

P.E.R.C. NO. 2020-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SAYREVILLE,

Petitioner,

-and-

Docket No. SN-2019-071

AFSCME LOCAL 3527,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, and denies, in part, the request of the Borough of Sayreville for a restraint of binding arbitration of a grievance filed by AFSCME Local 3527 which alleges that the Borough violated the parties' collective negotiations agreement (CNA) when it discontinued health insurance opt-out payments for certain members. The Commission grants the Borough's request to the extent that N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a preempt arbitration over the decision to allow employees to waive coverage and the amount of consideration to be paid therefore, which, the statute expressly states, "shall not be subject to the collective bargaining process." But the Commission finds that, to the extent the grievance relates to employees who waived the Borough's health care coverage for 2019 prior to the Borough announcing that it would eliminate opt-out payments for that year, an arbitrator may consider whether the Borough's application of its waiver and opt-out system violated the CNA and the statutes by failing to pay the promised consideration for the 2019 health insurance waivers.

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, attorneys (Robert J. Merryman, of counsel and on the brief)

For the Respondent, AFSCME (Conor Meara, Staff Representative)

DECISION

On June 6, 2019, the Borough of Sayreville (Borough) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by AFSCME Local 3527 (AFSCME). The grievance asserts that the Borough violated the parties' collective negotiations agreement (CNA) when it discontinued health insurance opt-out payments for certain members.^{1/}

^{1/} A companion case, Docket No. SN-2019-069, was also decided today involving the same employer, facts and legal issue but a different negotiations unit.

The Borough filed briefs, exhibits and the certification of its counsel, Robert J. Merryman. AFSCME filed a brief.^{2/} These facts appear.

AFSCME represents all employees in the classifications listed under Appendix A of the parties' CNA, excluding supervisors, confidential employees and all others. The Borough and AFSCME are parties to a CNA in effect from January 1, 2017 through December 31, 2022. The grievance procedure ends in binding arbitration.

Article 10 of the parties' CNA, entitled "Insurance," Section C, provides:

The Borough shall provide health insurance coverage for retired employees in accordance with N.J.S.A. 52:14-17.38. The present practice regarding insurance for retirees shall continue during the life of this agreement. In the event the insurance for bargaining unit employees is modified, the same modification shall apply to retirees.

Article 10, Section H of the CNA provides:

Employees may opt out of the Borough's health insurance plan and thereby be paid twenty-five percent (25%) of the premium cost or \$5,000 whichever amount is less or as otherwise provided by law. Employees may make this choice on an annual basis only. Employees opting out or choosing to re-enroll after opting out must do so by informing the borough of their intentions to do so by October 15 of the preceding coverage year.

^{2/} AFSCME did not submit a certification. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certification(s) based upon personal knowledge.

In order to obtain this benefit, employees must demonstrate to the Borough Administrator that they have alternative health coverage. In the event the employee demonstrates the loss of their alternative health coverage, the Borough will allow the employee to re-enroll in the Borough provided health coverage plan. In such a case, the payment for opting-out of Borough coverage will be pro-rated based upon the exact period of time that the employee waived coverage under the Borough provided plan.

Article 10, Section I of the CNA provides:

The Borough and AFSCME agree to look at health insurance options and plans which may be beneficial to the Borough and the Union. However, under no circumstances shall either party to this contract incur additional or greater costs than stipulated in the Agreement. Any modifications to the current shall be done by mutual consent and will be delineated in an addendum signed by both parties.

On February 11, 2019, the Mayor and Borough Council adopted Resolution #2019-61, which amended the policy allowing Borough employees and retirees to opt out of the Borough's health insurance plan and receive monetary benefits in consideration for doing so. The resolution states, in pertinent part:

1. Effective January 1, 2019, a Borough employee who is eligible for health insurance from the Borough through their spouse or domestic partner who is also a Borough employee shall not be entitled to any monetary compensation for waiving health insurance.
2. Effective January 1, 2019, a Borough employee who is eligible for health insurance from the Borough through their parent(s) or guardian(s) (dependent

coverage) shall not be entitled to any monetary compensation for waiving health coverage.

