

I.R. No. 2005-14

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF PARAMUS,

Respondent,

-and-

Docket No. CO-2005-303

TEAMSTERS LOCAL 97,

Charging Party.

SYNOPSIS

Appendix B of the collective negotiations agreement conferred paid retiree health benefits to employees retiring at age 62 or older with 15 years of service to the Borough. The Borough asserts that it never adopted a resolution pursuant to N.J.S.A. 40A:10-23 conferring the benefit at issue. Local 97 contends that the Borough repudiated the collective agreement. The Commission Designee found that N.J.S.A. 40A:10-23 does not control because the Borough is in the SHBP. N.J.S.A. 52:14-17.38 permits the Borough to enter into a binding collective agreement to pay the health benefit to eligible employees, including those at age 62 or older with 15 years of service to the Borough. She also found that if N.J.S.A. 52:14-17.38 requires the adoption of a resolution, under Op. of Denville, P.E.R.C. No. 81-146, the Borough would be required to take the necessary steps to effectuate the terms of its negotiated agreement by adopting a resolution, not unilaterally cancelling the benefit. Thus, the Designee concluded that it appeared the Borough repudiated the collective agreement and found that Local 97 had satisfied the other elements for granting of interim relief. Consequently, the Designee restrained the Borough from repudiating the terms of the parties' collective agreement by unilaterally eliminating paid medical benefits for employees who retire at the age of 62 or older with 15 years of service to the Borough and ordered the Borough to adhere to the terms of Appendix B and provide eligible employees with the appropriate level of paid medical benefit premiums in retirement.

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Appearances:

For the Respondent, Mets & Schiro, attorneys (James M. Mets, of counsel)

For the Charging Party, Eric Bernstein, attorney

INTERLOCUTORY DECISION

On May 31, 2005, Teamsters Local 97 (Local 97) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Borough of Paramus (Borough) violated subsection 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a(1) et seq. (Act).<sup>1/</sup> Local 97 contends that the Borough repudiated a

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<sup>1/</sup> These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

provision of the parties' collective negotiations agreement by unilaterally eliminating a portion of Appendix B providing paid post-retirement medical benefits for employees who have reached the age of sixty-two (62) or older and have at least fifteen (15) years of service with the Borough. Local 97 seeks an order requiring the Borough to reinstate the terms and conditions of employment that existed prior to the unilateral elimination of this retirement benefit.

The Borough denies that it has repudiated the parties' collective agreement. It asserts that Appendix B should not have been included in the collective agreement because it is beyond the enabling power of the Borough, and its inclusion was an ultra vires act. Specifically, it contends that the language in Appendix B providing paid retiree health benefits for employees who retire after age sixty-two with at least fifteen years of service to the Borough is unenforceable, because it was not adopted by resolution as required by the statutory scheme in N.J.S.A. 40A:10-23.

The unfair practice charge was accompanied by an application for interim relief. On June 1, 2005, I executed an Order to Show Cause establishing a return date for June 20, 2005. The parties submitted briefs, affidavits and exhibits in accordance with the Commission rules and argued orally on the scheduled return date. The following facts appear.

Local 97 represents all permanent blue collar workers employed by the Borough of Paramus. The Borough and Local 97 are parties to a collective negotiations agreement effective from January 1, 2004 through December 31, 2007. The agreement was executed by Mayor James J. Tedesco III on behalf of the Borough and Local 97 President John Gerow and various negotiations unit members and ratified by the parties.

Appendix B of the agreement, entitled N.J.S.A. 40:10-23  
Payment of Premiums After Retirement, provides in pertinent part:

A. Retired employees not covered under paragraph B of this Appendix shall be required to pay for the entire cost of coverage for themselves and their dependants at rates which are deemed to be adequate to cover the benefits, as affected by Medicare, of the retired employees and their dependents on the basis of the utilization of services which may be reasonably expected of the older age classification; provided, however, that the total rate payable by a retired employee for himself and his dependents for coverage under the contract and for Part B of Medicare, shall not exceed by more than twenty-five (25%) percent the total amount that would have been required to have been paid by the employee and his employer for the coverage maintained and had he continued in office or active employment and he and his dependents were not eligible for Medicare benefits.

