

P.E.R.C. NO. 2021-11

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SOMERVILLE,

Petitioner,

-and-

Docket No. SN-2020-033

SOMERVILLE PBA LOCAL NO. 147,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Borough's request for a restraint of binding arbitration of the PBA's grievance contesting the Borough's refusal to provide a patrolman with payment for waiving health insurance benefits. The Commission finds that the PBA's challenge to the grievant's eligibility for the waiver program does not challenge the Borough's statutory discretion to establish such a program. Holding that N.J.S.A. 52:14-17.31a and N.J.S.A. 40A:10-17.1 do not preempt arbitration over an alleged failure to make waiver payments for a year in which the employer accepted employee health insurance waivers, the Commission declines to restrain arbitration.

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, Rainone Coughlin Minchello,  
attorneys (Louis N. Rainone, of counsel; Ruben D.  
Perez, on the brief)

For the Respondent, Mets Schiro & McGovern, LLP,  
attorneys (Leonard C. Shiro, of counsel and on the  
brief)

DECISION

On December 19, 2019, the Borough of Somerville (Borough) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by Somerville PBA Local No. 147 (PBA). The grievance asserts that the Borough violated the parties' collective negotiations agreement (CNA) and past practice when it refused to provide a patrolman (grievant) with payment for waiving health insurance benefits (waiver payment).

The Borough filed briefs, exhibits and the certification of its Business Administrator, Kevin Sluka. The PBA filed a brief, exhibits, and the certification of the grievant. These facts appear.

The PBA represents all police officers and sergeants employed by the Borough. The Borough and the PBA are parties to a CNA in effect from January 1, 2015 through December 31, 2018. The grievance procedure ends in binding arbitration. Article XVI, Section A, provides that the Borough will provide hospital and medical insurance for all officers and their dependents. Article XX provides that no officer shall be deprived of any educational advantage.

The grievant was hired in June 2015 as a police officer. He certifies that the Borough has provided a health care waiver payment for all employees who are offered health care benefits and that he has been offered a health care waiver payment annually since the beginning of his employment. The grievant further certifies that in 2016, 2017 and 2018 he was deemed ineligible for the health care waiver payment because his wife's health care plan, which he is covered by, is part of the State Health Benefits Program (SHBP). The grievant asserts that his wife's Aetna plan is "self-insured" and is not covered by the SHBP, and therefore he should be eligible for the health care waiver payment.

On June 14, 2019, Sluka wrote to grievant and stated that grievant was not eligible to receive the health care waiver payment in 2018. Sluka explained that because grievant submitted information to the Borough indicating that his spouse was the

plan holder for their health insurance and that such coverage was through the SHBP, grievant was ineligible for a health care waiver payment. Sluka stated that although a health care waiver payment could not be made for 2018, grievant would receive it for 2019.

On July 23, 2019, a grievance was filed with the Chief of Police, alleging that the grievant was entitled to a health care waiver payment from 2016 forward. The Chief denied the grievance on July 30, 2019. On July 31, Sluka responded by letter to the grievant, stating that such letter would serve as the Borough's Step Two response. Sluka stated that the health benefit waiver program is statutorily prohibited from being subject to the collective bargaining process" and therefore the Borough did not violate any provisions of the CNA. The letter concludes by reiterating that reimbursement would be made to the grievant for 2019. The Borough's Council denied the grievance after hearing it at its September 3 meeting. On October 9, the PBA 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 merits of the grievance or any contractual defenses the employer may have.

The Borough argues that although health benefits are generally negotiable, the Borough's decision to provide consideration for an employee waiving health insurance coverage is statutorily preempted by N.J.S.A. 52:14-17.31a and N.J.S.A. 40A:10-17.1. Specifically, the Borough asserts that the issue of waiver payments is expressly precluded from negotiation and therefore the grievance should be restrained from arbitration.

The PBA responds that the Borough erred in assuming that grievant's wife was enrolled in an SHBP plan, when she was actually enrolled in a self-insured plan, which would have made grievant eligible for a waiver payment. According to the PBA, every Borough employee similarly situated was granted reimbursement, thus denying grievant an occupational advantage as defined in the CNA. The PBA argues that the grievance does not contest the Borough's ability to dictate whether a waiver payment program exists, rather; it challenges the Borough's applicability of its waiver payment program to the grievant.

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 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.

