P.E.R.C. NO. 2021-12

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MORRIS HILLS REGIONAL BOARD
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2020-049

MORRIS HILLS REGIONAL EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Morris Hills Regional Board of Education for a restraint of binding arbitration of a grievance filed by the Morris Hills Regional Education Association. The grievance alleges that the Board violated the parties' collective negotiations agreement when it, mid-contract and without notice to the Association, unilaterally altered the contractual level of health benefits because the Boards' health insurance provider instituted a new pre-approval requirement for chiropractic services, which resulted in Association members having their claims denied for those services. The Commission finds that the Association's grievance is legally arbitrable and that he Board's arguments are issues more appropriate for an arbitrator and/or the courts to resolve.

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, Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys (Anthony P. Sciarrillo, of counsel and on the brief; Jaclyn M. Morgese, on the brief)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys (Richard A. Friedman, of counsel and on the brief; Craig A. Long, on the brief)

DECISION

On March 27, 2020, the Morris Hills Regional Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Morris Hills Regional Education Association (Association). The Association's June 28, 2019 grievance alleges that the Board violated the parties' collective negotiations agreement (CNA) when it, mid-contract and without notice to the Association, unilaterally altered the contractual level of health benefits because the Boards' health insurance provider instituted a new

pre-approval requirement for chiropractic services, which resulted in Association members having their claims denied for those services.

The Board filed briefs, exhibits and the certification of its counsel, Anthony P. Sciarrillo.[1/] The Association filed a brief, an exhibit and the certification of its counsel, Craig A. Long.[2/] These facts appear.

The Association represents the Board's certified and non-certified personnel, with certain exclusions. The Board and the Association are parties to a CNA in effect from July 1, 2018 through June 30, 2021. The grievance procedure ends in binding arbitration. Article 3, Section B1, Paragraph(1)(a), of the parties' CNA provides in pertinent part:

> The Board shall provide and pay the full premium for all employees and their eligible dependents...If the Board changes carrier the

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1/ We grant the Board's motion to accept its brief as timely filed. N.J.A.C. 19:10-3.1 allows for the Commission's rules to be construed liberally to prevent injustices and to effectuate the purposes of N.J.S.A. 34:13A-1 et seq. Specifically, N.J.A.C. 19:10-3.1(b) states, "When an act is required or allowed to be done at or within a specified time, the commission may at any time, in its discretion, order the period altered where it shall be manifest that strict adherence will work surprise or injustice or interfere with the proper effectuation of the act."

2/ N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge. Long's certification appears to only certify as to the authenticity of an arbitration award cited in the Association's brief.

> benefits shall be equal to or better than the existing plan...

Sciarrillo certifies that while the CNA requires the Board to provide health benefits to employees, the CNA is silent regarding specific details of those health benefits, including chiropractic services. Sciarrillo further certifies that the Board is required to maintain health benefits at a level which is equal to or better than the benefits which were negotiated. Sciarrillo certifies that in 2016 it contracted with AETNA to be its health insurance carrier. AETNA's plans provided for the following chiropractic benefit:

In Network Providers	**Out of Network Providers**
$10 co-pay	Coverage for 70%
25 visits maximum	25 visits maximum
No referral required	No referral required

Sciarrillo certifies that since AETNA became the health insurance provider in 2016, no changes were made to the chiropractic benefit in the current CNA.

Effective January 1, 2019, AETNA began requiring pre-approval for chiropractic services performed by any provider, and AETNA could deny payment if such services were provided without approval. According to Sciarrillo, these procedural requirements for chiropractic services are an issue solely between the healthcare provider and AETNA.

Scirrillo certifies that it appears that a healthcare provider may not have abided by AETNA's policy change when providing chiropractic services to the Board's employees, and as a result, AETNA denied some claims for those services. Scirrillo further certifies that out of the six employees who reported issues regarding their chiropractic services, two employees' claims were reprocessed and covered, two employees had no claims for chiropractic service on file in the last eighteen months, and two employees' claims were denied due to the provider's failure to follow AETNA's required procedures. In one of these two occurrences where AETNA's procedural requirements were not followed, AETNA permitted a one-time exception to approve the requested claims, as the employee was balance billed by the provider. These claims were reprocessed on September 25, 2019 and payment was issued on October 1, 2019.

The Association represents that prior to AETNA's January 1, 2019 policy change, requiring pre-approval for chiropractic services, Association members were free to visit chiropractors, without pre-approval, as part of their regular healthcare coverage provided by the Board. The Association further asserts that Association members affected by the policy change were informed of the pre-approval requirement only after their claims were denied. The Association further asserts, that even if AETNA ultimately serviced the affected Association members, the new

pre-approval requirement is an additional barrier to obtaining necessary medical care, constitutes a mid-contract reduction in the level of healthcare benefits without negotiations, and as such, is a violation of the CNA that is reviewable through contractual grievance arbitration.

