D.U.P. No. 2011-6

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

TOWNSHIP OF FAIRFIELD,

Respondent,

-and- Docket No. CO-2011-316

WEST ESSEX PBA LOCAL #81,

Charging Party.

SYNOPSIS

The Deputy Director of Unfair Practices dismisses an unfair practice charge filed by West Essex PBA Local #81 against the Township of Fairfield. The charge alleges that the Township violated 5.4a(1), (2), (3), (4), (5), (6) and (7) of the Act and the parties' collective negotiations agreement when the Township required retirees to begin contributing towards health insurance during the pendency of interest arbitration. The Deputy Director finds that health benefits for current retirees are permissively negotiable for police and fire units, that disputes concerning permissive subjects of negotiations are arbitrable, and that the Commission's unfair practice jurisdiction is limited to allegations of unilateral changes in mandatorily negotiable terms and conditions of employment. Accordingly, a complaint will not be issued on a charge alleging a change in a permissively negotiable term and condition of employment.

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Appearances:

For the Respondent, Cleary, Giacobbe, Alfieri & Jacobs, attorneys (Matthew Giacobbe, of counsel)

For the Charging Party, Klatsky, Sciarrabone & DeFillippo, attorneys (David J. DeFillippo, of counsel)

REFUSAL TO ISSUE COMPLAINT

On February 14, 2011, West Essex PBA Local #81 (PBA) filed an unfair practice charge against the Township of Fairfield (Township or Respondent). An application for interim relief accompanied the charge. The charge alleges that the Township violated section 5.4a(1), (2), (3), (4), (5), (6) and (7)[1/] of

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1/ These subsections prohibit public employers, their representatives of agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization, (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee (continued...)

the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), and their collective negotiations agreement when, during the pendency of interest arbitration proceedings, the Respondent issued a letter to "all [police] retirees" advising of its intention to require their financial contributions to the cost of their health insurance benefits, retroactive to June 2010. The charge also alleges that on February 1, 2011, the Respondent denied a grievance "relative to the issue."

The Commission has authority to issue a complaint where it appears that the charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. The following facts appear:

The most recent collective negotiations agreement between the Township and PBA covered the period of January 1, 2006 through December 31, 2008. After the agreement expired, the

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1/ (...continued)
because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (7) Violating any of the rules and regulations established by the commission."

parties negotiated and executed an addendum modifying and extending the agreement to December 31, 2011. The addendum provides in a pertinent part that, "[t]he only remaining issue between the parties is salaries which are negotiated on a year to year basis for the years 2009, 2010, and 2011." The parties were subsequently unable to resolve the matter of salaries. On April 6, 2010, the PBA filed for interest arbitration. The parties are currently engaged in interest arbitration.

Article 7 of the parties' agreement defines health benefits for current employees and retirees. The Township agreed to provide "insurance protection at no cost to the members" and eligible retirees shall receive "medical benefits substantially similar in nature to those benefits being provided to employees presently working."

P.L. 2010, c. 2, was enacted on March 22, 2010, and became effective on May 21, 2010. It provides that:

> Commencing on the effective date of P.L.2010, c.2 and upon the expiration of any applicable binding collective negotiations agreement in force on that effective date, employees of an employer other than the State shall pay 1.5 percent of base salary, through the withholding of the contribution, for health benefits coverage provided under P.L.1961, c.49 (C.52:14-17.25 et seq.), notwithstanding any other amount that may be required additionally pursuant to this paragraph by means of a binding collective negotiations agreement or the modification of payment obligations.

In accordance with the statute, current employees of the Township began contributing 1.5% of base salary on June 1, 2010.

On December 29, 2010, the Township Administrator sent a letter to all retirees, advising that since the agreement provides that retirees receive paid medical upon retirement "similar in nature to the benefits provided to working employees" and since employees are now required to pay 1.5% of their base salaries for health benefits, retirees will also be charged a 1.5% health insurance contribution, based upon their pension.

On February 1, 2011, the Township denied a grievance contesting the 1.5% contribution for retirees, relying upon the parties' contract language and asserting that retirees are not members of the PBA who have access to the parties' grievance procedure.

ANALYSIS

The Commission has held that, ". . . a retiree is not an employee within the meaning of the Act." IAFF Local 2081 (Sarapuchiello), P.E.R.C. No. 2009-47, 35 NJPER 66, (¶25 2009); See also Belmar Bor., P.E.R.C. No. 89-27, 14 NJPER 625, (¶19262 1988); PBA Local 245 (Maggio), D.U.P. No. 97-27, 23 NJPER 72 (¶28043 1996). In the context of police and fire employees however, health benefits for current retirees are permissibly negotiable. Middletown Tp., P.E.R.C. No. 2006-102, 32 NJPER 244 (¶101 2006), citing Borough of Bradley Beach, P.E.R.C. No. 2000-

12, 25 NJPER 442 (¶30179 1999); see N.J.S.A. 34:13A-16f(4). When a public employer and police or fire union agree to include retiree benefits in their collective negotiations agreement, the union has the ability to submit a dispute concerning that negotiated term to binding arbitration, where arbitration is provided in the parties' agreement. Middletown.

