

P.E.R.C. NO. 2021-51

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ANDOVER REGIONAL BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2021-033

ANDOVER REGIONAL EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Andover Regional Board of Education's request for a determination that employee contributions for dental benefits coverage are subject to negotiations under both Chapter 78 and Chapter 44, for employees of school districts enrolled in the State-operated School Employees' Health Benefits Program (SEHBP). The dispute arose following an impasse in negotiations between the Board and the Andover Regional Education Association for a collective negotiations agreement covering its members, wherein the Association contended that by excluding dental benefits from the definition of the "cost of coverage" for medical and prescription coverage, under both Chapter 78 and Chapter 44, the Legislature meant to preempt negotiations over separate contribution rates for dental benefits provided under a private plan. The Commission finds that neither Chapter 78 nor Chapter 44 expressly sets particular terms and conditions of employment that "speak in the imperative and leave nothing to the discretion of the public employer," such that "negotiation over [that subject]. . . is not permissible."

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, Scarinci Hollenneck, LLC, attorneys
(Carolyn Chaudry, of counsel; Jorge R. De Armas, on the
brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys
(Samuel Wenocur, of counsel)

DECISION

On February 26, 2021, the Andover Regional Board of Education (Board) filed a scope of negotiations petition seeking a determination as to whether a matter in dispute between the Board and the Andover Regional Education Association (AREA or Association) is within the scope of collective negotiations. The dispute arose during the course of mediation proceedings initiated after the parties reached an impasse in negotiations for a collective negotiations agreement (CNA) covering teachers, custodial personnel, secretarial/clerical personnel and paraprofessionals employed by the Board. In its scope petition, the Board seeks a determination that employee contributions for

dental benefits coverage are subject to negotiations under both P.L. 2011 c. 78 (Chapter 78) and P.L. 2020 c. 44 (Chapter 44).

The Board filed briefs, exhibits, and the certifications of its Business Administrator, Nicole Sylvester. The Association filed a brief, exhibits, and the certifications of a New Jersey Education Association (NJEA) Field Representative, John Ropars, who serves as AREA's chief negotiator, and Samuel Wenocur, Esq., whose firm represents AREA in this matter. These facts appear.

The parties had previously negotiated four separate CNAs, each covering one of the above-noted units from 2017 through 2020; all of which expired as of June 30, 2020, prior to the enactment of Chapter 44 on July 1, 2020. The parties agreed to merge all four separate units into one wall-to-wall unit, to be covered by a single successor agreement. The Board filed a Notice of Impasse in those negotiations on October 16, 2020. (Docket No. I-2021-036.) A PERC Mediator was assigned to assist the parties during impasse mediation.

All of the expired CNAs at issue (except for that of the paraprofessionals, which did not provide for dental benefits) contained language in which the Association agreed that its members would pay \$200 in annual premiums for their dental insurance. The members would pay either \$8.33 or \$10 per pay period, depending on whether they were 10 or 12-month employees. These benefits are offered through Delta Dental, a private

carrier. (Ropars Cert. ¶6; Sylvester Cert. ¶¶14-19.) The provisions in dispute are as follows:

The contract for teachers, in Article IV provides:

The Board will provide a dental health program for all eligible teachers and their family or dependents with a benefit level of \$1,000 for the duration of this contract. Eligible teachers opting to not receive this benefit will have \$700 per year added to their paycheck. Teachers who continue to accept dental health program will contribute \$10.00 per pay period, tax-free via Section 125 program.

The contract for Custodial Personnel, in Article XVI, provides:

The Board will provide a dental health program for all custodians and their family or dependents with a benefit level of \$1,000 for the duration of this contract. Custodians opting to not receive this benefit will have \$700 added to their salary. Custodians will pay \$8.33 pre-tax per pay period to maintain coverage.

The contract for Secretarial/Clerical Personnel, in Article XVI, provides:

The Board shall provide a prepaid dental health program for all secretaries and their family or dependents with a benefit of \$1,000 for the duration of this contract. Secretaries opting to not receive this benefit will have \$700 per year added to their salary. Secretaries who continue to accept the dental health program will contribute \$8.33 per pay period, tax free via Section 125 program.

