I.R. NO. 2020-8

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PLAINFIELD,

Petitioner,

-and- Docket No. SN-2020-021

PLAINFIELD FIRE OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

A Commission Designee denies the City's request for an interim restraint of binding arbitration pending the outcome of a scope of negotiations petition before the Public Employment Relations Commission. The grievance alleges that the City violated the parties' collective negotiations agreement when it notified the PFOA that it would no longer cover the full cost of certain retirees' health care premiums. The City alleges that the grievance is statutorily preempted. Finding that N.J.S.A. 40A:10-21.2 provides that health benefits contributions, for employees and retirees, become negotiable again for the next contract after full Chapter 78 implementation, and thus Chapter 78 no longer preempted retiree health benefit contributions for the parties' 2018-2021 CNA, and further finding that N.J.S.A. 40A:10-21.1(b)(3) does not apply a 1.5% contributions floor to the grievants, the Designee concludes that the City failed to demonstrate a substantial likelihood of prevailing in a final Commission decision.

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Respondent.

Appearances:

For the Petitioner, Ruderman & Roth, LLC, attorneys (Mark S. Ruderman, of counsel)

For the Respondent, Law Offices of Craig S. Gumpel LLC, attorneys (Craig S. Gumpel, of counsel)

INTERLOCUTORY DECISION

On November 6, 2019, the City of Plainfield (City) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Plainfield Fire Officers Association (PFOA). The grievance alleges that the City violated the parties' collective negotiations agreement (CNA) when in April 2019 it notified the PFOA that it would no longer cover 100 percent of the cost of retirees' health care premiums. On December 31, 2019, the City filed the instant application for interim relief seeking a restraint of a binding arbitration scheduled for January 14, 2020 pending final disposition of the underlying scope of negotiations petition.

PROCEDURAL HISTORY

On January 2, 2020, I signed an Order to Show Cause directing the PFOA to file any opposition by January 9 and setting January 10 as the return date for oral argument. On January 8, the PFOA filed its opposition to the application for interim relief. On January 10, counsel for the City and PFOA engaged in oral argument during a telephone conference call with me. In support of the application for interim relief, the City submitted a brief and the December 31, 2019 certification of its counsel. In opposition, the PFOA submitted a brief, exhibits, and the January 8, 2020 certification of its counsel. The record also includes the briefs, exhibits, and certification of counsel that the City submitted in the underlying scope of negotiations petition, and the brief, exhibits, and certification of Walter Thompson, Fire Captain and former PFOA President, submitted by the PFOA in the underlying scope of negotiations petition.

On January 10, 2020, following the parties' oral arguments, I issued a brief written Order denying the City's application for interim relief. N.J.A.C. 19:14-9.5(b)2.[1/] The Order stated that a written decision will follow.[2/] N.J.A.C. 19:14-9.5(b)3.

1/ "An interim relief decision dismissing an application may be made by: . . . 2. An order, issued at the end of the proceedings on the return date, containing a brief statement of reasons for denying the application"

2/ "An interim relief decision dismissing an application (continued...)

FINDINGS OF FACT

The PFOA represents all uniformed fire officers, excluding firefighters, employed by the City. The City and PFOA are parties to a CNA effective from January 1, 2018 through December 31, 2021. The parties' previous two CNAs were effective from 2010-2012 (extended by an MOA through 2013) and 2014-2017.

On June 28, 2011, prior to the execution of the parties' 2010-2012 CNA, P.L. 2011, c. 78 (Chapter 78) was enacted. The health benefits premium contributions mandated by Chapter 78 were therefore effective for PFOA members almost immediately, rather than at the completion of the yet to be executed 2010-2012 CNA.[3/] On or around July 1, 2011, PFOA members began health premium contributions at the levels required by N.J.S.A. 52:14-17.28c, to be phased in over four years (the Chapter 78 "tiers") per N.J.S.A. 52:14-17.28d(a) (applicable to SHBP and SEHBP) and

2/ (...continued) may be made by: . . . 3. A written decision including findings of fact and conclusions of law."

