

P.E.R.C. NO. 2022-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF ROCKAWAY,

Petitioner,

-and-

Docket Nos. SN-2021-025
SN-2021-031
(Consolidated)

FOP LODGE 31;
FOP LODGE 31 (SUPERIORS),

Respondents.

SYNOPSIS

The Public Employment Relations Commission grants the Township of Rockaway's consolidated requests for a restraint of binding arbitration of grievances respectively filed by FOP Lodge 31 (Superiors) and FOP Lodge 31, each asserting that the Township violated the parties' collective negotiations agreements (CNAs) by failing to pay retirees' health insurance premiums in full. The dispute arose after the Township denied those benefits to a superior officer and a rank and file officer who were planning for retirement, because they lacked either: (1) the contractually required years of service to qualify for employer-funded retiree health insurance; or (2) twenty pensionable years (accrued by June 28, 2011) needed to be exempt from Chapter 78 contributions in retirement. The Commission finds that with respect to any unit members who do not qualify for either the contractually agreed-upon employer-funded retiree health insurance or the exemption from Chapter 78 contributions in retirement, the subject matter of the grievances at issue is not legally arbitrable until the parties negotiate a successor CNA providing for a lower rate of contribution, and that successor CNA goes into effect.

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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Respondents.

Appearances:

For the Petitioner, Laddey Clark & Ryan, LLP, attorneys
(Thomas N. Ryan, of counsel and on the brief)

For the Respondents, Loccke, Correia, & Bukosky,
attorneys (Michael A. Bukosky, of counsel and on the
brief; Corey M. Sargeant, on the brief)

DECISION

On December 30, 2020, the Township of Rockaway (Township) filed a scope of negotiations petition, SN-2021-025, seeking a restraint of binding arbitration of a grievance filed by the FOP Lodge 31 (Superiors) (FOP Superiors). On February 5, 2021, the Township filed a scope of negotiations petition, SN-2021-031, seeking to restrain binding arbitration of a similar grievance filed by FOP Lodge 31 (FOP). We consolidate the matters, as both grievances assert that the Township violated the parties' collective negotiations agreements (CNAs) by failing to pay retirees' health insurance premiums.

The Township filed briefs, exhibits and the certifications of its Chief of Police, Martin McParland and its Business Administrator, Patricia Seger.^{1/ 2/} The FOP and FOP Superiors filed briefs, exhibits and the certifications of its President, John Reilly. These facts appear.

FOP represents all uniformed and non-uniformed police officers and sergeants, excluding all police personnel above the rank of sergeant. FOP Superiors represents all police personnel holding the rank of lieutenant, captain and deputy chief excluding all police personnel below the rank of lieutenant.

When P.L. 2011, §.78 (Chapter 78) became effective on June 28, 2011, the parties had CNAs in force covering each of the

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- 1/ On March 8, 2021, the Township filed with the Commission an application for interim relief requesting a restraint of binding arbitration pending the disposition of the Township's scope petition. On the same day, the Commission Case Administrator advised the Township that its interim relief application was premature and would not be processed until an arbitrator and arbitration date was set. To date, the Township has not requested that the Commission resume processing its application.
- 2/ On April 9, 2021, the Township, without leave, filed a motion to supplement the record with an unpublished opinion of the Superior Court of New Jersey, Appellate Division, Yakup v. State, Dep't of the Treasury, Div. of Pensions and Benefits, 2021 N.J. Super. Unpub. LEXIS 527 (App. Div. Mar. 16, 2021). The FOP filed opposition on April 19. N.J.A.C. 19:13-3.6 allows for the filing of briefs by the petitioner and respondent, respectively, and a reply brief by the petitioner; but otherwise states, "No other briefs shall be served or filed without leave of the Chair or such other person designated by the Commission." Id. at (d). We deny the Township's motion.

bargaining units at issue, each with a term from January 1, 2010 through December 31, 2014. There followed CNAs with three-year terms from January 1, 2015 through December 31, 2017, which were in turn succeeded by the CNAs that are currently in effect, with four-year terms from January 1, 2018 through December 31, 2021. The CNAs' grievance procedures end in binding arbitration.

Article XVIII of the FOP CNA and Article XIX of the FOP Superiors CNA, both entitled "Retirement and Insurance," contain identical provisions which state, in pertinent part:

B. Subject to paragraph "E" herein, the Township will provide for the continuance of hospitalization, medical, surgical, major medical, health, life, dental, prescription, and accident insurance coverage and the Employer will assume the entire cost of such coverage and pay all the premiums for Employees and Spouse and/or dependants who have retired after 25 years or more of service, or retired on a disability within a State-Administered Pension Plan or any retirement covered in Chapter 88 laws of 1974.

