P.E.R.C. NO. 2020-57

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PLAINFIELD,

Petitioner,

-and- Docket No. SN-2020-021

PLAINFIELD FIRE OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Plainfield to restrain arbitration of a grievance filed by the Plainfield Fire Officers Association (PFOA) on behalf of three retirees, all of whom had 25years of service before retirement but not 20 years of service by June 28, 2011 (the effective date of Chapter 78) . The PFOA sought to enforce language in the parties' collective negotiations agreement stating that the City would assume the expense of health insurance coverage for the retirees. The City asserted that retirees' health care contribution levels were preempted by Chapter 78. The Commission found that the contribution levels for these retirees were not set through preemption by Chapter 78 as they had all completed full implementation of the mandated four tiers of Chapter 78, and that an arbitrator could also decide whether they were subject to a minimum 1.5% contribution.

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, Ruderman & Roth, LLC, attorneys (Mark S. Ruderman, of counsel and on the brief)

For the Respondent, Law Offices of Craig S. Gumpel, LLC, attorneys (Craig S. Gumpel, of counsel and on the brief)

DECISION

On November 6, 2019, the City of Plainfield (City) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Plainfield Fire Officers Association (PFOA). The grievance alleges that the City violated the parties' collective negotiations agreement (CNA) when in April 2019, it notified the PFOA that it would no longer cover 100% of the cost of retirees' health care premiums. Then, on December 31, 2019, the City filed an application for interim relief seeking a temporary restraint of the arbitration while its

petition was pending before the Commission.[1/]

The City filed briefs, exhibits and the certification of its counsel, Mark S. Ruderman. The PFOA filed a brief, exhibits and the certification of its Fire Captain and former President, Walter Thompson.[2/]

On January 10, 2020 following oral argument, a Commission Designee (Designee) signed an order denying interim relief and then, on January 16, issued a written decision setting forth his reasoning, I.R. No. 2020-8, 46 NJPER 339 (¶83 2020). These facts, drawn from the parties' submissions and the Designee's Findings of Fact, I.R. No. 2020-8 at pp. 3-7, appear. We have reviewed them and find that they are accurate.

The PFOA represents all uniformed fire officers employed by the City. The City and PFOA are parties to a CNA effective from January 1, 2018 through December 31, 2021. The parties' previous two CNAs were effective for the calendar years (CY) 2010-2012 (extended by an MOA through 2013) and CYs 2014-2017. The grievance procedure ends in binding arbitration.

The PFOA challenges the City's decision to impose on retirees, effective July 1, 2019, contributions for health care

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1/ The arbitration hearing had been scheduled for January 14, 2020.

2/ All of the parties submissions filed regarding the scope of negotiations petition and the interim relief application, were submitted before the hearing on the interim relief application.

based on Chapter 78 rates. The grievance was filed on behalf of three members of the PFOA collective negotiations unit who retired between July 1, 2018 and March 1, 2019. All three:

- Started with the City on June 29, 1992;
- Did not have 20 years of service by June 28, 2011; and
- Worked for at least 25 years before retirement.[3/]

On June 28, 2011, prior to the execution of the parties' 2010-2012 CNA, P.L. 2011, c. 78 (Chapter 78) was enacted. In accordance with Chapter 78's terms the mandated health benefit premium contributions were effective for PFOA members almost immediately, rather than at the completion of the 2010-2012 CNA, which was yet to be executed. If the 2010-2012 CNA had been executed before the enactment of Chapter 78, the terms of the contributions under that Chapter 78 would have become effective upon the expiration of the 2010-2012 CNA.

3/ The 25 years is based on the time between their start and retirement dates. The record does not state whether any of them had an interruption in creditable service.

- PFOA member W.O. began employment with the City on June 29, 1992 and retired effective March 1, 2019. 26 years, 3 months
- PFOA member V.S. began employment with the City on June 29, 1992 and retired effective July 1, 2018. 26 years
- PFOA member R.C. began employment with the City on June 29, 1992 and retired effective January 1, 2019. 25 years, 6 months.

