

I.R. NO. 2011-18

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF UNION,

Respondent,

-and-

Docket No. CO-2011-089

PBA LOCAL 69,

Charging Party.

SYNOPSIS

A Commission Designee denied an application for interim relief seeking to restrain the Township of Union from denying health benefits to a recent retiree. The Designee concluded there was insufficient basis to find a substantial likelihood of success on the merits and held that a plenary hearing was required.

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PBA LOCAL 69,

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Appearances:

For the Respondent:
Apruzzese, McDermott, Mastro & Murphy, P.C.
(Robert T. Clarke, Esq., of counsel)

For the Charging Party:
Mets, Schiro & McGovern, LLP
(Brian J. Manetta, Esq., of counsel)

INTERLOCUTORY DECISION

On August 26, 2010, PBA Local 69 (Charging Party or PBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Township of Union (Respondent or Township) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally altered certain terms and conditions of employment. More specifically, Charging Party contends that the Township violated subsections 5.4a(1) and (5)^{1/} of the Act when, in August

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,
(continued...)

2010, it repudiated the parties' collective negotiations agreement and past practice by denying retiree health benefits to a recently retired police officer.

The Township contends that its actions in this matter did not repudiate the applicable contract provisions concerning retiree health benefits and thus denies that it violated the Act.

The charge was accompanied by an application for interim relief. An Order to Show Cause was executed on September 13, 2010, scheduling a return date for a hearing on the Order to Show Cause for September 28, 2010. Respondent submitted a request to adjourn the September 28 hearing date and Charging Party agreed to that request. The hearing on the Order to Show Cause was then rescheduled to October 1, 2010. The parties submitted briefs, certifications and exhibits^{2/} and argued orally on October 1, 2010.

* * * *

In its charge, the PBA contends that for many years, the Township provided health insurance coverage to retired police

1/ (...continued)
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."

2/ Commission Exhibits C1 - C13.

officers, in accordance with Article IV (Insurance) of the parties' 2009-2012 collective negotiations agreement. That provision states that the Township shall provide health insurance coverage for all active and retired officers (after 25 years of service). The parties' 2004-2008 agreement contains the same language. The PBA notes that there is identical language in the 2004-2008 Union Township Superior Officers Association contract. The PBA also notes that Article XVIII (Retention of Benefits) of the parties' 2009-2012 agreement provides that all terms and conditions of employment presently in existence shall be continued until the execution of a new agreement.

The PBA asserts that the Article IV language has been interpreted by the parties to mean that an officer who retires with 25 years of service in any State or locally administered pension plan is eligible for employer-paid health benefits in retirement.

The PBA contends that the Township incorrectly denied a recently retired officer, Maryanne Cosimano, employer-provided health insurance in retirement, although she had achieved 25 years of creditable service in State or locally administered pension plans. The PBA asserts that Ms. Cosimano retired with twenty-five years and two months of service in the Police & Fire Retirement System (PFRS). The PBA states that Ms. Cosimano worked as a police officer for Union Township for 20 1/2 years;

as a police officer for Union County for 1 year; as a Police Communications Officer for Union Township for 3 years; and as a Safety Specialist for the New Jersey Division of Motor Vehicles for 10 months.

The PBA asserts that prior to her retirement, Ms. Cosimano spoke with Township Police Director Zieser on two occasions regarding her retirement. The PBA contends Zieser told Cosimano that she could purchase time from previous employment to obtain health benefits in retirement. After Cosimano purchased the credits, the PBA asserts that she again spoke to Zieser regarding her upcoming retirement and was assured that she would receive employer-provided retiree health benefits.

The PBA notes that four days after she retired, Cosimano was informed by Township Human Resources Director Green that she would not receive Township-provided retiree health benefits because she had insufficient years of service with the Township.