E. In order to maintain coverage upon retirement, officers hired after January 1, 2015, shall contribute the full cost of the premiums for health insurance. Spouses of officers hired after January 1, 2015, shall also be required to contribute the full cost of the premiums to maintain health insurance benefits coverage upon the officers retirement.

As to the genesis of the grievances at issue, Reilly certifies that in planning for retirement, a superior officer and a rank and file officer questioned the Township and asked whether

they would be receiving the contractual retirement benefits including, but not limited to, continued health insurance paid for by the Township. Reilly certifies that the Township, in response, denied these benefits, citing Chapter 78.

Seeger certifies that on October 25, 2020, she received a grievance from FOP President Reilly on behalf of the FOP. She received a second grievance from him on October 30, 2020, on behalf of FOP Superiors. Seeger certifies that the grievances sought to have the Township pay the full amount of all retirees' health insurance premiums, regardless of whether or not they had 20 years of service in the Police and Firemen's Retirement System (PFRS) as of June 28, 2011, the effective date of Chapter 78.

Seeger and Reilly met on October 30, 2020 to address both grievances, but were unable able to reach a resolution.

On November 6, 2020, Seeger denied both grievances via a memorandum to Reilly which stated, in pertinent part, that retiree benefits were not negotiable "[u]ntil the current contract ends after completing a four-year phase-in of the full contribution amount." In two subsequent memos to Reilly dated November 9, addressing the denial of each respective grievance, Seeger stated, in pertinent part:

[A]uthority for the payment of health benefits upon retirement was pre-empted by state law in 2011, pursuant to P.L. 2011, c.78. Public employees hired prior to 1999 who had less than 20 years of service in one or more state or locally administered

retirement systems on the effective date of Public Law 2011, c.78 are required to contribute toward their health benefits in retirement.

Following the full implementation of Chapter 78, which involved a 4-year period triggered upon the expiration of any CNA in place at the time of the law's effective date, the statutory language preempted any contractual language. See N.J.S.A. 52:14-17. The [contractual language] upon which I believe you are relying was expressly, specifically and comprehensively preempted by c.78 . . . until . . . specifically negotiated out of the contract. As you are aware, Chapter 78 contributions, following the sunset of Chapter 78, were never negotiated out of the CNA.

Seeger certifies that numerous members of the Rank and File FOP Lodge 31 unit and at least one Superior Officer did not have the requisite years of service as of the Chapter 78 effective date for the exemption. McParland certifies that the dates of hire and entry into the PFRS for each of the Township's Police Officers and Police Sergeants are as follows:

<u>Name</u> (Officer)	<u>Date of Hire</u>	<u>Date Entered PFRS</u>
M.B.	8/7/2006	1/1/2005
K.B.	9/28/2007	8/1/2006
B.C.	1/10/1997	5/1/1997
M.D.	6/29/2009	7/1/2009
J.D.	1/13/2003	1/1/2003
E.G.	8/2/2004	10/7/2000
C.G.	7/11/2005	7/1/2005
S.G.	7/16/2007	7/1/2007
M.G.	12/1/1998	12/1/1998
C.H.	7/14/2003	7/1/2003
S.H.	1/1/2007	1/1/2004
M.H.	7/15/2002	1/1/1999
C.H.	2/20/1996	3/1/1996
T.K.	8/25/1997	9/1/1997

J.L.	6/3/2002	6/1/2002
N.L.	7/26/1999	8/1/1999
P.L.	8/25/1997	9/1/1997
E.M.	7/15/2002	11/1/2001
L.P.	10/2/2017	4/1/2014
D.R.	1/7/2019	11/1/2013
J.R.	8/25/1997	9/1/1997
P.R.	9/29/1995	9/1/1995
M.R.	9/8/2008	11/1/1997
W.R.	9/10/2001	9/1/1995
R.S.	1/22/2007	8/10/2002
M.S.	7/9/2007	7/1/2007
R.S.	3/1/1999	3/1/1999
T.T.	10/2/2017	3/1/2012
T.T.	1/15/2001	8/1/2000
M.T.	1/10/2005	11/1/2000
D.T.	7/15/2002	7/1/2002
C.T.	8/25/1997	9/1/1997
J.T.	4/8/2002	4/1/1998
J.U.	1/24/2000	9/1/1999
S.V.	1/26/1998	2/1/1998

The FOP did not certify facts disputing the above information.

On November 11, the FOP separately filed a Request for Submission of a Panel of Arbitrators as to each grievance. These petitions ensued.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the employer may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

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 (¶1111 App. Div. 1983). Thus, if we conclude that the grievances are 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.