A union's right to submit a grievance to binding arbitration is not necessarily coextensive with the Commission's unfair practice jurisdiction. The Commission issues complaints on unfair practice charges alleging unilateral changes in *mandatorily negotiable* terms and conditions of employment. N.J.S.A. 34:13a-5.4a(5). See Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981). A complaint will not be issued upon a charge alleging a change in a permissively negotiable term and condition of employment. The PBA's charge implicates only a permissively negotiable term and condition of employment - retiree health benefits. In accordance with N.J.S.A. 34:13A-5.4a(5) and Middletown, the PBA has the right to pursue a contractual claim through the parties' grievance procedure, (or for that matter, in a civil court action) but does not have the ability to contest the Township's actions through our unfair practice proceedings.

The PBA asserts that its charge implicates current employees because they too will be subject to the alleged unilateral change upon their retirement, at a future, unspecified date. The PBA relies upon Camden Cty. Sheriff's Office, I.R. No. 2004-6, 29 NJPER 496 (¶157 2006).

In Camden Cty. Sheriff's Office, the Sheriff changed the years of service required of employees to obtain paid health benefits in retirement. The parties' agreement set forth unambiguous contract language regarding retiree contributions, which depended upon the retiree's years of service to the County.

To substantiate the change, the Sheriff relied on N.J.S.A. 40A:10-23, which establishes certain statutory criteria for post-retirement health benefit eligibility, including at least 25 years of service ". . . in a State or locally administered retirement system" and ". . . a period of service of up to 25 years with the employer at the time of retirement, such period of service to be determined by the employer and set forth in an ordinance of resolution as appropriate." The Commission Designee found the requirement of at least 25 years of service credit in a state or locally administered retirement system non-negotiable because that portion of the statute expressly, specifically and comprehensively established the condition of employment. But, relying on Tp. of Pemberton, P.E.R.C. No. 2000-5, 25 NJPER 369, 370 (¶30159 1999), the Designee found that the period of service

with the employer at the time of retirement is mandatorily negotiable. The parties had negotiated a sliding scale of premium payments based on various years of service with the County. Therefore, the Sheriff appeared to unilaterally change that provision and repudiate the parties' agreement.

Furthermore, the union in that case proffered evidence showing that at least one employee who had recently applied for retirement would have been denied any employer-paid health benefits because of the unilateral change. Accordingly, the Designee found that the union had established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. See, 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 Designee also found that the union met the irreparable harm requirement because the unilateral change took place during the pendency of interest arbitration, and employees eligible for retirement under N.J.S.A. 40A:10-23 could have been wrongfully denied paid health benefits and, consequently, discouraged from exercising their option to retire. Accordingly, the Designee found that the union met the standard to obtain interim relief.

Camden Cty. Sheriff's Office is distinguishable from this case. The union in Camden Cty. Sheriff's Office was not contesting a change to retiree benefits; it objected to the benefits provided to current employees upon their retirement. In contrast, the PBA here contests the health benefits contribution imposed upon retirees. The PBA attempts to link that change to current employees because they too would be subject to the change upon retirement. Unlike the circumstances in Camden Cty. Sheriff's Office, the PBA has not identified any employee who would be irreparably harmed if the Township's conduct is not restrained.

Also, the change in Camden Cty. Sheriff's Office increased the employee's contribution from ten percent of premium to 100 percent. In weighing the relative hardship to the parties, the Designee found that the hardship to the employee also warranted restraining the Sheriff's actions. The 1.5% contribution in this case by comparison does not rise to the level of hardship evident in Camden Cty. Sheriff's Office.

Finally, the Commission Designee relied on the parties' clear contract language and a previous Commission decision holding that the dispute was mandatorily negotiable. Neither are present in this case.

Because the disputed change in this matter does not implicate an unambiguous contract provision, the employer's conduct cannot amount to a repudiation. In State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419, 421 (¶15191 1984), the Commission held that:

> . . . a mere breach of contract claim does not state a cause of action under subsection 5.4(a)(5) which may be litigated through unfair practice proceedings and instead parties must attempt to resolve such contract disputes through their negotiated grievance procedures.

In this case, the parties have a good faith dispute over the meaning of Article 7 of their agreement. Under Human Services, when both parties reasonably rely upon language in the collective agreement for their actions, the Commission will not entertain an alleged violation of 5.4a(5) of the Act. Both the Township and PBA agree that the contract provides that retirees will receive benefits "similar in nature to the benefits provided to working employees." They disagree only over whether that clause permits the Township to extend the 1.5% premium contribution that is now required by statute to retirees. That dispute may be resolved through resort to the agreement's grievance procedure. See Ocean County College, D.U.P. No. 2001-10, 27 NJPER 56, 57 (¶32026 2000); Human Services, 10 NJPER at 421.

Accordingly, I deny the application for interim relief and dismiss the charge because the Commission's complaint issuance

standard has not been met.[2/] The PBA has the right to file a timely charge regarding the implications of any unilateral change to current employees. The PBA also has the right to pursue its grievance through the parties' contractual grievance procedure.

BY ORDER OF THE
DIRECTOR OF UNFAIR PRACTICES

Jonathan Roth
Deputy Director of Unfair Practices

DATED: March 30, 2011
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by April 8, 2011.

2/ N.J.A.C. 19:14-2.3.