B. The Borough shall assume the entire cost of such coverage and pay all of the premiums for employees who have retired on a disability pension or after twenty-five (25) years or more service with the employer, or have retired and reached the age of sixty-two (62) or older with at least fifteen (15) years of service with the employer, including the premiums on their dependents, if any,

under uniform conditions as the governing body of the local unit shall prescribe.  
[emphasis added]

Appendix B has been included, essentially without change, in the parties' collective agreements since January 1992. In the current collective agreement, the parties deleted the words "in its discretion" from line 1 of paragraph B after the words "The Borough shall. . .".

Calvin Koenig is seventy-seven (77) years old and has been employed by the Borough of Paramus for seventeen (17) years. In preparation for his retirement on June 1, 2005, Koenig spoke to the Borough employee who handles retirement applications and was informed that he would not be eligible for paid medical insurance coverage without twenty-five years of service with the Borough. Koenig cannot afford the premiums for medical insurance and may forego medical treatment without such insurance coverage.

Koenig advised Patrick Guaschino, director of public employee sector and acting recording secretary for Local 97, of the Borough's response to his retirement application. Guaschino spoke to several representatives of the Borough including Mayor James Tedesco regarding the Koenig situation. On or about May 10, 2005, Mayor Tedesco announced at a Borough Council meeting that the Borough would not offer retirement benefits to employees with less than twenty-five (25) years of service with the Borough.

On May 11, 2005, Local 97 filed a grievance seeking to enforce the provisions of Appendix B of the parties' collective agreement. The Borough denied the grievance stating that "[t]he clause referred to in the grievance (retirement after 15 years-age 62) was never adopted by the Borough of Paramus. Having included that clause in the contract was an ultra vires act, that is, it is beyond the enabling power of the Borough and should be removed."

According to the certification of Donald Cirulli, director of human resources and Borough compliance officer, the Borough has never assumed the cost of health benefits for an employee retiring on a regular, non-disability pension without twenty-five years of service with the Borough. Currently, Koenig is the only Local 97 member seeking such a benefit.

In 1990, the Borough passed two resolutions under provisions of Chapter 88 (N.J.S.A. 52:14-17.38) approving enrollment in the State Health Benefits Program (SHBP) and providing for payment of retiree health benefit premiums for:

. . . all eligible retired employees and their dependents covered under the program, including surviving spouses, if such employees retired from a State or locally-administered retirement system effective after the date the employer adopted the State Health Benefits Program on a benefit based on **25 years or more of service** credited in such retirement system, excepting employees who elected deferred retirement, but **including the employees who retired on disability pensions** based on fewer years of service

credited in such retirement system and also to reimburse such retired employees for their premium charges under Part B of the Federal Medicare Program covering the retired employees and their spouses in accordance with the regulations of the State Health Benefits Commission. [emphasis added]

According to the parties, the Borough is still enrolled in the SHBP.

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).

The essence of Local 97's claim is that the Borough repudiated the parties' collective negotiations agreement by refusing to provide benefits under Appendix B to members who retire at age sixty-two with fifteen years of service to the Borough. There is no dispute as to the meaning of Appendix B. The Borough asserts as a defense that under N.J.S.A. 40A:10-23, it could only confer that benefit (62/15) by resolution or

ordinance. Since it only adopted resolutions in 1990 granting retiree health benefits to employees with twenty-five years of service or who have retired on disability, the provision contained in Appendix B of the parties' collective agreement extending benefits to employees retiring at age sixty-two with fifteen years of service is unenforceable. In essence, the Borough asserts that the N.J.S.A. 40A:10-23 requirement to adopt retiree paid health coverage by resolution has a preemptive effect on the duty to negotiate.

In New Jersey Department of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), the Commission held that allegations setting forth at most a mere breach of contract do not warrant the exercise of the Commission's unfair practice jurisdiction. There are exceptions, specifically, relating to claims of repudiation where the contract clause is so clear that an inference of bad faith arises from a refusal to honor it. Id. at 422-423.

This matter falls within the exception to Human Services. Here, the language of the collective agreement is clear. Appendix B specifically provides for paid retirement medical health coverage for, among others, employees who retire at age sixty-two or older and with at least fifteen years of service to the Borough. This benefit has been in the parties' collective agreement for at least thirteen years.