The PBA further notes that other retired officers are now receiving Township-provided health benefits despite the fact that they did not accrue twenty-five years of service with the Township -- because they were credited with time worked for other employers in other pension plans. The PBA argues that denying Ms. Cosimano Township-provided health benefits in retirement is a repudiation of Articles IV and XVIII of the parties' collective negotiations agreement and the past practice of administering

Article IV of the agreement. The PBA asserts that it has thus demonstrated a likelihood of prevailing on the legal and factual merits of its claim.

Further, the PBA asserts that it and its members will suffer irreparable harm if interim relief is not granted -- Ms. Cosimano will be irreparably harmed if her health benefits are discontinued, as she will be unable to afford comparable benefits. The PBA also argues that other unit employees will be irreparably harmed because they will be discouraged from retiring due to the employer's actions here -- which may deny them health benefits in retirement.

Finally, the PBA argues that no hardship will come to the Township if they are required to continue paying Ms. Cosimano's health benefits pending the final Commission decision in this matter. Accordingly, the PBA contends that it has demonstrated the required elements for interim relief.

The Township contends that it has consistently interpreted and applied the language of Article IV of the agreement to mean that in order to qualify for paid health benefits in retirement, an employee must have a total of 25 years of service from employment as a Township of Union employee and from employment as a sworn officer, in some other municipal, county or state agency, within positions requiring the successful completion of an accredited police academy. In making this interpretation, the

Township has relied upon Article VI (Seniority) of the contract, which governs the application of seniority for various purposes. The Township notes that the affidavits of Lynch, Ferrara and Matrале submitted by the PBA, all indicate that their service time as a Township of Union officer combined with their other service as a police officer for other employers met the requirement of a total of 25 years of service as a Township of Union employee and as a sworn officer in other jurisdictions, which would qualify them for paid retiree health benefits. The Township notes that it did not count Ms. Cosimano's Division of Motor Vehicle service in her total because it did not meet the requirement of service in another jurisdiction in a position as a sworn officer, which requires police academy accreditation. Finally, the Township notes that Harry Capko did receive credit for service in two non-Union Township civilian employment positions toward the twenty-five years of service requirement for retiree health benefits. However, the Township notes that Capko retired in August 2006 as a sergeant and was covered by the then-current Superior Officers Association collective negotiations agreement. That agreement contained language in Article VI (Seniority) which provided that prior employment in police, fire or other governmental agencies were to all be counted regarding qualification for *pension benefits*. The Township points out that the language in the present PBA collective negotiations agreement

provides that, besides Township of Union employment, only prior employment as a police officer in a position requiring police academy accreditation may be considered in determining qualification for pension benefits. The Township contends that the term "pension benefits" concerns retirement benefits other than actual employee pensions -- such as health benefits in retirement -- inasmuch as actual pensions are non-negotiable.

The Township also notes that Cosimano signed an acknowledgment form upon her hire as a Township of Union Police Officer indicating that she would receive credit for prior employment only for employment as a Union County Police Officer and as a Township of Union Police Communications Officer.

Finally, the Township notes that it has specifically contested several material facts set forth in affidavits submitted by the PBA in support of its interim relief application. The Township argues that these disputed facts weigh against the granting of interim relief in this matter.

While the PBA has argued that securing alternate health benefits in retirement would be a hardship to Ms. Cosimano, the Township notes that Ms. Cosimano is presently receiving health insurance coverage from the State Health Benefits Plan, purchased through a deduction from her pension check. The Township further asserts that four days after her retirement -- but five days before her retirement was approved -- it offered to allow Ms.

Cosimano to return to work for the seven months she would need to qualify for paid retiree health benefits. Thus, the Township argues that no irreparable harm has been shown in this case inasmuch as Ms. Cosimano could have chosen to either return to work for seven months to secure free health benefits in retirement or she could have chosen to retire and pay for health benefits through a deduction from her pension check. In fact, the Township notes, she chose the latter. The Township argues that Ms. Cosimano will not suffer irreparable harm because should Charging Party prevail after a plenary hearing, she may be made whole through the payment to her of any monies which she had paid out for health insurance.