3/ N.J.S.A. 52:14-17.28d(c) (applicable to State Health Benefits Program (SHBP) and School Employees' Health Program (SEHBP) members) and N.J.S.A. 40A:10-21.1(d) (applicable to other health benefits coverage) provide that the required employee health premium contributions commence:

> "upon the effective date of P.L. 2011, c. 78 if such an agreement [CNA] has expired before that effective date with the contribution required for the first year under subsection a. of this section commencing in the first year after that effective date."

N.J.S.A. 40A:10-21.1(a) (applicable to other health coverage).[4/] Thompson certifies that the PFOA members progressed through the required health premium contribution tiers each year and completed tier four on December 31, 2014.[5/] PFOA members continued making the full tier four Chapter 78 contributions through the remainder of the 2014-2017 CNA.

Beginning with the 2013 MOA, the parties added language to the section of the CNA regarding active employee health benefit contributions stating that the City "agrees to comply with Chapter 78 P.L. of 2011." That language was again agreed to for the 2018-2021 CNA, and current PFOA employees continue to make health premium contributions at the Chapter 78 tier four levels. During oral argument, the City did not dispute that employee health benefit contributions had been fully phased in during the 2014-2017 CNA but had become negotiable again for the 2018-2021 CNA; nor did the PFOA dispute that it had agreed to continue employee health benefit contributions at the tier four Chapter 78 levels for the 2018-2021 CNA.

4/ The City provided health benefits through the SHBP when it began implementing Chapter 78, but left the SHBP effective January 1, 2015.

5/ The PFOA's brief also states that Chapter 78 contributions were fully phased in by June 30, 2015. (PFOA Brief, p. 11). Given a July 1, 2011 start date for the contributions, June 30, 2015 seems more plausible because it is four years from the start of contributions. Regardless, there was no dispute between the parties that the PFOA completed tier four during the 2014-2017 CNA.

During negotiations for the 2018-2021 CNA, the PFOA proposed that effective January 1, 2018, retiree health benefits would be provided by the City at no cost to the retiree. The 2018-2021 CNA contained the following retiree health benefits language:[6/]

> The City agrees at its sole expense to continue the health insurance coverage for employee, spouse and eligible dependents for those employees who retire, as such retirement is defined by P.F.R.S. Said health insurance coverage shall be the same coverage as provided to City employees.

This language was also in the 2010-2012 and 2014-2017 CNAs. The parties dispute whether the 2018-2021 CNA was intended to provide health insurance at no cost to future retirees.

PFOA member W.O. began employment with the City on June 29, 1992 and retired effective March 1, 2019. PFOA member V.S. began employment with the City on June 29, 1992 and retired effective July 1, 2018. PFOA member R.C. began employment with the City on June 29, 1992 and retired effective January 1, 2019. All three retirees (hereinafter "grievants") retired during the term of the 2018-2021 CNA. Upon retirement, W.O. and V.S. continued participating in the City's health insurance program, but at no cost. Thompson certifies that R.C. also believed he was entitled to retiree health benefits provided by the City at no cost. It

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6/ The version of the 2018-2021 CNA provided by the PFOA contains this language at Section 12.8(B) of Article XII, while version provided by the City contains this language at Section 13-6(B) of Article XI. Regardless of which version is the final, current CNA, the language is identical.

was not until July 1, 2019 that the City began charging these grievants for contributions towards their retiree health care. Thompson certifies that prior to the retirements of these grievants, PFOA retirees were subject to Chapter 78 but that all of the retirees who had retired when Chapter 78 was being phased in were exempt from the contributions because they had reached 20 years of service by June 28, 2011.

By letter of April 17, 2019, the City notified the PFOA that pursuant to its interpretation of Chapter 78, it would begin requiring health care premium contributions for current and future retirees who had not achieved 20 years of service in a state or local retirement system as of June 28, 2011, the effective date of Chapter 78. The April 17 letter stated:

> The City plans to begin the practice of billing retirees who did not have 20 years of pension credit by June 28, 2011 on July 1, 2019. In an effort to ensure a smooth transition for retirees, the City will phase in the amount retirees will owe. Beginning July 1, 2019, the billing rate will be calculated at Year 2 Level using the retiree's pension dollar figure to calculate their contribution. In January, 2020 the billing rate will be calculated at a Year 3 Level and in January 2021 the billing rate will reach the Year 4 Level.