Ropars certifies that the Board obtained health benefits through private providers, including dental, for the entire duration of the expired CNAs. (Ropars Cert. ¶7.) The Board disputes this. Sylvester certifies that the District has been in the State-operated School Employees' Health Benefits Program (SEHBP) for the last five years with the exception of the period from July 1, 2019 to December 30, 2020, when the Board switched to an equivalent private plan. (Sylvester Suppl. Cert. ¶4.) On January 1, 2021, the Board re-entered the SEHBP. (Id.)

Ropars certifies that the Board did this unilaterally, without first negotiating with the Association, and failed to negotiate over the impact of that decision; and that both the enactment of Chapter 44^{1/} and the transition from a private plan to the SEHBP occurred while the parties were negotiating a successor CNA. (Ropars Cert. ¶¶7, 9-11.) Sylvester certifies that the Association lodged no objection when informed by the Board that it was "reverting back to the terms in the written Agreement to provide insurance through SEHBP as the insurance carrier, which was the status quo." (Sylvester Suppl. Cert. ¶12.)

1/ Among other things Chapter 44, as more fully discussed infra, set affected employees/retirees' required contributions to their health benefits coverage as a percentage of their base salary/retirement allowance, and eliminated the requirement, under Chapter 78, that tied the contribution amount to a percentage of the premium.

Sylvester certifies that during negotiations and impasse mediation, AREA requested information about and made proposals regarding dental benefits; and that it made no proposals to eliminate dental contributions when changes due to Chapter 44 were discussed and proposed during negotiations. (Sylvester Cert. ¶9; Sylvester Suppl. Cert. ¶8.) Prior to February 2021, AREA did not take the position that dental contributions were not subject to negotiations, and never proposed or asserted that Chapter 44 would preclude negotiations for dental contributions for those who would elect Chapter 44 plans. (Sylvester Suppl. Cert. ¶¶7, 13-14.) She adds that the Association never asserted that dental contributions were non-negotiable in all the years the District was under Chapter 78, and when the parties had a separate dental contribution in the 2014-2017 agreement and the 2017-2020 agreement, which was negotiated while the SEHBP was the District's insurance carrier. (Sylvester Suppl. Cert. ¶16.)

Sylvester certifies that on February 11, 2021, prior to the third impasse mediation, Ropars (who did not participate on behalf of AREA in any negotiations sessions until after the parties entered impasse mediation) first took the position that negotiations over dental contributions were preempted under Chapters 78 and 44, and that the District should reimburse employees for any such contributions already taken. (Id. ¶10.)

Ropars asserts that employee contribution rates for dental plans had been negotiable when all insurance plans were obtained through private plans.^{2/} According to Ropars, the Association never agreed or suggested that dental plan contributions would have been negotiable had the Board instead obtained health care benefits through the SEHBP. (Ropars Cert. ¶7.) Ropars certifies that after the Board switched to the SEHBP on January 1, 2021, it continued making deductions from member paychecks for dental benefits contributions. (Ropars Cert. ¶12.) As such, Ropars certifies that AREA disputes the negotiability of dental benefits contributions only with respect to the last six months of the 2020-2021 school year. (Id. ¶24.)

In February of 2021, Sylvester provided a copy of the Delta Dental Renewal and Chapter 78 Tier 4 rates^{3/} to the Board's attorney, who forwarded it to AREA and the mediator on or about

2/ Ropars maintains that dental benefits were negotiable throughout the 3-year terms of the expired CNAs, during the entirety of which, he contends, the Board was not in the SEHBP. (Ropars Cert. ¶7.) However, as noted, supra, the Board certifies that there was only an 18-month period during the life of the expired contracts, from July 2019 to December 2020, when the Board was not in the SEHBP. (Sylvester Suppl. Cert. ¶4.)

3/ The record does not indicate when the parties reached Tier 4 and full implementation of Chapter 78's four-year tiered system by which public employees paid a percentage of their health insurance premiums, based upon salary. In its brief, the Board states only that in Andover, Chapter 78 has "sunset." The Association does not dispute that statement.

February 11, 2021. On the same date, in an email to the Board attorney, Ropars stated:

One additional issue with dental, unrelated to the tiers. Since the district has moved to the SEHBP, the district should not be making any deductions for dental at all. As I am sure you are aware, when a district is in the state plan for medical and prescription coverage, those two programs are the only payments upon which the employees should be contributing. That is true even when the dental or vision programs are being provided by a private carrier. Please talk to your client about this and have them cease the deductions for dental and make restitution for the deductions that have been made since the district moved to the state plan.