On or around July 1, 2011, employees represented by the PFOA began health premium contributions at the levels required by N.J.S.A. 52:14-17.28c, to be phased in over four years (the Chapter 78 "tiers") per N.J.S.A. 52:14-17.28d(a) (applicable to SHBP and SEHBP) and N.J.S.A. 40A:10-21.1(a) (applicable to other health coverage). It is undisputed that employees completed the Tier Four contribution levels by July 1, 2015.[4/]

Article XIII, entitled "Insurance Protection," provides, with respect to active employee health benefit contributions:

> 13-1. The City shall provide employee health coverage under the New Jersey State Health Benefit program. Employee contributions shall be as per Chapter 78 Public Law of 2011.

On or about February 9, 2015, the City and the PFOA entered into a CNA covering the period from January 1, 2014 through December 31, 2017. The 2014-2017 CNA contained changes to Article XIII, "Insurance Protection." Effective January 1, 2015, the City no longer participated in the New Jersey State Health Benefits program. NJ Direct 15 became the base health plan.

Thompson certifies that the City agreed to pay the costs associated with NJ Direct 15 "less the employee's mandatory health care contribution." In addition, Section 13-1 regarding active employees health benefit contributions contained the

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4/ The City provided health benefits through the SHBP when it began implementing Chapter 78, but left the SHBP effective January 1, 2015.

following sentence:

> "The City agrees to comply with Chapter 78 P.L. of 2011."

The City and PFOA commenced negotiations for a successor CNA on or about October 4, 2017. According to Thompson, at the time that negotiations commenced, unit employees represented by the PFOA had finished the 4-year phase in of health benefit contributions under Chapter 78.

According to Thompson, during contract negotiations, the City sought major changes to health benefit coverage. Specifically, the City proposed to implement a new medical plan as the base plan with the option for employee's to pay the difference or buy up for any higher cost plan. Additionally, the City proposed that employees would be required to use a "Difference Card" which would pay the difference between the base opt-access Aetna Base-20 plan and the plan that the City had contracted with the health insurance carrier which was a plan that provided lesser benefits, at a lower annual premium cost to the City.

On or about April 4, 2018, the parties entered into a MOA for a successor CNA covering the period from January 1, 2018 through December 31, 2021. The 2018 MOA included, among other things, salary increases and concessions towards the health benefit plan. On May 29, 2018, the City highlighted its languages changes to the insurance protection article of the CNA.

The 2018-2021 CNA was executed by the PFOA on November 27, 2018 and the City on February 19, 2019. Section 12.8 of the 2018-2021 entitled "Coverage Upon Death or Retirement," provides in pertinent part:

> The City agrees at its sole expense to continue the health insurance coverage employee, spouse and eligible dependents for those employees who retire, as such retirement is defined by P.F.R.S. Said health insurance coverage shall be the same coverage as provided to City employees.

The above contract language was also in the 2010-2012 and 2014-2017 CNAs.

Thompson further certifies that PFOA member W.O. began employment with the City on June 29, 1992 and retired effective March 1, 2019. Upon his retirement, W.O. was not required contribute towards retiree health benefits. V.S. began employment with the City on June 19, 1992 and retired effective July 1, 2018. Upon his retirement, V.S. was not required to contribute towards retiree health benefits.

On April 17, 2019, Business Administrator Carlos Sanchez sent a letter to the PFOA advising that the City intended to bill retirees who did not have twenty (20) years of pension credit by June 28, 2011 for Chapter 78 contributions in retirement effective July 1, 2019. The City further advised that they intended to phase in the retiree contributions starting July 1, 2019 at a year 2 Chapter 78 level using the retiree's pension

allowance, with increases in contributions in January 2020, at a year 3 Chapter 78 tier, and in January 2021, at a year 4 contribution tier based on the retiree's pension allowance.

By letter dated May 1, 2019, W.O. and V.S. received notice from the City that it intended to phase in Chapter 78 contributions for these retired members based on their retirement allowance. The contributions would begin on July 1, 2019, and would be fully phased in at the year 4 contribution level as of January 2021. The letter further indicated that these retirees would receive a monthly bill for their health insurance contribution and stated "a failure to pay will result in termination of the health benefit."