By letter of May 1, 2019, the City notified PFOA retirees that:

> Chapter 78 requires that all public employees who retire after the effective date (June 28, 2011) and receive employer paid health benefits contribute to their health insurance costs similarly to the way active employees contribute. A key exception is that this

> does not apply to retirees that had 20 years or more of service in a state or local retirement system as of June 28, 2011. . . . Effective July 1, 2019, the City will begin the practice of billing retirees who did not have 20 years of pension credit by June 28, 2011 the contribution for their health insurance.

On May 7, 2019, the PFOA filed a grievance challenging the City's decision to no longer provide retiree health benefits at no cost as a unilateral change in benefits in violation of the 2018-2021 CNA. On June 19, the PFOA filed a request for binding arbitration (Docket No. AR-2019-648). The City's scope of negotiations petition and this interim relief application ensued.

STANDARD OF REVIEW

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

In a scope of negotiations determination, the Commission's 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, the Commission does not consider the contractual 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 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 (¶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 restraint of binding arbitration is sought, a showing that the grievance is not legally arbitrable warrants issuing an order suspending the arbitration until the Commission issues a final decision. See Ridgefield Park, 78 N.J. at 154; Bd. of Ed. of Englewood v. Englewood Teachers, 135 N.J. Super. 120, 124 (App. Div. 1975).

LEGAL ARGUMENTS

The City asserts that it has a substantial likelihood of success on the merits because the issue of no cost retiree health benefits is preempted by Chapter 78, as codified at N.J.S.A. 40A:10-21.1. It argues that the Chapter 78 contributions were statutorily required of all retirees whose employers had agreed to pay all or a portion of retiree health benefits for eligible retirees under N.J.S.A. 40A:10-23, except those retirees who, per N.J.S.A. 40A:21.1(b)(3), had 20 years or more of creditable service on the June 28, 2011 effective date of Chapter 78. The City contends that even if the parties had negotiated a change in retiree health benefits for the 2018-2021 CNA, N.J.S.A. 40A:10-

21.1(b)(3) preempts the provision of no cost retiree health benefits by imposing a statutory "floor" of 1.5% of the monthly retirement allowance pursuant to N.J.S.A. 40A:10-23(b).

The PFOA asserts that the City does not have a substantial likelihood of success on the merits because the subject of the grievance is not preempted by N.J.S.A. 40A:10-21.1. It argues that the reference in N.J.S.A. 40A:10-21.1(b)(3) to N.J.S.A. 40A:10-23(b) does not preempt no cost retiree health benefits because N.J.S.A. 40A:10-23(b) specifically applies only to public employees who became members of the retirement system on or after May 21, 2010, the effective date of P.L. 2010, c. 2. The PFOA contends that N.J.S.A. 40A:10-21.2 provides that Chapter 78 health benefits contributions for both active employees and retirees are subject to collective negotiations after full implementation of Chapter 78's four tiers. It asserts that, as PFOA members reached the full Chapter 78 tier four contribution level by 2015 (during the 2014-2017 CNA), the contribution levels were subject to negotiations for the successor 2018-2021 CNA.

ANALYSIS

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); 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). Health benefits for future retirees are likewise mandatorily negotiable as long as the particular benefit at issue is not preempted by statute or regulation. Essex Cty. Sheriff, P.E.R.C. No. 2006-86, 32 NJPER 164 (¶73 2006); Watchung Bor., P.E.R.C. No. 2000-93, 26 NJPER 276 (¶31109 2000); Atlantic Cty., P.E.R.C. No. 95-66, 21 NJPER 127 (¶26079 1995). As for employees who have already retired, although an employer is not obligated to negotiate over benefits for them, a majority representative may seek to enforce alleged contractual obligations on behalf of retired employees via binding arbitration. Voorhees Tp. and Voorhees Police Officers Ass'n, P.E.R.C. No. 2012-13, 38 NJPER 155 (¶44 2011), aff'd, 39 NJPER 69 (¶27 2012) (elimination of retiree prescription co-pay benefit was arbitrable); City of Jersey City and Jersey City City PSOA, P.E.R.C. No. 2013-38, 39 NJPER 223 (¶75 2012), aff'd, 41 NJPER 31 (¶7 2014) (changes to retiree health benefit costs were arbitrable); Union City, P.E.R.C. No. 2011-73, 37 NJPER 165 (¶52 2011) (increase in retiree prescription co-pays); and Middletown Tp., P.E.R.C. No. 2006-102, 32 NJPER 244 (¶101 2006) (increase in retiree Medicare costs).