On February 12, 2021, the Board attorney replied:

The law is that under C.78 the C.78 contribution is calculated solely on Medical and Prescription if in SEHBP[,] it is silent on Dental contribution mandates.

Under a private plan the C.78 contribution is calculated on Medical, Prescription, Dental and Vision.

The Board has a separately negotiated contribution rate of \$10 per paycheck for dental and that is not precluded and never was under C.78.

Ropars responded:

I disagree with your opinion. . . . On the basis of your email I will direct the local to file a grievance next week and we can resolve it in arbitration.

In subsequent emails, copies of which are included in the Board's exhibits, the two further elaborated their opposing views on

whether dental benefits are a negotiable subject under the circumstances.

Ropars certifies that on February 18, 2021, he recommended that the parties resolve the dental contributions issue through the grievance and arbitration process, and also notified the mediator that the Association wished to move the impasse negotiations to fact finding. (Id., ¶¶14, 16.) The Board attorney responded that the Board instead would file a scope petition, and would also seek to hold the impasse mediation in abeyance pending the outcome of same. (Id. ¶14.)

Sylvester certifies that AREA's change in position on the subject of dental benefits contributions has had a chilling effect on the District, as it impacted the District's position on possible concessions it had discussed with the mediator during impasse. (Sylvester Suppl. Cert. ¶¶11, 17.) Sylvester certifies that if dental contributions were deemed to be non-negotiable, the District would need to reconsider its package; but it is unable to know the financial impact this will have on the District, other than the loss of contributions and the need to budget for that loss and potential added cost to the Board, with the Association offering no concessions. (Sylvester Suppl. Cert. ¶18.)

Ropars certifies that on the evening of February 18, 2021, the Board cancelled a previously scheduled impasse mediation

session, over the Association's objections. (Ropars Cert. ¶¶14, 15.) In a March 27, 2021 letter, Ropars certifies, the Board attorney voiced the Board's opposition to the impasse negotiations proceeding to fact finding, unless the Association agreed to negotiate over dental benefits contributions, or until PERC issues a decision on the scope petition. (Id., ¶17.) 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 contractual merits of the grievance or any contractual defenses the employer may have.

The Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982):

[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.

Where a statute or regulation is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically and comprehensively. Council of N.J. State College Locals, NJSFT-AFT/AFL-CIO v. State Ed. of Higher Ed., 91 N.J. 18, 30 (1982); 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). If a particular item in dispute is controlled by a specific statute or regulation, the parties may not include any inconsistent term in their agreement. Id.

The Board argues that neither Chapter 78 nor Chapter 44 preempts negotiation of deductions for the costs of private dental coverage, as both laws specifically exclude the cost of dental and vision premiums from the "cost of coverage," a key component of the formula for determining deductions, which

shows a clear legislative intent that the issue was and remains subject to negotiations. Further, a regulation allowing for separate dental contributions was in effect under Chapter 78 and remains in effect under Chapter 44.

The Association argues that under Chapter 78, the Legislature's grant of authority to the SEHBP plan design committee, over the design and creation of all SEHBP-administered plans, evidences a legislative intent to reduce a public employee's contributions by including dental benefits in a broad definition of "health care benefits," while excluding them from the narrower definition of "cost of coverage." The Association further argues that any ambiguity as to the legislative intent of Chapter 78 should be read in favor of employee-members.

The Association argues that under Chapter 44, dental benefits are also part of a broad definition of "health care benefits," and that members only need pay a "singular rate" for all health care benefits for employees enrolled in the New Jersey Educators Health Plan [NJEHP] or the Garden State Health Plan [GSHP] established by Chapter 44. The Association argues that, in conjunction with Chapter 44's exclusion of dental benefits from the definition of the "cost of coverage" (similar to Chapter 78), this is evidence of a legislative intent that employees enrolled in SEHBP plans under Chapter 44 are not required to make any additional contributions for dental premiums. The

Association also relies on a joint statement of the New Jersey Assembly speaker and the Assembly bill sponsors of Chapter 44, among others, as evidence of this legislative intent: "This legislation will restore fairness to Chapter 78 health benefit contributions [b]y providing new, more affordable health plan options and including a guaranteed floor of savings."^{4/}

In sum, the Association argues that under both Chapter 78 and Chapter 44, the Legislature did not authorize the charge of an additional fee for dental premiums, and this must be understood as an intent to preclude employees of school districts enrolled in the SEHBP from having to pay anything toward the cost of dental benefits.

