

P.E.R.C. NO. 2021-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Petitioner,

-and-

Docket No. SN-2020-038

NEW JERSEY SUPERIOR OFFICERS
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the State of New Jersey, Department of Corrections, for a restraint of binding arbitration of a grievance filed by the New Jersey Superior Officers Association which asserts that the Department violated the parties' collective negotiations agreement (CNA) when the grievant, while on Workers' Compensation benefits, was required to pay the same amount for health care benefits as when he was working on full duty receiving his base salary. The Commission finds that the issue of the amount the grievant is required to pay for health care benefits is not preempted because the requirement for "full implementation," as set forth in P.L. 2011 c. 78 and N.J.S.A. 40A:10-21.2, was met in the parties previous CNA. The Commission also finds that negotiation on the determination of the "base salary," for purposes of computing that payment, is not preempted by N.J.S.A. 52:14-17.28c and N.J.S.A. 43:15A-25.1.

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.

P.E.R.C. NO. 2021-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Petitioner,

-and-

Docket No. SN-2020-038

NEW JERSEY SUPERIOR OFFICERS
ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Gurbir S. Grewal, Attorney General,
Paul D. Nieves, Deputy Attorney General

For the Respondent, O'Brien, Belland & Bushinsky, LLC,
attorneys (Kevin D. Jarvis, of counsel and on the
brief; Matthew B. Madsen, on the brief)

DECISION

On January 16, 2020, the State of New Jersey, Department of Corrections (Department) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by New Jersey Superior Officers Association (NJSOA). The grievance asserts that the Department violated the parties' collective negotiations agreement (CNA) when the grievant, while on Workers' Compensation benefits from December 18, 2018 until February 11, 2019, was required to pay the same amount for health care benefits as when he was working on full duty receiving his base salary.

The Department filed briefs, exhibits, and the certifications of Camille Warner, an Employee Relations Coordinator at the Office of the Governor, Officer of Employee Relations and Dawn DaLoisio, a Human Resources Personnel Assistant 2 assigned to the Garden State Correctional Facility. The NJSOA filed a brief and the certification of Louis Hall, NJSOA Treasurer. These facts appear.

The Department and the NJSOA are parties to a CNA in effect from July 1, 2015 through June 30, 2019. The NJSOA represents Correction Lieutenants along with other titles of employees listed in Appendix II of the CNA. The grievance procedure ends in binding arbitration.

The grievant was a corrections lieutenant at the Garden State Correctional Facility with a base salary of \$97,960.68 per year when he was placed on Temporary Disability through Workers' Compensation from December 21, 2018 to February 11, 2019. During that period, he was paid \$855.00 per week in Workers' Compensation benefits and was required to pay the same amount per pay period^{1/} to maintain his full health benefits as when he was working full duty as a corrections lieutenant.

^{1/} In order to maintain his medical coverage, the grievant was required to pay approximately \$323.45 for health benefits every two weeks.

The parties' CNA at Article XXXV, Fringe Benefits, Health Insurance, in section B, Contributions Towards Health and Prescription Benefits provides in paragraph 1. d):

1. Effective July 1, 2011, or as soon thereafter as the State completes the necessary administrative actions for collection, employees shall contribute, through the withholding of the contribution from the pay, salary, or other compensation, toward the cost of health care benefits coverage for the employees and any dependent provided under the State Health Benefits Program in an amount that shall be determined in accordance with section 39 of P.L. 2011, c. 78, except that, in accordance with Section 40(a) of P.L. 2011, c. 78, an employee employed on July 1, 2011 shall pay:

d) from July 1, 2014, the full amount of contribution, as that amount is calculated in accordance with section 39 of P.L. 2011 c. 78. After full implementation, the contribution levels shall become part of the parties' collective negotiations and shall then be subject to collective negotiations in a manner similar to other negotiable items between the parties.^{2/}

Further, section B, paragraph 7, provides:

An employee on leave without pay who receives health and prescription drug benefits provided by the State Health Benefits Program shall be required to pay the above-outlined contributions, and shall be billed by the State for these contributions. Health and prescription benefit coverage will cease if the employee fails to make timely payment of these contributions.

^{2/} Full implementation was reached on July 1, 2014 under the previous CNA in effect from July 1, 2011 to June 30, 2015.

On July 17, 2019, the NJSOA filed a request for binding grievance arbitration challenging the "Pay treatment of [the grievant] while on [W]orkers' [C]ompensation." 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 merits of the grievance or any contractual defenses the employer may have.

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.

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).

Health benefits are mandatorily negotiable unless preempted by statute or regulation. State of New Jersey, P.E.R.C. No.

2000-12, 25 NJPER 402, 403 (¶30174 1999); Bor. of Woodcliff Lake, P.E.R.C. No. 2004-24, 29 NJPER 489 (¶153 2003); West Orange Bd. of Ed. and West Orange Ed. Ass'n, P.E.R.C. No. 92-114, 18 NJPER 272 (¶23117 1992), aff'd NJPER Supp.2d 291 (¶232 App. Div. 1993).

The Department argues that arbitration of the grievance is preempted, based upon the above-quoted portions of Article XXXV of the parties' CNA that was in effect from July 1, 2015 to June 30, 2019, which covered the grievant while he was on unpaid leave and receiving Workers' Compensation benefits from December 21, 2018 to February 11, 2019. The Department relies on that agreement's provisions that employees covered by it were subject to the health benefits program in P.L. 2011 c. 78 (Chapter 78), and that contribution amounts shall be determined in accordance with Section 39 of P.L. 2011 c. 78. The NJSOA responds that the grievance is not preempted as the parties reached full Chapter 78 implementation under the previous CNA. We agree with the NJSOA.