Here, the City asserts that the PFOA's grievance over what health benefits contributions the parties negotiated for future retirees in their 2018-2021 CNA and how that has been applied to

certain current retirees is preempted by Chapter 78. 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).

Section 42 of Chapter 78 was codified at N.J.S.A. 40A:10-21.1.[7/] N.J.S.A. 40A:10-21.1(a) sets forth that employees shall make health benefits premium contributions, phased in over four years, in the amounts specified in Section 39 of Chapter 78 (N.J.S.A. 52:14–17.28c), which sets forth the full contribution amounts based on salary range and coverage selected. N.J.S.A. 40A:10-21.1(b) requires certain retirees to, based on their annual retirement allowance, make the health benefits premium contribution amounts specified in N.J.S.A. 52:14–17.28c. N.J.S.A. 40A:10-21.1(b) provides, in part:

7/ As noted earlier, the City was enrolled in the SHBP prior to January 1, 2015, so the analogous Chapter 78 section (Section 40, codified at N.J.S.A. 52:14-17.28d) was technically applicable when the City began implementing Chapter 78. However, as the grievants here all retired when the City was no longer enrolled in the SHBP, and the language is identical in all relevant respects, I will conduct a preemption analysis using the statutes cited by the City that are applicable to non-SHBP local employers.

b.

(1) Notwithstanding the provisions of any other law to the contrary, public employees of an employer, as those employees are specified in paragraph (2) of this subsection, shall contribute, through the withholding of the contribution from the monthly retirement allowance, toward the cost of health care benefits coverage for the employee in retirement and any dependent provided pursuant to N.J.S.40A:10-16 et seq., unless the provisions of subsection c. of this section apply, in an amount that shall be determined in accordance with section 39 of P.L.2011, c.78 (C.52:14-17.28c) using the percentage applicable to the range within which the annual retirement allowance, and any future cost of living adjustments thereto, falls. The retirement allowance, and any future cost of living adjustments thereto, shall be used to identify the percentage of the cost of coverage.

(2) The contribution specified in paragraph (1) of this subsection shall apply to:

(a) employees of employers for whom there is a majority representative for collective negotiations purposes who accrue the number of years of service credit, and age if required, as specified in N.J.S.40A:10-23, or on or after the expiration of an applicable binding collective negotiations agreement in force on that effective date, and who retire on or after that effective date or expiration date, excepting employees who elect deferred retirement, when the employer has assumed payment obligations for health care benefits in retirement for such an employee; and

* * *

(3) Employees described in paragraph (2) of this subsection 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 shall

> not be subject to the provisions of this subsection. . . .

As summarized by the Appellate Division in New Brunswick Mun. Employees Association, 453 N.J. Super. 408 (App. Div. 2018):

> 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) requires all employees who accrue the necessary service credit and age required by Section 23, on or after the expiration of a CNA in force on the effective date of Chapter 78 for whom the employer has agreed to assume some portion of their health care costs, to contribute to those costs in accordance with subsection (b)(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, using the percentage applicable to the amount of their annual retirement allowance.
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> [453 N.J. Super. at 418.]

In this case, the grievants did not attain either the years of service for retiree health insurance (prior to the effective date of Chapter 78 or the expiration of any applicable CNA in effect at the time) to avoid application of 40A:10-21.1(b)(2)(a), or the 20 years of service (by the effective date of Chapter 78) to be exempt from Chapter 78 contributions in retirement under N.J.S.A. 40A:10-21.1(b)(3).[8/] However, the parties dispute whether the Chapter 78 contributions mandated by N.J.S.A. 40A:10-

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8/ In Hamilton Twp. Superior Officers Ass'n v. Twp. of Hamilton, 2019 N.J. Super. Unpub. LEXIS 2282, at *9 (App. Div. 2019), the Appellate Division found: "[I]t is clear that N.J.S.A. 40A:10-21.1(b)(3) applies only to public employees who had twenty or more years of creditable service on June 28, 2011."

