IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Douglas Soule,	:	
Appellant	:	
	:	
v.	:	
	:	No. 2250 C.D. 2010
Nether Providence Township	:	Argued: October 17, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY Filed: December 30, 2011

David Soule (Soule) appeals from an order of the Court of Common Pleas of Delaware County (common pleas court) that denied Soule's petition to vacate the Grievance Arbitration Award issued pursuant to Act 111[1] by Steven Wolf, Esquire (Arbitrator Wolf).

Soule is a retired member of the Nether Providence Township Police Department. He sustained an on-duty injury, and as a result, he began his service-connected disability retirement in February 2005. He was at that time fifty-five years old.

[1] The Act of June 24, 1968, P.L. 237, as amended, 43 P.S. §§ 217.1–217.10 is known as Act 111. Act 111 governs collective bargaining between public employers and their police and fire departments.

Soule qualified for a permanent, tax-exempt, *service-connected disability pension*, pursuant to Article 28(A) of the parties' 1990-1992 collective bargaining agreement (1990-1992 CBA) which provided:

> **Service Connected Disability**. If a covered employee is totally and permanently disabled as the result of a service connected disability, he shall receive one hundred (100%) percent of his wages as currently calculated for the present benefit, less any applicable Workers' Compensation or Social Security. In no event shall this benefit exceed one hundred (100%) percent of wages as received in the twelve (12) months prior to his retirement because of the disability.

The parties, however, did not agree on whether Soule was entitled to *post-disability retirement health insurance benefits*, without cost, for him and his family.

Pursuant to a Settlement Agreement executed in February 2005, the Township agreed to place Soule and his family on continuing coverage, at no cost, *pending resolution of the grievance* filed by the Fraternal Order of Police (FOP) on the matter of Soule's entitlement to post-retirement health insurance coverage. The issue before the Grievance Arbitrator was whether the Township was obligated under the 1990-1992 CBA to provide post-retirement medical benefits to an officer, who is fifty-five years or older but retires due to a service-connected disability.

On March 3, 2005, the parties entered into a Memorandum of Agreement which provided that: (1) the 1990-1992 CBA will be amended to reflect the outcome of Soule's pending grievance award; and (2) the parties will submit to interest arbitration the issue of what post-retirement medical benefits

must be provided when an officer, regardless of his age, retires due to a service-connected disability.

A grievance arbitration hearing was held before John M. Skonier, Esquire (Arbitrator Skonier) on May 6, 2005. Arbitrator Skonier ruled that the Township had historically paid contractually mandated "normal" retirement benefits, including severance pay and life insurance, to officers age fifty-five or older who retired on a service-connected disability pension. He concluded that the Township had violated the 1990-1992 CBA when it failed to provide post-retirement medical benefits to Soule.

Pursuant to the Memorandum of Agreement dated March 3, 2005, Article 28, § A. of the 1990-1992 CBA was duly amended to add the following:

> The Township shall provide medical and health coverage for an Officer and his family for any Officer on a Service-Connected Disability until such Officer reaches Medicare eligibility. All categories of premium caps shall apply. The Officer is also eligible to participate in the opt-out program. (emphasis added).

Interest Arbitration Award at 2; R.R. at 40a.

In compliance with the May 6, 2005, grievance arbitration award and the Amended 1990-1992 CBA, the Township continued to provide Soule (and his family), at no cost, the full panoply of health/medical insurance coverage and benefits enjoyed as of the effective date of Soule's service-connected disability retirement.

In 2008, the Township and FOP entered into a new CBA, effective from January 1, 2008, through December 31, 2012, which was applicable to the active officers in the bargaining unit. Pursuant to the new CBA, FOP agreed to increases in medical co-payments for members of the bargaining unit, in exchange for, significant annual wage increases, night differential and longevity payments in addition to other enhanced employment benefits. Patient co-payments were increased as follows: for Primary Physician, $2.00 to $10.00; for Specialist Physician, $0 to $15.00; for Emergency Room visits, $15.00 to $35.00; and for Prescription Coverage, $1.00/$3.00 (generic) to $4.00/$8.00 (brand).