* * * *

Maryanne Cosimano was employed by Union Township as a Police Officer for approximately twenty and one-half years. Before that, Ms. Cosimano was employed as a Union County Police Officer for approximately one year; she was also employed by the Township as a Police Communications Officer for approximately three years; and she was employed as a New Jersey Division of Motor Vehicles Safety Specialist for approximately ten months. These employments add up to a total of approximately 25 1/2 years of employment in the public sector -- 21 1/2 years of employment as a law enforcement employee in the Police & Fire Retirement System (PFRS) and 3 3/4 years of employment as a civilian employee in

the Public Employees Retirement System (PERS). Ms. Cosimano decided she would retire on August 1, 2010.

On June 20, 2010, Ms. Cosimano purchased several credits from her civilian employment -- time which was added to her years of service in police employment in the PERS, thus increasing the amount of her annual pension payments. On August 9, 2010, the Division of Pensions & Benefits sent Ms. Cosimano a letter approving her retirement effective August 1, 2010.

Prior to her retirement, Ms. Cosimano asserts she had two conversations concerning her retirement plans with Township Police Director Zieser. Ms. Cosimano asserts she spoke to him on April 27, 2010, about the purchase of service credits for prior public employment. In his affidavit, Police Director Zieser states that he is not involved in the administration of health benefits for current employees or retirees. Director Zieser acknowledges an initial conversation with Ms. Cosimano about buying back pension time so that she could increase her pension payment. He did not recall exactly when that conversation had occurred.

Ms. Cosimano asserts that on June 29, 2010, she again spoke to Police Director Zieser about her pending retirement. She asserts he assured her that she would receive health benefits in retirement because other officers that retired without twenty-

five years of service with the Township had received retiree health benefits.

Director Zieser contests Ms. Cosimano's statement regarding what he said during their June 29 conversation. Instead, Director Zieser asserted that while Ms. Cosimano was in his office on June 29, 2010 reviewing her retirement documents with his administrative assistant, Ms. Cosimano turned to Director Zieser and said she was going out like Harry Capko -- since they gave Harry Capko his Division of Motor Vehicles time, they would have to give it to her. Director Zieser asserts that he then responded that "if they gave it to Harry Capko, I guess they will give it to you" (Exhibit 12).

On August 4, 2010, Director of Human Resources Green reviewed Ms. Cosimano's file and determined that she was not eligible for Township-paid health benefits in retirement as she had not achieved the requisite 25 years of service. On August 5, Ms. Green contacted Ms. Cosimano and advised her that she was seven months short of qualifying for employer-paid health benefits in retirement. Ms. Green advised Ms. Cosimano to return to employment for seven months so that she could secure Township-paid health benefits in retirement. Ms. Cosimano declined to return to employment.

Exhibit 2A is the collective negotiations agreement currently in effect between the Township and PBA Local 69,

covering the period from January 1, 2009 through December 31, 2012. It was in effect during the events cited in this unfair practice charge.

Article IV (A) of that agreement provides:

. . . the Township shall provide . . . group Health Insurance coverage for all active and retired officers (after 25 years of service) and . . . eligible dependents. . . .

The same provision is found in the 2004 through 2008 Agreement between the Township and PBA Local 69, the 2004 through 2008 Agreement between the Township and the Superior Officers' Association and the 2000 through 2003 Agreement between the Township and the SOA.

The PBA concedes that the term "after 25 years of service" is not defined in Article IV of the contract. The PBA contends that it has been defined through the parties' past practice -- as demonstrated through the affidavits of Ferrara, Lynch, Matrале and Capko -- to mean service in any state or locally administered retirement system. The PBA contends that officers who have retired with less than twenty-five years of service with the Township have been given paid retiree health benefits if they demonstrated a total of "25 years of service" in any state or local retirement system. The PBA cites contract Article XVIII (Retention of Benefits) and argues that this practice has thus been contractually preserved. The PBA argues that denying Ms. Cosimano retiree health benefits was a repudiation of Article IV

of the parties' Agreement and the past practice of the application of that provision.