21.1(b) were still applicable to future retirees following the 2014-2017 CNA so as to preempt the PFOA from negotiating for lower contribution levels in the 2018-2021 CNA. They also dispute whether, even if Chapter 78 no longer applied, the City was preempted by the final paragraph of N.J.S.A. 40A:10-21.1(b)(2)(a), in conjunction with N.J.S.A. 40A:10-23(b), from negotiating health benefit contributions of less than 1.5% of the grievants' retirement allowance.

Section 79 of Chapter 78, codified as N.J.S.A. 40A:10-21.2, provides that health benefits contributions become negotiable again "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)." N.J.S.A. 40A:10-21.2 also provides that: "After full implementation, those [Chapter 78] 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." In Fairfield Tp., P.E.R.C. No. 2019-31, 45 NJPER 309 (¶80 2019), the Commission held that, per N.J.S.A. 40A:10-21.2, negotiations over employee health benefit contributions for the contract following the one in which the parties reached full Chapter 78 implementation were no longer preempted by Chapter 78. See also, Gloucester Tp., P.E.R.C. No. 2019-4, 45 NJPER 82 (¶21

2018) (retiree health contributions could not be negotiated below Chapter 78 levels until the expiration of the contract during which the unit reached full implementation). As N.J.S.A. 40A:10-21.2 refers to full implementation of the premium share set forth in N.J.S.A. 52:14–17.28c, which, as discussed above, is applicable to both employees and certain retirees through N.J.S.A. 40A:10-21.1, and N.J.S.A. 40A:10-21.2 contains no language specifically prohibiting the negotiation of future retiree benefits following full implementation of Chapter 78 contribution levels, I find that negotiations over future retiree health benefits contributions were not preempted by Chapter 78 following the parties' 2014-2017 CNA.

N.J.S.A. 40A:10-21.2's only limitation specific to retirees is that a retiree who retired while the Chapter 78 contributions were in effect must continue in retirement to make such Chapter 78 health benefit contributions regardless of the expiration of N.J.S.A. 40A:10-21.1.[9/] Based on the record, all PFOA members who retired while Chapter 78 contributions were applicable to the unit had the requisite 20 years of service to be exempt from its

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9/ The final paragraph of N.J.S.A. 40A:10-21.2 provides: "A public employee whose amount of contribution in retirement was determined in accordance with section 42 or 44 shall be required to contribute in retirement the amount so determined pursuant to section 42 or 44 notwithstanding that section 42 or 44 has expired, with the retirement allowance, and any future cost of living adjustment thereto, used to identify the percentage of the cost of coverage."

requirements (per N.J.S.A. 40A:10-21.1(b)(3)). As this case does not involve an attempt to negotiate reductions in health benefits contributions of any current retirees who retired when Chapter 78 contributions were statutorily mandated, the restriction set forth in N.J.S.A. 40A:10-21.2 does not preempt the grievance.

In addition to the statutory language itself and Commission precedent in Fairfield Tp. and Gloucester Tp., the determination that future retiree health benefits became mandatorily negotiable and no longer subject to Chapter 78 levels following the expiration of the parties' 2014-2017 CNA is supported by the Appellate Division's unpublished Hamilton Tp. decision, 2019 N.J. Super. Unpub. LEXIS 2282, cited in Footnote 8 above. In that case, while finding that the retiree in question was bound by the Chapter 78 fourth tier level contributions according to the language of the CNA under which he retired, the court recognized that retiree health contributions would become negotiable again upon expiration of that CNA. It stated:

> As noted, the ability to negotiate health contribution levels did not occur until SOA CNA #2 expired on December 31, 2018. Employees and retirees governed by SOA CNA #2 remained subject to Chapter 78's mandatory contributions until its expiration. See N.J.S.A. 40A:10-21.2. Therefore, since Walters retired on July 1, 2017, before SOA CNA #2 expired, he remains subject to Chapter 78's mandatory contributions during retirement. See N.J.S.A. 40A:10-21.1.
>
> [Hamilton Tp., 2019 N.J. Super. Unpub. LEXIS 2282, at *8.]