The parties reached "full implementation" required by Chapter 78 on July 1, 2014, while the previous CNA was in effect from July 1, 2011 to June 30, 2015. Full implementation means that "all affected employees are contributing the full amount of the contribution [toward the cost of health care benefits coverage], as determined by the [four-year] implementation schedule set forth in [N.J.S.A. 40A:10-21.1(a)]". N.J.S.A. 40A:10-21.1(d). Here, the parties achieved full implementation

commencing July 1 of year four of their 2011-2015 CNA. "After full implementation," N.J.S.A. 40A:10-21.2 mandates, "those contribution levels shall become part of the parties' collective negotiations and shall then be subject to collective negotiations in a manner similar to other negotiable items between the parties." Id. Article XXXV(B)(1)(d) of the parties' successor CNA incorporates the statutory mandate that contribution levels are negotiable after full implementation.

N.J.S.A. 40A:10-21.2 also provides, "A public employer and employees who are in negotiations for the next collective negotiation agreement to be executed after the employees in that unit have reached full implementation of the premium share set forth in section 39 of P.L.2011, c.78 (C.52:14-17.28c) shall conduct negotiations concerning contributions for health care benefits as if the full premium share was included in the prior contract."

Here the 2015-2019 CNA was the "next collective negotiation agreement" executed by the parties after reaching full implementation during the 2011-2015 agreement. N.J.S.A. 40A:10-21.2 thus set the full premium share as the status quo from which the parties negotiated over the matter of employee health care benefit contributions in the successor agreement. The parties were free to agree to address that subject in that agreement by reference to Chapter 78, as they did. However, Chapter 78 only

preempted negotiations about contribution levels prior to full implementation. Chapter 78 expressly directed that the subject is negotiable after achieving full implementation, as the parties have done here. See City of Plainfield, P.E.R.C. No. 2020-57, 46 NJPER 593 (¶135 2020) ("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.")

As such, we find that an arbitrator may determine what contribution levels the parties intended for the grievant while he received Workers' Compensation benefits. The Department's contention that the parties agreed in the successor CNA to continue to be bound by the statutory terms of Chapter 78 as they applied prior to full implementation is a contractual defense that may be raised to the arbitrator.

For the same reasons as above, we reject the Department's assertion that arbitration of the grievance, as to the issue of whether the grievant's base salary must be used to compute his

contribution amount, is preempted by subsection (a) of N.J.S.A. 40A:10-21.1, "Contributions of employees of local unit, agency toward health care benefits." N.J.S.A. 40A:10-21.1 is a provision of Chapter 78 which mandates that public employees' healthcare contribution amounts, prior to the achievement of full implementation, "shall be determined in accordance with [N.J.S.A. 52:14-17.28c]." In turn, N.J.S.A. 52:14-17.28c specifies that "[b]ase salary shall be used to determine what an employee earns for the purposes of" calculating an employee's healthcare contribution required by N.J.S.A. 40A:10-21.1.

Together, these provisions focus on employee contributions (and the calculation thereof by reference to base salary) during the four-year implementation period of Chapter 78. They do not specify or restrict methods of calculating employees' health care contributions after full implementation has occurred. In other words, nothing in those statutes expressly, specifically and comprehensively requires that base salary must be used following full implementation. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982).

In light of the foregoing, we need not decide the merits of the Department's further contention that in computing the grievant's healthcare contribution, amounts received as Workers Compensation benefits cannot constitute "base salary" because the Civil Service Commission defines "base salary" as "an employee's

rate of pay exclusive of any additional payments or allowances," N.J.A.C. 4A:1-1.3, and because such benefits are specifically excluded from the definition of "gross income" under Federal and State tax codes.^{3/}

In conclusion, we find that the issue of the amount the grievant is required to pay for health care benefits is not preempted because the requirement for full implementation, as set forth in P.L. 2011 c. 78 and N.J.S.A. 40A:10-21.2, was met in the parties' previous CNA. We also find that negotiation on the determination of the "base salary," for purposes of computing that payment, is not preempted by N.J.S.A. 52:14-17.28c and N.J.S.A. 43:15A-25.1.

^{3/} We find that the question of whether the grievant's Workers' Compensation benefits constitute taxable income is not relevant to a determination of whether his health care benefits contribution level is negotiable. The NJSOA does not contend that such benefits are reportable as gross income. Cf., N.J. Turnpike Authority, P.E.R.C. No. 2010-68, 36 NJPER 68 (¶32 2010) (where parties disagreed whether an income exclusion applied, finding "[o]nly the Internal Revenue Service can determine" that issue, not an arbitrator). The Department also relies on "secondary authorities" including Fact Sheet #45, "Workers' Compensation," published by the New Jersey Division of Pensions and Benefits, and Local Finance Notice (LFN), LFN 2011-20R, issued by the New Jersey Department of Community Affairs, entitled "Implementing the 2011 Pension and Health Benefit Reforms (P.L. 2011 c. 78)." We find nothing in the relevant text of Fact Sheet #45 or LFN 2011-20R that would lead us to conclude the subject of the grievance at issue is outside the scope of negotiations or preempted.

ORDER

The request of the State of New Jersey, Department of Corrections for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: August 13, 2020

Trenton, New Jersey