3. Effective January 1, 2019, a Borough employee who is eligible for compensation for waiving health coverage must demonstrate that they have alternative health coverage by submitting documentation verifying such alternative coverage by October 15 of the prior year and must sign the required "Employer Insurance Waiver" form on an annual basis. Eligible employees will be compensated in an amount equal to 25% of the savings to the Borough, after deducting any required employee contribution, not to exceed \$5,000.00 for a full year waiver of coverage. Waivers for less than a full year will entitle the employee to a pro-rated portion of the waiver compensation.
4. Retirees shall not be entitled to payment for waiving health benefits. Employees eligible for a waiver payment who retire during the year will be entitled to a pro-rated payment for the portion of the year they waived coverage as an employee.

NOW THEREFORE BE IT AND IT IS HEREBY

RESOLVED, that the Mayor and Council of the Borough of Sayreville hereby rescind Resolution #2018-289 adopted on August 20, 2018 entitled "Employee and Retiree Insurance Waiver Policy" is hereby rescinded removing all waivers for Borough Employees and retirees holding dual coverage of health insurance benefits, effective immediately.

On March 11, 2019, AFSCME filed a grievance challenging the resolution, asserting that it violated Article 10, "Insurance," Sections H and I, and Article 31, "Fully Bargained Provisions,"

of the parties' CNA. The grievance demanded the immediate revocation of Resolution #2019-61, and the "reinstatement of waivers to all employees who demonstrate to the Borough Administrator that they have alternative health coverage." The Borough denied the grievance on May 13. On May 28, AFSCME 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.

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 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.]

The Borough asserts that arbitration must be restrained because the decision of whether and when to allow health insurance waiver payments is preempted by N.J.S.A. 40A:10-17.1, which state which specifically excludes such a decision from the collective negotiations process. The Borough contends that its resolution modifying its health insurance waiver payment program was an exercise of its rights under N.J.S.A. 40A:10-17.1, and that it cannot be forced to make the payments pursuant to contract language that is preempted by that statute. The Borough further argues that because N.J.S.A. 40A:10-17.1 grants it sole discretion on health insurance waiver payments, permitting arbitration of the grievance would significantly interfere with the Borough's determination of policy on that subject.

AFSCME asserts that arbitration should not be restrained because, after the Legislature amended N.J.S.A. 40A:10-17.1 in 2010 to impose a maximum dollar amount and explicitly give

municipalities the right to implement such a benefit, the Borough repeatedly made the waiver benefit the subject of negotiations with the union in succeeding contracts and active negotiations between the parties, from 2010 until AFSCME's ratification of the current CNA on October 18, 2018. AFSCME argues that this establishes a past practice, in the course of which the Borough mutually agreed with AFSCME to continue and at times raise the dollar amount of the benefit. AFSCME contends that the Borough's elimination of the benefit "less than four months after signing and executing a new contract,"^{3/} evidences bad-faith negotiations by the Borough and disrespect for unit employees who rely on the negotiated waiver compensation.

The Borough replies that it does not dispute that the CNA contains language allowing for health benefit waivers and payment for same, and admits it previously complied with those provisions. But it reiterates that the preemptive effect of N.J.S.A. 40A:10-17.1 renders that language non-negotiable and unenforceable through arbitration, as confirmed by Commission precedent holding extant contract language that was inconsistent with a controlling statute or regulation never should have been

3/ The documentary record here consists of the Borough's exhibits (AFSCME submitted none), including a signed copy of the parties' current CNA. Its signature page is undated, and it does not otherwise indicate the date of ratification by either party. Nor is that fact elsewhere certified to or found in the record.

negotiated or included in the parties' contract in the first place. The Borough adds that AFSCME's "past practice" argument is thus illogical and contrary to law.

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).

N.J.S.A. 40A:10-17.1 provides (emphases added):

N.J.S.A. 40A:10-17.1 County, municipal, contracting unit employee permitted to waive healthcare coverage.