The court thus applied N.J.S.A. 40A:10-21.2 to the retiree health contributions requirements of N.J.S.A. 40A:10-21.1, finding that the contributions would no longer be mandatory for retirees after the expiration of that CNA. Here, unlike the retiree in Hamilton Tp., the grievants retired during the CNA that followed the one in which Chapter 78 was fully implemented, and the new CNA allegedly provided for no cost retiree health benefits. Because retiree health benefits contributions were no longer preempted, they were negotiable; therefore the question of what retiree health benefits the parties had agreed to in the 2018-2021 CNA and how they apply to the grievants is legally arbitrable.[10/]

Moreover, the Chapter 78 retiree contribution language quoted in the City's brief from Local Finance Notice 2011-20R, a publication of the New Jersey Department of Community Affairs, Division of Local Government Services, does not speak to whether or when retiree health benefit contributions become negotiable following Chapter 78 implementation. However, the Division of Local Government Services has issued guidance on this issue in the "2011 Health Benefits Reform" section of the Division's

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10/ During oral argument, the parties agreed that this case does not implicate the issues present in Ridgefield Park Bd. of Educ. and Ridgefield Park Educ. Association, 459 N.J. Super. 57 (App. Div. 2019), concerning whether, under certain circumstances, health benefits contributions could become subject to collective negotiations after full Chapter 78 implementation but prior to the expiration of the CNA in which full implementation was reached.

"Financial Administration" resource section.[11/] The "Health Benefits Reform/Webinar Presentation" by the then-Deputy Director of the Division of Local Government Services contains a section specifically dealing with negotiating future contracts after Chapter 78 implementation. It provides (emphasis added):

> NEGOTIATION OF FUTURE CNAS (S.77 AND 79)
> At end of 4th year, c.78 provides that:
> - All provisions of sections 39, 40 & 42 remain in place until fully phased-in
> - Negotiation for next contract is conducted as if the full contribution was a part of the previous contract
> - The contribution structure is negotiable
> - Future retiree benefit contribution structure can be negotiated; but employees who retired cannot have their contributions changed

This guidance by the State's Division of Local Government Services, while not binding on the Commission,[12/] is consistent with the court's interpretation in Hamilton Tp., and therefore further supports my determination that the issue is legally arbitrable.

11/ https://www.nj.gov/dca/divisions/dlgs/resources/fa_docs/school_keys_to_health_benefit_reforms.pdf

12/ Guidelines such as Local Finance Notices, FAQ's, Fact Sheets, or letters from agency officials can provide further insight and merit consideration especially when, as here, they represent the practical interpretation of the statute by the agency charged with instructing local governmental units on how to comply with a new law. See Brick Twp. PBA Local 230 v. Brick Twp., 446 N.J. Super. 61, 70-71 (App. Div. 2016); Paterson Police PBA Local 1 v. City of Paterson, 433 N.J. Super. 416, 429 (App. Div. 2013).

I next turn to the City's contention that, even if retiree health contributions had become negotiable, the parties were preempted by the final paragraph of N.J.S.A. 40A:10-21.1(b)(3) from agreeing to contributions of less than 1.5% of retirees' retirement allowance. N.J.S.A. 40A:10-21.1(b)(3) provides, in relevant part (emphasis added):

> The amount payable by a retiree under this subsection shall not under any circumstance be less than the 1.5 percent of the monthly retirement allowance, including any future cost of living adjustments thereto, that is provided for such a retiree, if applicable to that retiree, under subsection b. of N.J.S.40A:10-23. A retiree who pays the contribution required under this subsection shall not also be required to pay the contribution of 1.5 percent of the monthly retirement allowance under subsection b. of N.J.S.40A:10-23.

