

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY COLLEGE,

Petitioner,

-and-

Docket No. SN-2012-002

ESSEX COUNTY COLLEGE FACULTY ASSOCIATION,

Respondent.

SYNOPSIS

A Commission Designee grants the request of Essex County College for an interim restraint of binding arbitration of a grievance during the pendency of a scope of negotiations petition before the Public Employment Relations Commission. The grievance, and a demand for binding arbitration, was filed by the Essex County College Faculty Association. The grievance claims that the College refused to comply with a separation agreement for senior faculty contained in a side letter of agreement to the parties' collective negotiations agreement. The College asserts that the provision is an impermissible early retirement incentive because it violates State pension statutes and New Jersey Supreme Court precedent. The Association argued that the provision is distinguishable because it is "separation pay" in the form of a sabbatical, which is deferred compensation to be paid to employees based, not on their age, but on their length of service; it provides for an increase as opposed to a decrease in the amount of compensation for employees remaining longer; and, the fact that the provision may have the incidental effect of encouraging employees to retire at some point, is not dispositive on the issue of whether the provision constitutes an impermissible early retirement incentive.

The designee found that the College established it has a likelihood of success on the merits as the Commission is likely to find that the provision is an unauthorized early retirement incentive.

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Appearances:

For the Petitioner, Lum Drasco & Positan, LLC,  
attorneys (Daniel M. Santarsiero, of counsel)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum  
& Friedman, attorneys (Robert A. Fagella, of counsel)

INTERLOCUTORY DECISION

On July 11, 2011, the Essex County College petitioned for a scope of negotiations determination. The College seeks a restraint of binding arbitration of a grievance filed by the Essex County College Faculty Association. The grievance asserts that the College refused to comply with a separation agreement for senior faculty contained in Article 32-8.2 in a side letter of agreement to the parties collective negotiations agreement (CNA).

On November 9, 2011, the College filed an application for interim relief seeking a temporary restraint of arbitration pending a final determination of the Commission. It filed a brief in support of its application. The College asserts that

Article 32-8.2 is an impermissible early retirement incentive because it violates State pension statutes and New Jersey Supreme Court precedent. On November 14, 2011, I issued an Order to Show Cause without temporary restraints specifying November 30 as the return date for argument via telephone conference call. The return date was adjourned at the request of the parties. The return date was ultimately rescheduled for February 1, 2012. On January 30, 2012, the Association filed a response opposing the interim relief request. On February 1, the parties argued orally via telephone conference call. At the conclusion of the conference call, I orally issued a temporary restraint of arbitration of the grievance.

The Association represents all full time teaching faculty and half time lecturers.

The following material facts are based on certifications and documentation provided by the parties.

The College and the Association are parties to a CNA with a term of August 31, 2009 through August 31, 2011. The CNA contains Article 32-8, "Terminal Sabbatical." The provision provides in pertinent part:

A faculty member shall be granted a terminal sabbatical at  $\frac{1}{2}$  pay based on the following criteria:

Minimum of:

- a) 15 years of service--1 year

- b) 20 years of service--2 years
- c) 30 years of service--3 years

The College's Human Resources Director received a letter from the Assistant Director of the State of New Jersey, Department of the Treasury, Division of Pensions and Benefits, dated May 4, 2007, which stated in pertinent part:

In accord with our telephone conversations, please be advised that your proposed leave plan is not acceptable from the prospective of the Division of Pensions and Benefits. As stated, there are several issues that are unacceptable. You offer increased years of pay based upon increased years of service – thus creating an early retirement incentive, which is contrary to the law.

Thereafter in 2007, the parties modified Article 32-8 by creating a side letter of agreement which contained in pertinent part, Article 32-8.2, "Separation Agreement":

After September 1, 2008, a faculty member with the following years of service may apply for the Separation Agreement as follows:

15 years of service	1 year at half pay or 2 years at 1/4 pay
20 years of service	1 year at 3/4 pay or 3 years at 1/4 pay
30 years of service	1 year at full pay or 2 years at half pay

Such application shall be submitted within 1 year of the anticipated separation date.