R.C. was also notified by the City that he will be billed for health benefit contributions in retirement. R.C. began his employment with the City on June 29, 1992 and retired effective January 1, 2019. He also believed that the City was to provide health benefits in retirement at no cost to the retiree.

On May 7, 2019, the PFOA filed a grievance challenging the City's decision to no longer provide retiree health benefits at no cost as a unilateral change in benefits in violation of the 2018-2021 CNA. On June 19, the PFOA filed a request for binding arbitration. This petition ensued.

In a scope of negotiations determination, the Commission's 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, the Commission does not consider the contractual merits of the grievance or any contractual defenses the employer may have. In addition, unless necessary for background or purposes of comparison, a scope of negotiations determination arising in a grievance arbitration context, will not speculate about employee rights and employer obligations pertaining to persons other than those directly involved in the grievance.[5/]

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

5/ I.R. 2020-8 at p17 comments on the rights and obligations vis-a-vis Chapter 78 of employees who retired while the 2014 to 2017 CNA was in effect. The grievants retired during the 2018 to 2021 CNA.

> 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.
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> [Id. at 404-405.]

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). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers. However, because the negotiability issue presented is whether employee or retiree contributions to health care are preempted by a specific statute, permissive negotiability is not implicated in this case.

The parties' arguments are recited in detail in the Designee's written decision, I.R. No. 2020-8 at pp 10-11, and need not be fully restated herein. In sum, the City argues that the three retirees are required to contribute toward the cost of health care insurance at the Tier levels set by Chapter 78. Alternatively, it argues that at a minimum the retirees must contribute in accordance with the 1.5% rate first set by P.L. 2010, c. 2 and continued by the language of Chapter 78.

The PFOA argues that the applicable statutes do not preempt no cost retiree health benefits because they are not applicable

to public employees who became members of the retirement system prior to the effective date of the 1.5% law. The PFOA argues that because contributions of all four tiers had been completed during the CNA preceding the one during which the three grievants retired, health benefit contribution levels were fully negotiable for both employees and retirees.

The Designee's decision contains a complete recitation of pertinent statutes, administrative and judicial decisions. I.R. No. 2020-8 at 12 to 24.

We concur with the Designee's conclusion that none of these retirees rates of contribution to health insurance coverage were set through preemption by Chapter 78's "tiers." These fire officers, as active employees, had completed the four tiers of contributions during the term of the 2014-2017 CNA. While the employee health insurance contribution rates of the 2018 to 2021 CNA were arguably linked to Chapter 78, that term and condition of employment was set through collective negotiations, not preemption, because full implementation of Chapter 78's statutorily mandated terms occurred no later than the end of 2015, and the 2018 to 2021 CNA was the "next" agreement, meaning that health insurance contributions were fully negotiable.[6/]

Based on the cases cited by the Designee (I.R. No. 2020-8 at

6/ The 2018 to 2021 CNA provides: the City "agrees to comply with Chapter 78 P.L. of 2011."

11 to 12) holding that health care insurance, including premium contributions, are mandatorily negotiable and his conclusion, which we share, that Chapter 78's "tiers" are not preemptive, there are no grounds to restrain arbitration of the grievance on that basis.

We next address the City's argument that even if health care contributions are negotiable, the grievants as retirees must contribute, pursuant to statute, at least 1.5% of their retirement allowance toward health insurance premiums.

N.J.S.A. 40A:10-21.1(b)(3) provides, in relevant part (emphasis added):

> Employees . . . . who have 20 or more years of creditable service in one or more State or locally-administered retirement systems on the effective date of P.L.2011 c.78 [June 28, 2011] shall not be subject to the provisions of this subsection.
>
> The amount payable by a retiree under this subsection shall not under any circumstance be less than the 1.5 percent of the monthly retirement allowance, including any future cost of living adjustments thereto, that is provided for such a retiree, if applicable to that retiree, under subsection b. of N.J.S.A 40A:10-23. A retiree who pays the contribution required under this subsection shall not also be required to pay the contribution of 1.5 percent of the monthly retirement allowance under subsection b. of N.J.S.40A:10-23.