I do not find that this section of Chapter 78 sets a preemptive statutory floor that is applicable to retirees situated as the grievants are in this case. First, the entire subsection is predicated on being imposed only on "a retiree under this subsection" (i.e., subsection N.J.S.A. 40A:10-21.1(b) that applies Chapter 78 contributions to certain retirees). Thus, for retirees such as the grievants who upon retirement were not subject to mandatory Chapter 78 contributions under this subsection, this paragraph does not apply at all. It applies a 1.5% floor for certain retirees who are subject to the Chapter 78 contributions in retirement, in case the calculated Chapter 78

contributions per N.J.S.A. 40A:10-21.1(b)(1) and N.J.S.A. 52:14–17.28c based on their retirement allowance are less than 1.5% of their retirement allowance.

Furthermore, the statute limits application of this 1.5% floor to only those retirees for whom the 1.5% floor was applicable pursuant to N.J.S.A. 40A:10-23(b) (enacted as part of P.L. 2010, c. 2). N.J.S.A. 40A:10-23(b), in turn, provides (emphasis added):

> An employee who becomes a member of a State or locally-administered retirement system on or after the effective date [May 21, 2010] of P.L.2010, c.2 shall pay in retirement 1.5 percent of the retiree's monthly retirement allowance, including any future cost-of-living adjustments, through the withholding of the contribution from the monthly retirement allowance, for health care benefits coverage provided under N.J.S.40A:10-22, notwithstanding any other amount that may be required additionally by the employer or through a collective negotiations agreement for such coverage. This subsection shall apply also when the health care benefits coverage is provided through an insurance fund or joint insurance fund or in any other manner. This subsection shall apply to any agency, board, commission, authority, or instrumentality of a local unit.

Thus, by reference to N.J.S.A. 40A:10-23(b), the 1.5% contribution floor applicable to Chapter 78 retirees contained in N.J.S.A. 40A:10-21.1(b)(3) is only applicable to those retirees who became members of a State or local retirement system on or

after May 21, 2010, the effective date of P.L. 2010, c. 2.[13/] The legislative history of Chapter 78 supports this interpretation. The Senate Budget & Appropriations Comm. Statement to S. 2937 (June 16, 2011) provides: "A 1.5% 'floor', for those retirees to whom the 1.5% contribution in current law applies, will also be applicable to these retirees." (Emphasis added). As the "1.5% contribution in current law" - i.e., N.J.S.A. 40A:10-23(b) - only applied to retirees who joined the retirement system on or after May 21, 2010, the Senate Statement supports a finding that the 1.5% floor contained in N.J.S.A. 40A:10-21.1(b)(3) was not generally applicable to all Chapter 78 retirees.

Accordingly, as the grievants identified in this case have all been employed with the City since 1992, long before the operative date of the 1.5% retiree health benefit contributions floor, and because they were not subject to mandatory Chapter 78 contributions levels in retirement, the 1.5% floor set forth in N.J.S.A. 40A:10-21.1(b)(3) is inapplicable and does not preempt negotiations or arbitration over lower contribution levels.

13/ See New Brunswick Mun. Emps. Ass'n, supra, 453 N.J. Super. at 415, wherein the Appellate Division described N.J.S.A. 40A:10-23(b) as "requiring those employees becoming members of the retirement system on or after May 21, 2010, the statute's effective date, to pay 1.5 percent of their pension benefit toward the cost of their health coverage . . . Chapter 2 ended the ability of those governments to pay the entire cost of coverage for any retiree becoming a member of the retirement system after the statute's effective date . . ."

Compare Fairfield Tp., P.E.R.C. No. 2019-31, supra (negotiations for employee health benefit contributions after full Chapter 78 implementation are subject to the 1.5% floor set forth in N.J.S.A. 40A:10-21(b), which is not circumscribed by the date the employee joined a retirement system).

Given the legal precepts set forth above, I find that the City has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal allegations, a requisite element to obtain interim relief under the Crowe factors.[14/] I accordingly deny the application for interim relief. This case will be referred to the Commission for final disposition.

ORDER

The City of Plainfield's application for an interim restraint of binding arbitration is denied pending the final decision or further order of the Commission.

/s/ Frank C. Kanther
Frank C. Kanther
Commission Designee

DATED: January 16, 2020
Trenton, New Jersey

14/ As a result, I do not need to conduct an analysis of the other elements of the interim relief standard.