The Township also concedes that the term "25 years of service" is not defined in Article IV. However, the Township asserts that the term is defined in Article VI (C) of the Agreement (Seniority). That provision states:

Prior service as a full time, sworn, paid Police Officer, with a municipal, county or state police agency, which requires successful completion of an accredited police academy shall not be considered in calculating seniority for the purposes of layoffs, promotions and vacation selections and vacation accrual; however, such prior service shall be considered for the purposes of determining placement on the salary guide, longevity schedule as listed in Article XII and pensions benefits. . . .

Exhibit 2B-A.

The Township argues that these contract provisions, taken together, have been the basis for determining whether a retired police officer received paid health benefits. The Township contends that the consistent application of the parties' agreement has been that in order to qualify for paid retiree health benefits, a retiring officer must have a total of twenty-five years of service as a Township of Union employee and as a sworn police officer in a municipal, county or state agency, which requires successful completion of an accredited police academy.

These two qualification elements cited by the Township appear to be consistent with qualifications presented by Ferrara, Lynch and Matrале (Exhibits 5, 6 and 7) -- each has a total combination of twenty-five years of service as a Township of Union employee and as a police officer in another jurisdiction.

Ms. Cosimano's qualification elements are not exactly the same as those of Ferrara, Lynch and Matrале. Rather, Ms. Cosimano's qualifications are virtually the same as those of retiree Harry Capko (Exhibit 4). Ms. Cosimano worked as a Union Township Police Officer (Township employment), a Union Township Police Communications Officer (Township employment), a Union County Police Officer (other jurisdiction employment -- law enforcement) and a New Jersey Division of Motor Vehicles Safety Specialist (other jurisdiction employment -- non-law enforcement). Mr. Capko worked as a Township of Union Police Officer (Township employment), a New Jersey Division of Motor Vehicles Safety Specialist (other jurisdiction employment -- non-law enforcement) and an Essex County Mechanic (other jurisdiction employment -- non-law enforcement).

For purposes of determining qualification for paid retiree health benefits, and consistent with its past application of Articles IV and VI, the Township gave Ms. Cosimano credit for her Township employments as a Police Officer and Police Communications Officer and for her employment in law enforcement

in another jurisdiction (Union County). However, it did not give her credit for time employed in another jurisdiction in a non-law enforcement position because such employment was not service as a sworn police officer in another jurisdiction, requiring the successful completion of an accredited police academy.

However, the PBA argues that the past practice was to give credit for other jurisdiction employment, whether law enforcement or non-law enforcement. Thus, the PBA contends that because Mr. Capko was given credit for such other jurisdiction, non-law enforcement employment, Ms. Cosimano should also be given such credit.

While the Township concedes that Mr. Capko was given such credit, it notes that Mr. Capko retired in 2006, as a police sergeant, under a different collective negotiations agreement between different parties (the Township and the SOA). The Township notes that when Mr. Capko retired, the Township and the SOA were in interest arbitration for a collective negotiations agreement covering 2004 through 2008. Thus, the collective negotiations agreement then in effect between those parties was the agreement covering the period from 2000 through 2003.

Article VI (C) of that agreement (Seniority) states:

In determining seniority within the Department for the purposes of layoffs, promotions and vacation selection, prior service with another Police or Fire Department or other governmental agency shall not be considered in calculating seniority

under this contract, but such prior service shall be applicable to salaries, longevity and pension benefits.

Exhibit 11-2.

The Interest Arbitration Award for the Township-SOA 2004-2008 contract was issued on November 26, 2007. That Award amended the language of Article VI (C), in accordance with a previously executed Memorandum of Agreement which, by its own terms, was to be applied prospectively, after the expiration of the 2000-2003 Agreement, and included in any successor collective negotiations agreement (unless modified by negotiations). Thus, upon the issuance date of the 2004-2008 Interest Arbitration Award (November 26, 2007), the "old language" of Article VI (C) was changed to the new (present) language of Article VI (C).