On June 27, 2019, the Association filed an unfair practice charge (UPC), Docket No. CO-2019-318, alleging that the new pre-approval for chiropractic services policy, instituted mid-contract without negotiations, violates the Employer-Employee Relations Act (Act). On June 28, the Association filed the instant grievance, alleging violation of the parties' CNA, which was held in abeyance pending the UPC. On September 5, an exploratory conference was held. On October 4, the Director of Unfair Practices (Director) deferred the UPC to arbitration in accordance with Commission precedent. On October 8, the Association objected to the Board's terms and reservation of rights for deferral of the matter to arbitration and requested that the Director issue a complaint on the UPC. On October 31, in a detailed letter, the Director again deferred the matter to arbitration and explained why that was the appropriate forum for the resolution of the dispute raised by the UPC. On November 27, the Association filed for arbitration, and on February 5, 2020 an arbitrator was appointed. The arbitration has yet to be scheduled. 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.

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 Board argues the Association's grievance is not mandatorily negotiable or legally arbitrable because it took no action that violates the CNA and the Association has not asserted a "grievance" as defined by the CNA. The Board argues that AETNA instituted the policy change requiring pre-approval of chiropractic services, and that it was the healthcare providers' failure to abide by AETNA's policy change that may have adversely affected Association members, rather than any conduct by the Board. Moreover, the Board asserts that all Association members affected by AETNA's policy change have been remedied and made whole.

The Association argues that the procedural change requiring pre-approval for chiropractic services is a change in the level of healthcare benefits, which is mandatorily negotiable and legally arbitrable. The Association further argues that whether the Board or its healthcare insurance provider instituted the procedural change, which unilaterally imposed administrative barriers to previously unimpeded medical services, is irrelevant. The Association argues that even where a mid-contract change to healthcare benefits is attributable to the healthcare insurance provider, the Board's conduct or lack of action may constitute a violation of the CNA.

The level of health benefits is generally negotiable absent a preemptive statute or regulation and a grievance contesting a change in a negotiated level of benefits is generally arbitrable. In re Council of New Jersey State College Locals, 336 N.J. Super. 167 (App. Div. 2001); accord. Rockaway Tp. and FOP, Lodge No. 31, P.E.R.C. No. 2008-21, 33 NJPER 257 (¶96 2007), dism. as moot, 35 NJPER 183 (¶69 App. Div. 2009), on remand, P.E.R.C. No. 2009-19, 34 NJPER 300 (¶109 2008); see also Newark Bd. of Ed., P.E.R.C. No. 94-52, 19 NJPER 588 (¶24282 1993)(finding that whether or not the level of negotiated podiatry benefits and the administration of the plan have been changed in fact must be resolved through the parties' negotiated grievance procedures.)

In Borough of East Rutherford and East Rutherford P.B.A. Local 275, P.E.R.C. No. 2009-15, 34 NJPER 289 (¶103 2008), aff'd, 36 NJPER 33 (¶15 App. Div. 2010), the Commission declined to restrain arbitration of a grievance alleging violation of the parties' CNA due to a change in the level of healthcare benefits as a result of increased co-payments. The Commission stated:

> To restrain arbitration, we would have to first conclude that the PBA is not entitled to pursue its claim that the Borough was obligated to maintain a contractual level of benefits. Such a holding would be a departure from well-established case law. Purchasing insurance from the SHBP does not insulate an employer from enforcement of an agreement over a level of health benefits. Absent a preemptive statute or regulation not present here, an employer must reconcile its

> contractual obligations with its choice of health insurance providers.

In the Director's October 31 letter to the parties deferring the UPC to arbitration,[3/] he states, "...I believe that the appropriate forum for the dispute raised by the [UPC] (and the Board's response) is grievance arbitration...An arbitrator can interpret Article 3(B1)(1a) to determine whether there has been a contractual violation and, if so, order an appropriate remedy." We agree.

Therefore, we find that the Association's grievance alleging a violation of the CNA due to the Board's healthcare insurance provider instituting a policy change, which affected Association members' access to and payment for chiropractic services, is legally arbitrable. The Board's arguments regarding whether this dispute meets the CNA's definition of grievance, its asserted lack of control over AETNA and healthcare providers, and the alleged mootness of the dispute are issues more appropriate for an arbitrator and/or the courts to resolve. Ridgefield Park, supra.

3/ Citing State New Jersey (Dep't of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), the Director stated, "... when a charge essentially alleges a violation of subsection 5.4a(5)[of the Act] interrelated with a breach of contract claim, rendering deferral to the parties' grievance procedure (ending in binding arbitration) is the appropriate course." (Internal quotations omitted)

ORDER

Morris Hills Regional Board of Education'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: October 15, 2020

Trenton, New Jersey