years of service with the City. N.J.S.A. 40A:10-23(a)b., c., and d.

However, the grievants have already retired and had been receiving retiree health benefits in conformance with the IBEW's proffered interpretation of Article VIII, E.4. of the CNA. The City granted those retiree health benefits to the grievants with no objections, alternative contract interpretations, or statutory claims at the time of those retirement decisions. Thus, the grievants all retired with the understanding, based on an interpretation of the CNA assented to by the actions of the City, that they would be guaranteed those retiree health benefits for 10 years. These basic premises are analogous to those in Middletown, supra, 162 N.J. 361.

In Middletown, a unanimous Supreme Court held that although the retiree health benefits language of the CNA between the Township and PBA violated N.J.S.A. 40A:10-23, the Town was equitably estopped from terminating retiree health benefits of a unit member who had already retired and been receiving the benefits despite not meeting the minimum years of service for statutory eligibility.[2/] The Court reasoned:

2/ The pre-1995 version of N.J.S.A. 40A:10-23 in effect at the time the unit member in Middletown retired required 25 years of service with the employer, not just total service credit.

> That contract, therefore, did not comply with the terms of N.J.S.A. 40A:10-23, because it permitted (in fact, required) benefits to be paid to employees who had not completed twenty-five years of "service," and therefore was ultra vires. . . . Because the Agreement is ultra vires in the secondary sense, we apply the principle of equitable estoppel, and find that the Township is estopped from terminating Beaver's health benefits. . . . But for the Township's representations to Beaver that his health benefits would be continued after retirement, Beaver could have waited and retired two and a half years later to guarantee those benefits. . . . A municipality will be equitably estopped from terminating benefits that were previously approved and relied upon by the recipient. The Township approved Beaver's retirement package and should be equitably estopped from terminating his health insurance benefits after extending those benefits for more than ten years.
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> [Middletown, 162 N.J. 361, 370-73; internal citations omitted; emphasis added.]

Thus, despite finding that both the language of the CNA and the extension of benefits to the unit member violated N.J.S.A. 40A:10-23, the Court held that equitable considerations supported the continuation of the retiree health benefits that had been approved upon his retirement. Similar to this case, the Court noted the significance of the fact that the Middletown employee could have waited a few years to retire to guarantee his health benefits, but instead relied on the representations of his employer and the employer's approval of those benefits that were technically prohibited by statute. Specifically, here, had the City informed the grievants that they might be statutorily

disqualified from receiving their presumed contractual retiree health benefits, rather than approving of those benefits, then G.H. (who already met the service requirements of N.J.S.A. 40A:10-23(a)d.) would have only needed to work two more years to reach age 62 to qualify, and R.F., F.G., and D.S. (who already met the age requirements of N.J.S.A. 40A:10-23(a)d.) would have only needed three, four, and five more years, respectively, of service with the City to statutorily qualify for retiree health benefits. While the grievants here have not gone so long into retirement as the Middletown employee (10 years) before the City retracted their health coverage, the salient factor is that these grievants were all in a position where they could have delayed retirement in order to qualify for coverage under N.J.S.A. 40A:10-23(a)d. had they not relied on the City's approvals of their retiree health coverage.

Similarly, in I.A.F.F. v. City of Hoboken, 2014 N.J. Super. Unpub. LEXIS 190 (App. Div. 2014), the Appellate Division applied Middletown in affirming a Chancery Division's order confirming a binding arbitration award that found that a retiring fire officer was entitled to terminal leave based on the CNA's allowance of up to three years of accrued vacation time, despite such vacation accrual being preempted by N.J.S.A. 11A:6-3(e). In response to the City's argument that the arbitrator's decision essentially required it to continue violating the law because the relevant

CNA provisions conflicted with the statutory limitations imposed by N.J.S.A. 11A:6-3(e), the Appellate Division stated:

> However, as we have explained, in Middletown, the Court applied equitable estoppel and precluded the Township from refusing to continue to provide a retired police officer with free health benefits, as provided by the Township's collective bargaining agreement, even though the relevant provisions of the agreement were contrary to State law. Middletown, supra, 162 N.J. at 370-71. The Court concluded that denial of the benefits would result in an injustice because the employee had relied on the agreements when he retired. Id. at 372. The arbitrator's decision in this case was entirely consistent with principles set forth in Middletown. Therefore, the arbitrator's decision is not contrary to public policy.
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> [Hoboken at 19-20.]

See also Oakland Bor., P.E.R.C. No. 2012-41, 38 NJPER 288, 289 (¶101 2012), wherein the Commission held a clause addressing continued medical coverage for employees who have separated from employment is preempted by N.J.S.A. 40A:10-20, but, citing Middletown, stated: "We do not decide how former employees who took such coverage will be affected."

Furthermore, in a recent published decision, Ridgefield Park Bd. of Educ. v. Ridgefield Park Educ. Ass'n, 2019 N.J. Super. LEXIS 60 (App. Div. 2019), the Appellate Division found that the Commission accurately interpreted the plain language of N.J.S.A. 18A:16-17.2 as preempting a school board from reducing employee health insurance premium contributions from Chapter 78 Tier 4

rates to 1.5% in the middle of their 2014-2018 CNA. However, the court held that the fact that the Board actually reduced the contributions to 1.5% for about six months in 2015 before determining that the employees were statutorily required to contribute more for the duration of the 2014-2018 CNA showed that the parties did not contemplate the preemptive effect of N.J.S.A. 18A:16-17.2 when that agreement was reached. The court found that it was evident from the parties' actions that they believed the Chapter 78 contribution rates had been fully implemented after the first year of their 2014-2018 CNA. The court so held even though the contractual clause relied on for the reduction to 1.5% contributions allowed for greater contributions up to "the minimum set forth by statute, regulation, or code." Therefore, based on equitable grounds, the court ordered the case remanded to the Commission to fashion an appropriate remedy to refund Association members for all premium contributions in excess of 1.5% made during the 2015-2018 CNA.

Accordingly, based on the Supreme Court's Middletown decision, as well as the Appellate Division's Hoboken and Ridgefield Park decisions, we hold, under the circumstances present in this case, that the arbitrator may consider the IBEW's equitable estoppel claims to potentially overcome our finding that the retiree health benefits were preempted by N.J.S.A. 40A:10-23. Like Middletown, Hoboken, and Ridgefield Park, there

is an alleged contractual basis for the benefit, and the benefit has already been approved by the employer and received by the grievants prior to the employer's elimination of it. The IBEW has asserted various facts addressing how close the grievants were to retiring with full statutory eligibility under N.J.S.A. 40A:10-23 to support its detrimental reliance contention that the retirees could or would have continued employment if they had known that the City would renege on the retiree health benefits it had approved upon retirement. It is for the arbitrator to determine whether the grievants were contractually entitled to the retiree health benefits they had been receiving, and, if so, whether principles of equitable estoppel apply to prevent the employer from terminating such benefits.

ORDER

The request of the City of Clifton for a restraint of binding arbitration over the retraction of previously granted retiree health benefits is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Boudreau, Jones, Papero and Voos voted in favor of this decision. None opposed. Commissioner Bonanni recused himself.

ISSUED: May 30, 2019

Trenton, New Jersey