"[A]n otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation."

Bethlehem Tp. Bd. of Educ. v. Bethlehem Tp. Educ. Ass'n, 91 N.J.

38, 44 (1982). "However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations." County of Mercer, P.E.R.C.

No. 2015-46, 41 NJPER 339 (¶107 2015). "Negotiation is preempted only if the [statute or] regulation fixes a term and condition of employment 'expressly, specifically and comprehensively.'"

Bethlehem Tp. Bd. of Educ., 91 N.J. at 44 (citing Council of New Jersey State College Locals v. State Board of Higher Ed., 91 N.J.

18, 30 (1982)). "The legislative provision must 'speak in the imperative and leave nothing to the discretion of the public

employer.'" Id. (citing Local 195, 88 N.J. at 403-404); see also, State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978)

(holding that the "adoption of a statute or regulation setting or controlling a particular term or condition of employment will preempt any inconsistent provision of a negotiated agreement governing" the matter).

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 Township, citing relevant court and Commission decisions, contends that Chapter 78's contribution requirements remain in effect until after the current CNAs expire and the parties negotiate different contribution levels, because the parties did not reach full Chapter 78 implementation until the first year of their current CNAs, which do not expire until December 31, 2021. Until then, Chapter 78 preempts the disputed language in the current CNAs regarding health benefits of retirees, and employees covered by those CNAs must continue making Chapter 78 contributions if they lack either: (1) the contractually required years of service (accrued prior to the June 28, 2011 effective date of Chapter 78 or the expiration of any applicable CNAs then in effect) to qualify for employer-funded retiree health insurance; or (2) the twenty pensionable years (accrued by June 28, 2011) needed to be exempt from Chapter 78 contributions in retirement under N.J.S.A. 40A:10-21(b)(3).

The FOP argues that employee health care premiums is a mandatorily negotiable subject and, following its sunset in 2015 (which occurred in the parties' previous CNAs), Chapter 78 no longer preempts negotiations on that subject. The FOP relies in particular on two Commission decisions as well as a portion of N.J.S.A. 40A:10-21.2 which states, "After full implementation, 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."

Upon its enactment, Chapter 78 required affected public employees and retirees to contribute toward the cost of their health care benefits coverage for themselves and any dependents, paying a greater or lesser share of the premium depending upon their salary/retirement allowance. Chapter 78's contribution requirements were implemented over a four-year period, with each employee/retiree paying "one-fourth of the . . . contribution" during the first year (Tier I), "one-half" in the second year (Tier II), "three-fourths" during the third year (Tier III), and the full premium rate during the fourth year (Tier IV). N.J.S.A. 40A:10-21.1(a). Further, the amounts payable by employees and retirees subject to Chapter 78's contribution requirements could "not under any circumstance be less than . . . 1.5 percent" of

the applicable base salary or monthly retirement allowance.

N.J.S.A. 40A:10-21.1(a) and (b)(3).

"Full implementation," under Chapter 78, means that "all affected employees [and retirees] are contributing the full amount of the contribution, as determined by the implementation schedule set forth in [N.J.S.A. 40A:10-21.1(a)]." N.J.S.A. 40A:10-21.1(d).

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

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.

As we stated in Springfield Tp., P.E.R.C. No. 2021-14, 47 NJPER 221 (¶49 2020) regarding the above provision and the effect of Chapter 78 on retiree health benefit contributions:

[W]hile N.J.S.A. 40A:10-23 authorizes the Township to agree . . . to assume the costs of health coverage for certain retirees, "Chapter 78 limited the ability of local governments to assume as much of the cost of that coverage as before." Matter of New Brunswick Mun. Employees Association, 453 N.J. Super. 408, 418 (App. Div. 2018). As the court in New Brunswick put it:

Accordingly, but for those local government employees having twenty or more years of service on the effective date of Chapter 78 (who are exempted by subsection (b)(3)), subsection (b)(2)(a) [of N.J.S.A. 40A:10-21.1] requires all employees who accrue the necessary service credit and age required by

[N.J.S.A. 40A:10-23], on or after the expiration of a CNA in force on the effective date of Chapter 78 . . . to contribute to those costs in accordance with subsection (b)(1) [of N.J.S.A. 40A:10-21.1] by the withholding from their monthly retirement allowance the amount specified by the schedule set forth in N.J.S.A. 52:14-17.28c.

[Id., 453 N.J. Super. at 418]

[Springfield Tp., 47 NJPER at 223.]

Although Chapter 78 expired four years after its effective date of June 28, 2011, see P.L. 2011, c.78, § 83, parties are bound by the Chapter 78 contribution requirements until they have reached full implementation, which can occur after the sunset of Chapter 78, as it did here. N.J.S.A. 40A:10-21.1(d).