In February, 2009, Soule received a "new" medical insurance card, which noted, as of January 1, 2009, he was subject to the increased patient co-payments.

On March 11, 2009 the FOP filed a grievance to contest the Township's unilateral changes in Soule's post-retirement health insurance coverage and benefits.

On May 4, 2010, Arbitrator Wolf, issued a Grievance Award which denied the FOP's grievance and ruled that the Township was authorized to alter Soule's post-retirement medical insurance benefits by imposing the increased patient co-payments.

The FOP petitioned to the common pleas court for review and argued that Arbitrator Wolf: (a) exceeded his specific power and authority specified in the collective bargaining agreement; (b) imposed upon Soule a deprivation of constitutional rights, insofar as he authorized "vested" retirement benefits to be

taken or removed from Soule without the benefit of collective bargaining, mandated by Act 111, and without any consideration being required from the Township; (c) reformed the collective bargaining agreement provision for vested post-retirement medical benefits to be provided to all retirees, without collective bargaining required by Act 111; (d) violated the express directive set forth in the May 6, 2005, grievance arbitration award which required the Township to provide Soule and his family with post-retirement medical benefits as of the date of his disability retirement; and (e) violated the FOP's collective bargaining rights, guaranteed under Act 111. See Petition for Review of Act 111 Grievance Arbitration Award, May 21, 2010, Paragraphs 1-12 at 1-5.

The common pleas court denied the FOP's petition and concluded:

> The substance of the bone of contention is monumentally minor. Quite simply, should one particular claimant, a service-connected disabled (and retired) veteran of the Nether Providence Police Force be entitled to a non co-pay arrangement for his medical insurance *ad infinitum* . . . .
> . . . .
> The peculiarities of this case have been carefully set out in the Arbitrator's decision and after carefully reviewing the submissions of counsel we see no grounds, either procedural or substantive, giving us power to set aside the Award. The Arbitrator's decision carefully weighs the information provided and reaches a conclusion that falls well within the bounds of his commission. In short, we lack the authority to conduct a review of the Arbitrator's decision.
>
> Even if we possessed such power, we would adopt his decision, by reference, as our own. We are satisfied that the concerns of Act 111 and the parties have been properly and legitimately litigated and that the Arbitrator's analysis and his outcome were firmly based on the facts and the law. (emphasis added).

Opinion of the Common Pleas Court, December 30, 2010, at 1-2.

On appeal[2], Soule raises one issue: Did the common pleas court err when it failed to conclude that Arbitrator Wolf's May 4, 2010, Act 111 Grievance Award was "in excess of his authority."

Specifically, Soule contends that whenever health and medical coverage is part of a police officer's retirement benefit, that benefit may not be eliminated, diminished, or in any way diluted after the effective date of the officer's retirement. He claims that once he was retired, he was no longer subject to the FOP/Township's collective bargaining process. He contends that his "contractual rights" to lifelong medical benefits at a *set co-pay* was vested, and non-negotiable, basically "set in stone." He claims that the Township unilaterally changed his post-retirement health and medical insurance plan by implementing increases in his existing co-pays which, in turn, required him to incur *increased* out-of-pocket expenses.

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[2] This Court's scope of review in an appeal of a grievance arbitration award under Act 111 is narrow certiorari. Pennsylvania State Police v. Pennsylvania State Troopers' Association (Betancourt), 540 Pa. 66, 656 A.2d 83 (1995). Narrow certiorari permits inquiry only into the following four aspects of an Act 111 arbitrator's award: (1) the jurisdiction of the arbitrator; (2) the regularity of the proceedings; (3) an excess of the arbitrator's powers; or (4) deprivation of constitutional rights.