N.J.S.A. 40A:10-23(b), in turn, provides (emphasis added):

> An employee who becomes a member of a State or locally-administered retirement system on

> or after the effective date [May 21, 2010] of P.L. 2010, c. 2 shall pay in retirement 1.5 percent of the retiree's monthly retirement allowance, including any future cost-of-living adjustments, through the withholding of the contribution from the monthly retirement allowance, for health care benefits coverage provided under N.J.S.40A:10-22, notwithstanding any other amount that may be required additionally by the employer or through a collective negotiations agreement for such coverage. This subsection shall apply also when the health care benefits coverage is provided through an insurance fund or joint insurance fund or in any other manner. This subsection shall apply to any agency, board, commission, authority, or instrumentality of a local unit.

The City's argument focuses on the portion of N.J.S.A. 40A:10-21.1(b)(3) that states "[t]he amount payable by a retiree under this subsection shall not under any circumstance be less than the 1.5 percent of the monthly retirement allowance." However, that same sentence goes on to reference its applicability to retirees pursuant to N.J.S.A. 40A:10-23(b). N.J.S.A. 40A:10-23(b) in turn requires a minimum 1.5% health care premium contribution only for "[a]n employee who becomes a member of a State or locally-administered retirement system on or after the effective date [May 21, 2010] of P.L. 2010, c. 2." An employee becomes a "member" of the Police and Firemens Retirement System as a condition of employment. N.J.S.A. 43:16A-3. Therefore, reading N.J.S.A. 40A:10-21.1(b)(3) and N.J.S.A. 40A:10-23(b) together, a grievance alleging that these three

retirees, who began employment before May 21, 2010, could not be found to be preempted by statute and required to contribute a minimum of 1.5% to health care contributions in retirement. Their contributions were subject to contract negotiations between the City and the PFOA.

In fact, that interpretation of the statutes together led the Designee to reject the City's alternative argument that all retirees must contribute a minimum of 1.5% toward health care contributions (except for those retirees with 20 or more years of creditable service as of June 28, 2011 as set forth by N.J.S.A. 40A:10-23(b)). We do not necessarily concur with the Designee's clear cut conclusions on this issue. Moreover, there are no instructive court cases cited by the parties or the Designee regarding this issue as it applies to retirees.[7/] However, we also cannot find that the language of N.J.S.A. 40A:10-21.1(b)(3), read in conjunction with N.J.S.A. 40A:10-23(b), meets the standard for preemption by "expressly, specifically and comprehensively" speaking on the issue of whether these retirees

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7/ Fairfield Tp., P.E.R.C. No. 2019-31, 45 NJPER 309 (¶80 2019) involved collective negotiations over health benefit premium contributions by employees after Chapter 78's requirements had been met which held that employees are subject to the 1.5% floor set forth in N.J.S.A. 40A:10-21(b).

In Ridgefield Park Bd. of Educ. and Ridgefield Park Educ. Association, 459 N.J. Super. 57, 62 (2019), the Court observed, "In no case, however, could the employee's contribution rate be less than the 1.5% of their base salary."

must contribute at least 1.5% toward health insurance premiums. Bethlehem Twp. Bd. of Educ. v. Bethlehem Educ. Assn., 91 N.J. 38, 45 (1982).

Given all of the above considerations, we find that this issue may proceed to arbitration on its contractual merits. The PFOA may present to the arbitrator the grievance claiming that the City violated the CNA with respect to deducting health care contributions from these retirees. The City may raise any contractual and statutory defenses to the arbitrator on the merits of the grievance.

Since these retirees' health benefit contributions were no longer preempted by Chapter 78, their level of health care contributions is mandatorily negotiable and legally arbitrable. The issue of whether these retirees are subject to a minimum 1.5% health care contribution is also mandatorily negotiable and legally arbitrable.

ORDER

The City of Plainfield's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: May 28, 2020

Trenton, New Jersey