Our case law provides, that health benefits for future retirees are mandatorily negotiable as long as the benefit at issue is not preempted by statute or regulation. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975), app. dis'd as moot App. Div. Dkt. No A-8-75 (6/24/76), certif. den. 70 N.J. 150, (1976). A statute will not preempt negotiations unless the statute fixes an employment condition specifically, expressly, and comprehensively, thus eliminating the employer's discretion to vary that employment condition. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n., 91 N.J. 38, 44 (1982). The Borough asserts a statutory preemption claim, namely that N.J.S.A. 40A:10-23 only allows it to confer paid retirement health benefits by resolution.

N.J.S.A. 40A:10-22 and -23 specify four eligibility conditions under which employers not in the State Health Benefits Program (SHBP) may pay their retirees' health insurance premiums. The Commission has held that the eligibility criteria of N.J.S.A. 40A:10-23 preempt the parties from negotiating changes to those statutory conditions. Camden Cty. Sheriff, I.R. No. 2004-6, 29 NJPER 496, 498 (¶157 2003). The Borough, however, does not contend that retirement at age sixty-two with fifteen years of service to the employer is outside the parameters of those eligibility criteria. Therefore, the cases cited by the Borough

are inapposite.<sup>2/</sup> Its sole contention relates to an asserted requirement of adoption of the benefit by resolution.

In Atlantic County, P.E.R.C. No. 95-66, 21 NJPER 127 the Commission reviewed a 1994 amendment to N.J.S.A. 40A:10-23 and determined that the statute gives public employers the discretion to grant or deny paid health insurance to retirees under certain conditions and concluded that under State v. State Supervisory Employees Ass'n., 78 N.J. 54 (1978) and other preemption cases, this discretion could be exercised through collective negotiations. It further stated:

The statutory requirements that the employer adopt and file a resolution are not conditions preempting the duty to negotiate; instead these conditions may be met consistent with that duty. Thus, if an employer agrees to pay health care premiums to retirees credited with 25 years of service, it will be obligated to adopt and file a resolution to put its agreement into effect. [Id. at 128].

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2/ Respondent cites Fair Lawn Retired Policemen v. Borough of Fair Lawn, 299 N.J. Super. 600 (App. Div. 1997), certif. den. 191 N.J. 75 (1997); Wolfersberger v. Borough of Point Pleasant Beach, 152 N.J. 40 (1997); Middletown Township Policemen's Benevolent Assn. Local No. 1124 v. Township of Middletown, 162 N.J. 361 (2000) in support of its contention that Appendix B of the collective agreement is unenforceable as contrary to statute. In these cases, the employer negotiated retiree health benefits for employees who did not meet one of the four eligibility criteria set forth in N.J.S.A. 40A:10-23. For instance, in Middletown Township the employer offered medical benefits upon retirement to all employees regardless of length of service or age, while in Fair Lawn the Borough required only twenty years of service whereas the statute required twenty-five years.

Thus, it appears that the adoption of a resolution, even if required by statute, would not preclude the Borough from entering into a binding collective agreement to provide paid health benefits to retirees who meet the eligibility requirements of N.J.S.A. 40A:10-23.

However, N.J.S.A. 40A:10-23 has no preemptive effect on Appendix B for another reason. In 1990 the Borough entered the SHBP by resolution of the governing body pursuant to N.J.S.A. 52:14-17.25 et seq. The Borough still participates in that program. Thus, its ability to provide retiree health benefits is proscribed by that statutory scheme not N.J.S.A. 40A:10-23.

N.J.S.A. 52:14-17.38 specifies the conditions under which employers in the SHBP may agree to provide paid retirement medical coverage. It sets forth four eligibility criteria and mirrors N.J.S.A. 40A:10-23 in this regard, specifically, permitting the employer to provide retiree health benefits to employees who retire at the age of sixty-two or older with at least fifteen years of service to the employer. Additionally, in 1999, N.J.S.A. 52:14-17.38 was amended to add subsection b(2) which provides in pertinent part:

Notwithstanding the provisions of any other law to the contrary, **the obligations of an employer . . . to pay the premium or periodic charges for health benefits coverage under the provisions of paragraph (1) may be determined by means of a binding collective negotiations agreement, including any**

agreement in force at the time of the adoption of this act . . . . [emphasis added]

Thus, the Borough could within the parameters of N.J.S.A. 52:14-17.38 enter into a binding collective agreement to provide the benefits in Appendix B and, specifically, the benefit at issue here.