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). 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, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

In Bethlehem Twp. Bd. of Ed. v. Bethlehem Twp. Ed. Ass'n, 91 N.J. 38, 44 (1982), the Supreme Court of New Jersey articulated its statutory preemption test:

As a general rule, an otherwise negotiable topic cannot be the subject of a negotiated

agreement if it is preempted by legislation. However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations. Negotiation is preempted only if the regulation fixes a term and condition of employment "expressly, specifically and comprehensively," Council [of New Jersey State College Locals v. State Board of Higher Education] 91 N.J. 18 at 30. The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." In re IFPTE Local 195 v. State, 88 N.J. 393, 403-04 (1982), quoting State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978).

Our Supreme Court has also held that "statutes and regulations are effectively incorporated by reference as terms of any collective agreement covering employees to which they apply" and "[a]s such, disputes concerning their interpretation, application or claimed violation would be cognizable as grievances subject to the negotiated grievance procedure contained in the agreement." West Windsor Twp. v. PERC, 78 N.J. 98, 116 (1978). Thus, "grievances involving the application of controlling statutes or regulations . . . may be subjected to resolution by binding arbitration" as long as the award does not have the effect of establishing a provision of a negotiated agreement inconsistent with the law. Old Bridge Bd. of Education v. Old Bridge Education Ass'n., 98 N.J. 523, 527-528 (1985).

N.J.S.A. 52:14-17.31a, "Employee permitted to waive benefits coverage under SHBP," provides, in pertinent part:



a. Notwithstanding the provisions of any other law to the contrary, an employer other than the State which participates in the State Health Benefits Program, established pursuant to P.L.1961, c.49 (C.52:14-17.25 et seq.), may allow any employee who is eligible for other health care coverage to waive coverage under the State Health Benefits Program to which the employee is entitled by virtue of employment with the employer. The waiver shall be in such form as the Director of the Division of Pensions and Benefits shall prescribe and shall be filed with the division. After such waiver has been filed and for so long as that waiver remains in effect, no premium shall be required to be paid by the employer for the employee or the employee's dependents. Not later than the 180th day after the date on which the waiver is filed, the division shall refund to the employer the amount of any premium previously paid by the employer with respect to any period of coverage which followed the filing date.

b. Notwithstanding the provisions of any other law to the contrary, the State as an employer, or an employer that is an independent authority, commission, board, or instrumentality of the State which participates in the State Health Benefits Program, may allow any employee who is eligible for other health care coverage that is not under the State Health Benefits Program to waive the coverage under the State Health Benefits Program to which the employee is entitled by virtue of employment with the employer. The waiver shall be in such form as the Director of the Division of Pensions and Benefits shall prescribe and shall be filed with the division.

c. In consideration of filing a waiver as permitted in subsections a. and b. of this section, an employer may pay to the employee annually an amount, to be established in the sole discretion of the employer, which shall not exceed 50% of the amount saved by the employer 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 employer because of the employee's waiver of coverage. An employee who waives coverage shall be permitted to immediately resume coverage if the employee ceases to be eligible for other health care coverage 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 from the employer which represents an advance payment for a period of time during which coverage is resumed. An employee who wishes to resume coverage shall notify the employer in writing and file a declaration with the division, in such form as the director of the division shall prescribe, that the waiver is revoked. The decision of an employer 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.

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

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. 52:14-17.31a and N.J.S.A. 40A:10-17.1 preempt negotiations over an employer's decision to provide health insurance waiver opt-out payments. 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); 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) we found that, in a given year in which the employer has already exercised its discretion under N.J.S.A. 52:14-17.31a and N.J.S.A. 40A:10-17.1 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.

Here, there is no evidence in the record that the Borough decided to end its health care waiver program for any of the years in which grievant sought a waiver payment. The PBA is contesting the applicability of the Borough's health care waiver reimbursement program to the grievant, not the Borough's

discretion to establish such a program. Thus, this dispute centers on the grievant's eligibility for the established program. Therefore, N.J.S.A. 52:14-17.31a and N.J.S.A. 40A:10-17.1 do not preempt arbitration of the grievance to the extent it relates to the years in which the Borough provided waiver payments and determined the grievant was ineligible. An arbitrator may consider whether the Borough's determination that the grievant was ineligible for healthcare waiver reimbursement violated its asserted past practice of providing such reimbursement. See West Windsor Twp., 78 N.J. at 116, Old Bridge Bd. of Education, 98 N.J. at 527-528.

ORDER

The request of the Borough of Somerville 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: October 15, 2020

Trenton, New Jersey