The standard by which this Court reviews an arbitrator's determination of these issues depends on the nature of the issue in the case. Pennsylvania State Police v. Pennsylvania State Troopers' Association, 840 A.2d 1059 (Pa. Cmwlth.), appeal denied, 578 Pa. 711, 853 A.2d 363 (2004). Where resolution of the issue turns on a pure question of law, or the application of law to undisputed facts, our review is plenary. However, where, as here, it depends upon fact-finding or upon interpretation of the collective bargaining agreement, the extreme standard of deference applicable to Act 111 awards is applied; that is, we are bound by the arbitrator's determination of these matters even though the Court finds it to be incorrect. Id.

In Boyd v. Rockwood Area School District, 907 A.2d 1157 (Pa. Cmwlth. 2006), *appeal denied*, 591 Pa. 717, 919 A.2d 959 (2007), this Court ruled that a public employer may alter post-retirement benefits for currently retired unionized public employees based upon the language of the collective bargaining agreement in place at the time of the retirement. In that case, the Rockwood Area School District (school district) changed health plans and altered benefits. The retirees claimed that they were "vested" in and entitled to the same benefits in effect when they retired. This Court disagreed. The language of the collective bargaining agreement enabled the school district to change benefits for current retirees to match benefits provided to active employees. The Rockwood Court, in addition to noting that the contract that granted the benefits did not state that they would remain unchanged forever, emphasized that since the act of "vesting" retiree health benefits renders them "forever unalterable," an employer's commitment to vest such benefits "is not to be inferred lightly and must be stated in clear and express language." Rockwood, 907 A.2d at 1164. The court found no such language in the parties' collective bargaining agreement.

In order for Soule to prevail, the parties' intent with respect to whether co-pays may be increased must be stated in "clear and express language" in the 1990-1992 CBA. Therefore, at the outset, it must be determined whether the CBA provided the retirees with a vested, unalterable right to a fixed amount of co-pays.

Having reviewed the CBA, this Court must agree with the common pleas court that, based on the express language of the CBA, the parties did not

intend to forever bind the Township to provide retirees with healthcare subject to a predetermined set co-pay. The CBA provided that the Township "shall provide medical and health coverage for an Officer and his family for any Officer on a Service-Connected Disability until such Officer reaches Medicare eligibility." There is nothing in the CBA which prevented the Township from requiring Soule to pay increases in co-pays. In fact, there is no language which suggests that the Township must provide the retirees with any specific health plan. It does not reference any specific benefits, the number of doctor visits, or the co-pays, or the type of plan in general. It only provides that the Township was to provide some type of health plan to all officers, whether active, retired, or on a service-connected disability, until that officer reaches Medicare eligibility. Normal retirees and service-connected disabled retirees were all entitled to receive the same health care coverage afforded to active officers, whatever that may be. The CBA did not establish a fixed co-pay.[3]

Here, Soule had a right to the continued receipt of health care coverage from the Township. That right was not altered or affected by the Grievance Arbitrator. Accordingly, under *the narrow certiorari* scope of review, this Court will not vacate the Arbitrator's decision because it was not unlawful and

[3] Moreover, this Court notes it is neither unusual nor unexpected for a public employer not to agree to provide a specific health plan or a specific co-pay for life because, unlike the funding of pension benefits, health care costs do not remain the same. A co-pay is a fee paid for a doctor visit or to obtain a prescription. The amount of the co-pay is dependent upon a third party not bound by the terms of the CBA, i.e. the insurer. So, for the Township to have agreed to set the co-pays for a retiree's lifetime would be contrary to the practical realities of health care. The Arbitrator recognized this fact and the fact that the Township's actions were not clearly and expressly prohibited by the contract language that was in place when Soule retired.

did not require the Township to perform an unlawful act or do something that the Township could not do voluntarily.

The order of the common pleas court is affirmed.

BERNARD L. McGINLEY, Judge

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v.	:	
Nether Providence Township	:	No. 2250 C.D. 2010

O R D E R

AND NOW, this 30th day of December , 2011, the order of the Court of Common Pleas of Delaware County in the above-captioned matter is affirmed.

BERNARD L. McGINLEY, Judge