Even if the statute required the adoption of a resolution authorizing the Borough to pay the premium for an employee who retires with less than twenty-five year of service to the employer, failing to enact the resolution after negotiating the benefit is a violation of our Act. In Tp. of Denville, P.E.R.C. No. 81-146, 7 NJPER 359 (¶12162 1981), the Commission considered whether the Township committed an unfair practice when it unilaterally altered a ten year past practice regarding payment to officers who were on work related injury leave. The Commission reversed a hearing examiner's determination that the Township was without authority to make payments to officers on injury leave without first having adopted an ordinance to that effect. The Commission stated that:

While it is true that a municipality acts through ordinance, it is also specifically empowered to enter into binding and enforceable contracts with its employees by virtue of the New Jersey Employer-Employee Relations Act. Indeed, an employer is prevented by the Act from taking unilateral action with respect to terms and conditions of employment . . . .

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. . . by failing to enact an ordinance, a municipality cannot evade its responsibility not to unilaterally alter terms and conditions of employment which it had agreed upon through negotiations, or as herein, has been an established practice of longstanding duration. [Id. at 360].

The Commission concluded that "[t]he obvious solution is to enact the appropriate ordinance, not unilaterally cancel the benefit."

Id. at footnote 3. Thus, if N.J.S.A. 52:14-17.38 requires the adoption of a resolution to effectuate the terms of Appendix B, under Denville, the Borough must adopt a resolution.

Based on the foregoing analysis, I find that Local 97 has established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations that the Borough has repudiated the collective agreement by unilaterally eliminating a portion of Appendix B providing paid post-retirement medical benefits for employees who have reached the age of sixty-two (62) or older and have at least fifteen (15) years of service with the Borough.

Local 97 has established that it will be irreparably harmed by the Borough's actions. The Borough asserts that irreparable harm cannot be shown because the parties are not engaged in interest arbitration or negotiations. However, unit member Koenig has certified that he wishes to retire, but cannot afford the premiums for medical coverage and may forego necessary medical treatment. Thus, Koenig and other employees who may be

eligible for retirement because they satisfied the criteria contained in the parties' collective agreement may be wrongfully denied paid health benefits, and consequently, discouraged from exercising their option to retire or forego medical treatment if they cannot afford the cost of premiums. This is sufficient to establish irreparable harm. See Borough of Closter, P.E.R.C. No. 2001-75, 27 NJPER 289, 290 (¶32104 2001).

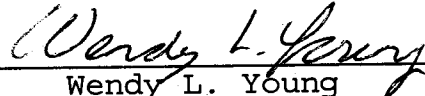
In weighing the relative hardships to the parties resulting from the grant or denial of interim relief, I find in favor of Local 97. As a result of the unilateral change in terms and conditions of employment, unit members and, in particular, Koenig may not retire or retire and either lose medical benefits or forego necessary treatments. Moreover, the public interest is fostered by requiring the Borough to adhere to the express provisions contained in the collective agreement and to adhere to the tenets of the New Jersey Employer-Employee Relations Act.

The above-captioned unfair practice matter will proceed through the normal unfair practice processing mechanism.

**ORDER**

The Borough of Paramus is restrained from continuing to repudiate the terms of the parties' collective negotiations agreement, specifically, Appendix B, by unilaterally eliminating paid medical health benefits in retirement for employees who reach the age of sixty-two (62) years with fifteen (15) years of

service with the Borough. The Borough is restrained from refusing to pay the cost of Calvin Koenig's health benefits in retirement in accordance with Appendix B of the parties' collective agreement. The Borough is ordered to make Koenig and any similarly situated negotiations unit member whole for any out-of pocket expenses that may have been incurred and demonstrated because of the Borough's repudiation of Appendix B of the parties' collective negotiations agreement. This interim order will remain in effect pending a final Commission order in this matter.



Wendy L. Young  
Commission Designee

DATED: June 24, 2005  
Trenton, New Jersey