Also pertinent to this dispute are N.J.S.A. 40A:10-21.1(d)(2) and 40A:10-21.2. The former is a Chapter 78 provision which addresses public employees with a majority representative, who had a CNA in force on June 28, 2011, the effective date of Chapter 78. It directed that the Chapter 78 contributions of such employees would commence:

upon the expiration of any applicable binding collective negotiations agreement in force on that effective date for employees covered by that agreement with the contribution required for the first year . . . commencing in the first year after that expiration

[N.J.S.A. 40A:10-21.1(d)(2).]

N.J.S.A. 40A:10-21.2 addresses health care contributions after full implementation of Tier IV contribution rates. The statute provides:

A public employer and employees who are in negotiations for the next collective negotiations 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.

. . .
After full implementation, 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.

[N.J.S.A. 40A:10-21.2.]

The Supreme Court of New Jersey, in Matter of Ridgfield Park Bd. of Educ., 244 N.J. 1 (2020), adopted and affirmed the Commission's construction, in Ridgfield Park Bd. of Ed., P.E.R.C. No. 2018-14, 44 NJPER 167 (¶49 2017), of Chapter 78 provisions in N.J.S.A. 18A:16-17.2 that are identical to the above-quoted language from N.J.S.A. 40A:10-21.2. The Court held, "when employees reach the Tier 4 contribution level in the first year of a CNA, they must continue to contribute at that level until they negotiate a successor CNA providing for a lower rate

of contribution, and that successor CNA goes into effect." 244
N.J. at 6.^{3/}

Here, CNAs covering the bargaining units at issue were in force on June 28, 2011, the effective date of Chapter 78. Those CNAs expired on December 31, 2014. Thus, under N.J.S.A. 40A:10-21.1(d)(2), the first year of Chapter 78 contributions for employees covered by those agreements commenced January 1, 2015. This was also the first year of the parties' successor CNAs. Each successor CNA had a three-year term from January 1, 2015 through December 31, 2017, during the course of which the parties completed the first three years of the Chapter 78 contribution tiers. The parties achieved full implementation (Tier IV) in the first year of the CNAs that are currently in effect, each commencing January 1 and not expiring until December 31, 2021.

Under these circumstances, Matter of Ridgfield Park Bd. of Educ., 244 N.J. 1 (2020), controls. That is, with respect to any unit members who do not qualify for either the contractually agreed-upon employer-funded retiree health insurance^{4/} or the

^{3/} Recently, in an unpublished opinion, the Appellate Division followed and applied Ridgfield Park in deciding a dispute between a police union and a municipal employer. W. Essex PBA Local 81 v. Fairfield Twp., 2021 N.J. Super. Unpub. LEXIS 1209 (App. Div. June 22, 2021). There, the Appellate Division affirmed the Chancery court's affirmance of a grievance arbitrator's award which found that, because the Chapter 78 Tier IV rates were reached in an expired CNA and the parties neither agreed to nor implemented modifications to those rates in their successor agreement, the Tier IV rates remained in effect for the successor CNA. Id.

^{4/} Meaning those who lacked 25 years or more of service as of
(continued...)

exemption from Chapter 78 contributions in retirement under N.J.S.A. 40A:10-21(b)(3), the subject matter of the grievances at issue is not legally arbitrable until the parties "negotiate a successor CNA providing for a lower rate of contribution, and that successor CNA goes into effect." 244 N.J. at 6. The FOP does not dispute the information provided by the Township of its Police Officers' and Sergeants' dates of hire and entry into the PFRS, nor does the FOP allege that the Township is refusing to pay for health benefits of unit members, if any, who do qualify for either contractual retiree health benefits or the Chapter 78 contribution exemption.

Finally, we note that the Commission decisions primarily relied upon by the FOP are distinguishable from the instant matter. Both Tp. of Fairfield and W. Essex PBA Local 81, P.E.R.C. No. 2019-31, 45 NJPER 309 (¶80 2019), and City of Plainfield, P.E.R.C. No. 2020-57, 46 NJPER 593 (¶135 2020), involved disputes over health benefits contributions that arose in the next CNA after the parties had achieved full Chapter 78 implementation. Those circumstances are not present here.

ORDER

The Township of Rockaway's request for a restraint of binding arbitration is granted.

4/ (...continued)
either June 28, 2011 or the expiration of a CNA then in effect, after which Chapter 78 preempted the contractual language.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Papero and Voos voted in favor of this decision. Commissioners Ford and Jones opposed this decision.

ISSUED: August 26, 2021

Trenton, New Jersey