However, the Township notes that Mr. Capko retired on August 1, 2006, at a time when the "old" Article VI language from the 2000 - 2003 Township-SOA agreement was in effect. Under the language of that provision -- "or other governmental agency" -- the Township contends it was obligated to give Mr. Capko credit for his other jurisdiction, non-law enforcement employment (as a New Jersey Division of Motor Vehicles Safety Specialist and as an Essex County Mechanic) when it considered whether he met the "after 25 years of service" requirement for retiree health benefits ("pension benefits").

Notably, the Township asserts here that Ms. Cosimano retired under a contract with substantially different language in Article VI (C) (Exhibit 2b-A). That language, taken together with Article IV, would seem to indicate that only prior service as a police officer in another jurisdiction will be considered in determining an employee's qualification -- 25 years of service -- for pension benefits.

The Township submitted a document (Exhibit 11-1) signed by Ms. Cosimano (and the Union Township Police Department Personnel Officer) when she was hired as a Union Township Police Officer on January 24, 1990. That document indicates that, for purposes of computation of amount of service, Ms. Cosimano would be credited for approximately three years of employment as a Union Township Police Communications Officer and one year as a Union County Police Officer and that credits for any other prior service (New Jersey Division of Motor Vehicles) were waived. This document appears to exclude giving service credit to Ms. Cosimano for her New Jersey Division of Motor Vehicles service and is consistent with the Township's interpretation and application of Article VI (C).

ANALYSIS

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 arguments 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. DeGioia, 90 N.J. 126, 132-134 (1983); 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 PBA argues that the Township has repudiated terms and conditions of Article IV and the parties' past practice in the administration of the contract when it refused Ms. Cosimano paid retiree health benefits.

In State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 41 (¶15191 1984), the Commission held that charge allegations stating a mere breach of contract claim do not warrant the exercise of the Commission's unfair practice jurisdiction. In Human Services, the Commission noted that the National Labor Relations Board has refused to issue complaints when all that is involved is a good faith dispute over the interpretation of an ambiguous contract clause. The Commission cited In re United Telephone Co. of the West, 112 NLRB No. 103, 36 LRRM 1097 (1955), where the Board stated:

The complaint alleges no violation of the Act other than the one arising out of the parties' conflicting contract interpretations. It is obvious from the

conflicting interpretations of the parties that the contract was not sufficiently clear to avoid a dispute over its terms. There is no showing that the Respondents, in carrying out the contract as they did, were acting in bad faith. Furthermore, the Respondents' action was in accordance with the contract as they construed it, and was not an attempt to modify or to terminate the contract. United Telephone, 35 LRRM 1097.

However, the Commission has also held that a breach of contract may rise to the level of a refusal to negotiate in good faith. A specific claim that an employer has repudiated an established term and condition of employment may rise to the level of a 5.4a(5) violation. Human Services, supra; see also, Township of Jackson, P.E.R.C. No. 82-79, 8 NJPER 129 (¶13057 1983). A repudiation claim may be supported by a contract clause that is so clear that an inference of bad faith arises from a refusal to honor it or by factual allegations indicating that the employer has changed the parties' past practice in administering the disputed clause. Human Services, supra.

The PBA cited two Commission interim relief cases where Commission Designees ordered the restoration of employer paid health insurance benefits for retirees. In Camden Cty. Sheriff's Office, I.R. No. 2004-6, 29 NJPER 496 (¶157 2003), the County unilaterally determined that retired employees would henceforth be required to have 25 years of service with the County to receive paid retiree health benefits. Prior to that change, the parties' collective negotiations agreement set forth a sliding

scale of years of service with the County that employees were required to have in order to receive a given percentage of employer-paid health benefits in retirement. The employer argued that the contract provision was preempted by N.J.S.A. 40A:10-23. The Commission Designee determined that the County had misapplied the statute and therefore, had repudiated the parties' agreement.