Notwithstanding the provisions of any other law to the contrary, a county, municipality or any contracting unit as defined in section 2 of P.L.1971, c.198 (C.40A:11-2) 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 county's, municipality's or contracting unit's plan to which the employee is entitled by virtue of employment with the county, municipality or contracting unit. The waiver shall be in such form as the county, municipality or contracting unit shall prescribe and shall be filed with the county, municipality or contracting unit. 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 the effective date [May 21, 2010] of P.L.2010, c.2, 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. An employee who waives coverage shall be permitted to resume coverage under the same terms and conditions as apply to initial coverage if the employee ceases to be covered through the employee's spouse for any reason, including, but not limited to, the retirement or death of the spouse or divorce. An employee who resumes coverage shall repay, on a pro rata basis, any amount received which represents an advance payment for a period of time during which coverage is resumed. An employee who wishes to resume coverage shall file a declaration with the county, municipality or contracting unit, in such form as the county, municipality or contracting unit shall prescribe, that the waiver is revoked. 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 Commission has held that N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a preempt negotiations and arbitration over whether to provide health insurance waiver opt-out payments.^{4/} Town of Westfield, P.E.R.C. No. 2018-12, 44 NJPER 144 (¶42 2017) (despite CNA provision for waiver payments, N.J.S.A. 40A:10-17.1 preempted arbitration over employer's decision to end them);

^{4/} N.J.S.A. 52:14-17.31a is identical in all relevant respects to N.J.S.A. 40A:10-17.1, but concerns health insurance waivers and opt-out payments for employees of public employers in the State Health Benefits Plan.

Clinton Tp., P.E.R.C. No. 2013-33, 39 NJPER 212 (¶70 2012); State of New Jersey, P.E.R.C. No. 2014-78, 40 NJPER 547 (¶177 2014).

However, in City of Orange Tp., P.E.R.C. No. 2019-37, 45 NJPER 325 (¶86 2019) the Commission held that, in a given year in which the employer has already exercised its discretion under N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a to accept employees' waivers of health care coverage in exchange for an annual opt-out payment, the statutes do not preempt arbitration over the employer's alleged failure to effectuate its end of the deal for that year. We found that the statutes directly link the employer's decision to make an opt-out payment to its decision to allow the waiver by characterizing the payment as being "in consideration of filing such a waiver" and describing it as "the amount of consideration to be paid therefor [for the waiver]." As the employer in City of Orange Tp. had already accepted employee health care waivers for 2018 but later announced it would not be making the opt-out payments, the issue was not preempted and was legally arbitrable for that year.^{5/}

5/ See also, City of Orange Tp., I.R. No. 2019-10, 45 NJPER 169 (¶43 2018): "In other words, though an employer has the discretion per N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a to decide whether to provide opt-out payments in exchange for waivers for a given benefit year, its failure to follow through on its waiver system by retracting promised opt-out payments subsequent to employees' waiving coverage may be arbitrated."

Here, the Borough's February 11, 2019 resolution terminated health care waiver opt-out payments for certain unit members and retirees, but was effective retroactive to January 1, 2019. Thus, as in City of Orange Tp., the change to the health care waiver and opt-out system was applicable not just prospectively, but for a benefits year (2019) which had already begun. There is no evidence in the record that the Borough, prior to accepting employee health care waivers for the year 2019, notified those employees that it intended to eliminate the opt-out payments for that year. Therefore, consistent with our decision in City of Orange Tp., we find that N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a do not preempt arbitration of AFSCME's grievance to the extent it relates to employees who waived the Borough's health care coverage for 2019 prior to the Borough announcing that it would eliminate opt-out payments for that year. An arbitrator may consider whether the Borough's application of its waiver and opt-out system violated the CNA and the statutes by failing to pay the promised consideration for the 2019 health insurance waivers. See West Windsor Twp. v. PERC, 78 N.J. 98, 116 (1978); and Old Bridge Bd. of Education v. Old Bridge Education Assoc., 98 N.J. 523, 527-528 (1985) (disputes concerning the interpretation and application of statutes setting terms and conditions of employment may be subject to binding arbitration so

long as the grievance resolution does not contravene statutory mandates).

As to prospective application of the Borough's resolution terminating health care waiver opt-out payments for some employees, we find that N.J.S.A. 40A:10-17.1 and N.J.S.A. 52:14-17.31a preempt arbitration over its decision "to allow its employees to waive coverage and the amount of consideration to be paid therefore," which, the statute expressly states, "shall not be subject to the collective bargaining process."

ORDER

The request of the Borough of Sayreville for a restraint of binding arbitration is granted to the extent that it challenges the Borough's discretion as to how the health care waiver payment system will generally be administered. The request is denied to the extent that the Association's grievance relates to employees who waived the Borough's health care coverage for 2019 prior to the Borough announcing that it would eliminate opt-out payments for that year.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: January 23, 2020

Trenton, New Jersey