The Board replies, among other things, that AREA's arguments as to what the Legislature may have intended, or what its policy goals may have been, do not establish that negotiations on the issue of dental contributions are preempted under Chapter 78 and/or Chapter 44. The Board argues that Chapter 44, as the Association admits, merely uncoupled the contribution from the premium for school employees, who now contribute a percentage of base salary which is no longer tied to premiums, and also created more affordable options called the NJEHP and GSHBP plans. It guaranteed a floor of savings, not a ceiling or legal maximum. The Legislature left to boards the discretion to continue with

^{4/} <https://www.nj.gov/governor/news/news/562020/20200701c.shtml>

separate dental plans, with contributions as already negotiated and subject to renegotiation. No new language as to dental contributions was added or eliminated from the statute. Nor is there any language in Chapter 44 that alters or revokes the regulation permitting the separate negotiation of dental contributions not included as part of the coverage offered under the SEHBP plans.

The level of health benefits is generally a mandatorily negotiable subject. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975); Middlesex Cty., P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979), aff'd in relevant part, 6 NJPER 338 (¶11169 App. Div. 1980). Moreover, the allocation of health insurance premiums is a negotiable term and condition of employment. Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 2019-42, 45 NJPER 378 (¶98 2019); Bridgewater Tp., P.E.R.C. No 95-28, 20 NJPER 399, 401 (¶25202 1994), aff'd 21 NJPER 401 (¶26245 App. Div. 1995).

Applying the Local 195 balancing test to the unique facts of this case, as we are required to do by City of Jersey City v. Jersey City Police Officers Benevolent Ass'n, 154 N.J. 555, 575-75 1998), we find that dental premiums are mandatorily negotiable and legally arbitrable.

The second prong of the Local 195 negotiability test is dispositive of this case. Applying that prong to AREA's argument that by not expressly specifying the charge of an additional fee

for dental premiums under Chapters 78 and 44, the Legislature preempted negotiations over that topic, we find the Association has not shown, with respect to dental benefit contributions for employees of school districts enrolled in the SEHBP, that either Chapter 78 or Chapter 44 expressly sets particular terms and conditions of employment that "speak in the imperative and leave nothing to the discretion of the public employer," such that "negotiation over [that subject]. . . is not permissible." State v. State Supervisory Emps. Ass'n, 78 N.J. 54, 80 (1978).

N.J.S.A. 52:14-17.28c, the Chapter 78 statute that the Association asserts preempts this matter, defines "cost of coverage" as:

As used in this section, "cost of coverage" means the premium or periodic charges for medical and prescription drug plan coverage, but not for dental, vision, or other health care, provided under the State Health Benefits Program or the School Employees' Health Benefits Program;

[N.J.S.A. 52:14-17.28c (emphasis added).]

Chapter 44 became effective on July 1, 2020. Beginning on January 1, 2021, regardless of any CNA in effect on July 1, 2020 that provides for other plans offered by the SEHBP prior to January 1 2021, Chapter 44 requires the SEHBP to offer only three plans, for medical and prescription benefits coverage: the New Jersey Educators Health Plan; the SEHBP NJ Direct 10 plan; and the SEHBP NJ Direct 15 plan. N.J.S.A. 52:14-17.46.13 (a)(1) and

(2). Chapter 44 further requires that beginning July 1, 2021, the SEHBP must also offer a Garden State Health Plan, which will be equivalent to the New Jersey Educators Health Plan, except that benefits under the Garden State Health Plan will be available only from providers located in the State of New Jersey. N.J.S.A. 52:14-17.46.13(d). Chapter 44 imposes similar requirements on employers who do not participate in the SEHBP. N.J.S.A. 18A:16-13.2.

Chapter 44 requires affected employees and retirees to contribute annually toward the cost of their health care benefits coverage an amount equal to a percentage of each employee's annual base salary or retiree's annual retirement allowance, according to a range of specified contribution rates and a corresponding range of specified salaries/retirement-allowances, as set forth in N.J.S.A. 52:14-17.46.14, and as calculated according to N.J.S.A. 52:14-17.46.16. By setting the required contribution solely as a percentage of base salary/retirement allowance, Chapter 44 eliminates the requirement, under Chapter 78, that tied the contribution amount to a percentage of the premium, with employees paying a greater or lesser share of the premium depending upon their salary/retirement allowance. For the plan year commencing on January 1, 2028 and for each plan year thereafter, Chapter 44 permits the contribution amounts to

again be modified through collective negotiations. N.J.S.A. 52:14-17.46.14(h).