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 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). Where a restraint of binding grievance 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 Pk. Ed. Ass'n v. Ridgefield Pk. Bd. of Ed., 78 N.J. 144, 155 (1978); Bd. of Ed. of Englewood v. Englewood Teachers, 135 N.J. Super. 120, 124 (App. Div. 1975); City of Newark, I.R. No. 2005-4, 30 NJPER 459, 460 (¶152 2004).

The New Jersey Supreme Court has held that local public employers cannot institute early retirement incentive programs unauthorized by statute and, further, cannot negotiate over any proposal that would contravene or supplement the State's comprehensive regulation of pensions and retirement benefits.

Fair Lawn Ed. Ass'n v. Fair Lawn Bd. of Ed., 79 N.J. 574, 588 (1979); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 83 (1978).

N.J.S.A. 43:8C-2.1. "Incentive Program to Encourage Retirement, Termination of Employment of County Employees" provides:

Notwithstanding the provisions of section 2 of P.L. 1999, c. 59 (C. 43:8C-2) to the contrary, but subject to the other provisions of that law, a county governing body may, by resolution, adopt an incentive program to encourage the retirement or termination of employment of county government employees, regardless of whether the county is entering into an interlocal services contract or a joint services contract. The incentive program shall be submitted to the Director of the Division of Local Government Services in the Department of Community Affairs for approval. The director may condition approval on modifications to the incentive program. Following approval of the incentive program by the director, the county government may implement the program and offer the incentives to its employees.<sup>1/</sup>

The Commission in City of Elizabeth, P.E.R.C. No. 99-69, 25 NJPER 103 (¶30044 1999) determined that a proposed early retirement remuneration plan was invalid, and, as a result, not mandatorily negotiable.<sup>2/</sup> Elizabeth summarized the Fair Lawn

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<sup>1/</sup> Counsel for the College advised during oral argument that Articles 32-8 and 32-8.2 have not been submitted to and approved by the Director of the Division of Local Government Services in the Department of Community Affairs.

<sup>2/</sup> The proposal was as follows: "Terminal leave \$20,000. Minus  
(continued...)"

decision:

In Fair Lawn, the Supreme Court struck down a negotiated early retirement remuneration plan that provided that teachers between the ages of 55 and 64 who retired by September 1, 1977 would receive a \$6,000 payment. 79 N.J. at 577. In addition, teachers in the same age group who retired after that date would receive a cash payment keyed to the teacher's age, with those retiring at an earlier age receiving a larger bonus. Ibid. To qualify for either option, teachers were required to have 15 years of continuous service with the board. Ibid., n.1 and 2. The stated goals of the plan were to reward loyalty and long years of service and to encourage early retirement so that tenured teachers could be replaced with less experienced instructors whose salaries would be much lower. 79 N.J. at 577.

The Fair Lawn Court focused in part on the potential impact that a widespread adoption of similar plans would have on the actuarial assumptions of the State pension plan. 79 N.J. 582-584. But it also emphasized that employers may not negotiate over proposals that would "affect" employee pensions or supplement the State's comprehensive regulation of pensions and retirement benefits. Id. at 582-583, 587. We thus read Fair Lawn as barring two types of proposals: those that, by themselves or if adopted by others, would affect the actuarial integrity of a pension system and those that, regardless of any such impact, would establish retirement benefits that would contravene or supplement State-established benefits. In the latter vein, Fair Lawn holds that a provision that rewards early retirement rather than years

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2/ (...continued)  
sick leave for final 12 months. Members with 25 or more years will have a window for life of contract. 25th year \$20,000.00; 26th year \$18,000.00; 27th year \$16,000.00 and so on."

or quality of service is a retirement benefit rather than compensation for services.