In Borough of Paramus, I.R. No. 2005-14, 31 NJPER 202 (¶80 2005), the employer unilaterally eliminated paid retiree health benefits to retiring employees who were at least 62 years old and who had at least 15 years of service with the Borough. The employer argued that the contract provision was ultra vires and unenforceable because it had not been promulgated by resolution, as N.J.S.A. 52:14-17.38 appeared to require. The Commission Designee concluded that N.J.S.A. 52:16-17 permits employers to negotiate health benefits for retirees, that the Borough did so and entered into an agreement providing such benefits. Given that agreement, the Commission Designee determined the Borough was obligated to take the necessary steps to properly effectuate that agreement; because it did not take those steps which it was obligated to take will not enable it to cancel the terms of an otherwise valid agreement.

In Camden, because the unilateral change occurred during negotiations for a successor agreement, irreparable harm was established. In Paramus, a seventy-seven year old employee who

was about to retire asserted that he would be forced to forgo certain medical treatments if the paid retiree health insurance was removed because he would be unable to afford health insurance or the treatments. This established irreparable harm.

The instant matter is distinguishable from the Camden and Paramus cases. In both Camden and Paramus, there were clear contractual provisions which required the employers to provide employer-paid health benefits for retirees achieving certain clearly stated qualifications. In the instant matter, the meaning of the term "after twenty-five years of service" is disputed by the parties. The parties have each set forth colorable arguments as to the meaning of the term -- the PBA asserts it means a total of twenty-five years of service with the Township (in both law enforcement or non-law enforcement positions) and service in other public sector jurisdictions (in both law enforcement or non-law enforcement positions). The Township asserts it means a total of twenty-five years of service with the Township (in both law enforcement and non-law enforcement positions) and service in other public sector jurisdictions (in law enforcement positions only).

Further, the argument made by the Township is consistent with the agreement (Exhibit 11-1) regarding credit for prior work experience (credit only for prior employment as a Union Township Police Communications Officer and as a Union County Police

Officer) which Ms. Cosimano signed at the commencement of her employment as a Township Police Officer.

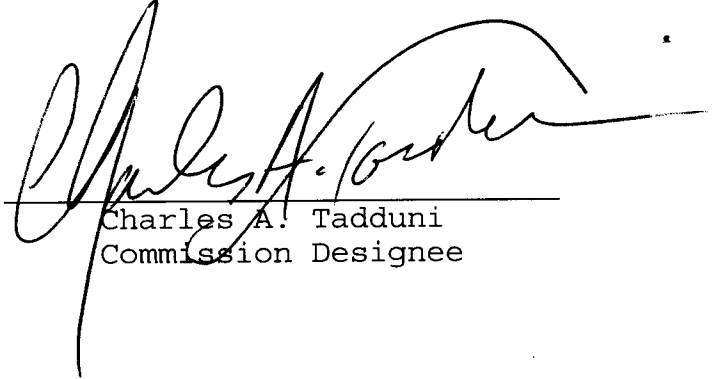
Without more facts, the contract may be read to support either parties' position, depending upon how one interprets and applies Article IV (A) and VI (C). While both parties have made good arguments for their respective interpretations and applications of the contract, in the circumstances set forth in this record, a contract repudiation claim -- required for finding a 5.4a(5) violation -- is a far more difficult case to establish. Thus, in this matter, a substantial likelihood of success was not established.

* * * *

Having considered all of the facts and arguments presented in this matter, I conclude that the heavy burden requisite for securing interim relief -- a substantial likelihood of success on the merits of Charging Party's case in a plenary hearing -- has not been met. The retired employee who was primarily affected in this matter has secured health insurance; thus, the nature of any harm which might occur now would be primarily economic; should Charging Party succeed in its plenary case, any resultant economic harm to this employee can be redressed by the Commission at the conclusion of plenary proceedings.

ORDER

The application for interim relief is denied. The charge will be forwarded to the Director of Unfair Practices for processing in accordance with the Commission's rules.



Charles A. Tadduni
Commission Designee

DATED: October 22, 2010
Trenton, New Jersey