N.J.S.A. 52:14-17.46.16, the Chapter 44 statute that the Association asserts preempts this matter, defines "cost of coverage" as:

As used in this section, "cost of coverage" means the premium or periodic charges for medical and prescription drug plan coverage, but not for dental, vision, or other health care, provided: (1) under the New Jersey Educators Health Plan or the Garden State Health Plan offered by the School Employees' Health Benefits Program pursuant to section 1 of P.L.2020, c.44 (C.52:14-17.46.13); or (2) under the equivalent New Jersey Educators Health Plan or the equivalent Garden State Health Plan offered by an employer pursuant to section 5 of P.L.2020, c.44(C.18A:16-13.2) when that employer is not a participant in the School Employees' Health Benefits Program.

[N.J.S.A. 52:14-17.46.16 (emphasis added).]

N.J.A.C. 17:9-9.1 is a regulation that addresses the subject of employee dental plans for employers who participate in the State Health Benefits Program and the School Employees Health Benefits Program. In effect under both Chapter 78 and Chapter 44, it provides, in pertinent part:

If an employer elects to participate in the Employee Dental Plans, the employee's share of the cost for the Plans may be determined by a formula different from that used to determine the employee's share of the cost of health coverage. The employee may pay a share of the cost of dental coverage for the employee and for the employee's covered dependents as required by a collective

negotiations agreement. The employer may establish by ordinance or resolution, rules for the employee's share of the cost for those employees not covered under a collective negotiations agreement;

[N.J.A.C. 17:9-9.1(c)(4) (emphasis added).]

We find no basis to conclude that merely by excluding dental benefits from the definition of the "cost of coverage" for medical and prescription coverage, under both Chapter 78 and Chapter 44, the Legislature "expressly, specifically and comprehensively" meant to eliminate the discretion to negotiate separate contribution rates for dental benefits provided under a private plan. Council of N.J. State College Locals, supra. The ongoing applicability of N.J.A.C. 17:9-9.1, under Chapter 78 and Chapter 44, reinforces this view.

Further indication that Chapter 44 does not preempt such negotiations is found in N.J.S.A. 52:14-17.46.13, which states, in pertinent part:

[Beginning with the plan year that commences January 1, 2021 and for each plan year thereafter, the School Employees' Health Benefits Program shall offer only three plans that provide medical and prescription drug benefits for employees ...

. . .

Employers that participate in the School Employees' Health Benefits Program shall retain the ability to enter the program for medical only plans and may separately purchase pharmacy and dental benefits outside of the program without limitation or restriction.

[N.J.S.A. 52:14-17.46.13(a)(1), (d) (emphasis added).]

Our conclusion is not inconsistent with relevant Commission and persuasive court decisions. See, e.g., Matawan-Aberdeen Reg. Bd. of Ed., supra (in choosing to move to a private plan, board failed to fulfill contractual commitment, negotiated while board was in SEHBP, to cover full cost of dental coverage); Atlantic City Bd. of Ed. v. Atlantic City Educ. Ass'n, 2020 N.J. Super. Unpub. LEXIS 1714 (App. Div. 2020) ("employee contributions to dental insurance premiums [under Chapter 78] is subject to negotiation and agreement"). We find the Association's reliance on N.J.S.A. 52:14-17.46.3(e) and N.J.S.A. 52:14-17.27(b) as alleged sources of a broad statutory "definition" making dental benefits inseparable from medical, prescription, vision, and "any other health care benefits" to be misplaced. Those statutes address the establishment and responsibilities of the SEHBP Plan Design Committee. Definitions relative to health care benefits for public employees are found in N.J.S.A. 52:14-17.26 and N.J.S.A. 52:14-17.46.2, neither of which even lists "health care benefits," per se, as a defined term.

ORDER

The Andover Regional Board of Education's request for a determination that employee contributions for dental benefits coverage are subject to negotiations under both Chapter 78 and Chapter 44, under the circumstances presented, is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: June 24, 2021

Trenton, New Jersey