The Association makes the following arguments in support of its position that Article 32-8.2 is not an impermissible early retirement incentive and is mandatorily negotiable. It relies on City of Newark, P.E.R.C. No. 83-143, 9 NJPER 296 (¶14137 1983) (proposal for lump sum payment for unused leave was directly tied to compensation for services actually rendered was mandatorily negotiable) and Galloway Tp., P.E.R.C. No. 98-133, 24 NJPER 261 (¶29125 1998) (proposal that provided for, and defined the method of payment of, pre-retirement longevity allowances was mandatorily negotiable) and argues that Article 32-8.2 is not an early retirement incentive and distinguishable from Fair Lawn because the "separation pay" (in the form of a sabbatical) is a traditional award for past services to members in the higher education community and is deferred compensation to be paid to employees based, not on their age, but on their length of service.

Second, the Association argues that the provisions in Elizabeth and in the Borough of Butler, P.E.R.C. No. 99-83, 25 NJPER 160 (¶30073 1999) (Butler I) (with a similar provision that was held to be mandatorily non-negotiable <sup>3/</sup>) differ from Article

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<sup>3/</sup> The proposal provided for a retirement incentive lump sum payment upon the employee's official retirement date as  
(continued...)



32-8.2 because both provisions provide for a decrease in the amount of compensation for additional years of service whereas Article 32-8.2 provides for an increase in the amount of compensation for the employee remaining longer rather than leaving.

Finally, the Association, relying on Borough of Butler, P.E.R.C. No. 2000-69, 26 NJPER 119 (¶31051 2000) (Butler II), argues that the fact that a provision may have the "incidental effect" of encouraging employees to retire at some point is not dispositive on the issue of whether the provision constitutes an "early retirement incentive."

In Butler II, the Commission held that a provision that provided for a flat payment of 20% of salary upon the retirement of an employee who has worked 25 years was not mandatorily negotiable because the proposal was, in essence, a retirement benefit that contravened Fair Lawn by supplementing State-established pension benefits.<sup>4/</sup> The Commission found that

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<sup>3/</sup> (...continued)  
follows: "40% of base salary-25 years; 30% of base salary-26 years; 20% of base salary-27 years; 10% of base salary-28 years; After 28 years-0%."

<sup>4/</sup> The proposal was as follows: "The Borough shall pay to each employee who retires in good standing with the Borough 20% of each employees base salary. Each employee, prior to retirement, shall give the Borough one year's notice of his or her official retirement date. A waiver of the one year notice can be granted if agreed to by both employee and  
(continued...)"

the proposal did not share the characteristics of negotiable benefits such as longevity pay, terminal leave, or payment for accumulated sick leave, citing Newark and Galloway.

I find that the College has established a likelihood of success on the merits of its scope petition. Article 32-8.2 is an unauthorized early retirement incentive similar to the provision in Butler II. Article 32-8.2 requires separation from employment and that the employee leave the College permanently. In that respect, it is not a traditional award for past services in the form of a sabbatical since a sabbatical requires a faculty member to perform a service during the sabbatical period that is beneficial to the College and then return to work.

Although Article 32-8.2 differs from Fair Lawn, Elizabeth and Butler I because it provides for an increase in the amount of compensation for the employee remaining longer rather than leaving at 15 years, it nonetheless is an early retirement incentive since employees may still avail themselves to leave at the 15 or 20 year mark.

Finally, Article 32-8.2 was never approved by the Director of the Division of Local Government Services in the Department of Community Affairs as required by N.J.S.A. 43:8C-2.1.

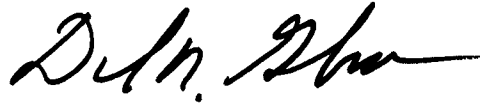
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4/ (...continued)  
employer. Also for good cause, if both employer and employee agree, then employee's retirement date can be extended one extra year."

Therefore I find that the Commission is likely to find the grievance is not legally arbitrable.

ORDER

The request of the Essex County College for an interim restraint of binding arbitration is granted pending the final decision or further order of the Commission.



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David N. Gambert  
Commission Designee

DATED: February 14, 2012

Trenton, New Jersey