

I.R. NO. 86-19

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and-

DOCKET NO. CO-86-253

COUNCIL OF NEW JERSEY STATE  
COLLEGE LOCALS,

Charging Party.

Synopsis

A Commission Designee denies a request for interim relief where Charging Party sought to stay the State of New Jersey from adopting and implementing compulsory age 70 retirement policies for faculty members of the State Colleges. The Commission Designee found that the Charging Party did not demonstrate a substantial likelihood of success on the merits of the charge, concluding that the language of C. 73, L. 1985 may preempt negotiations on the compulsory retirement issue and that negotiations in the compulsory retirement issue may effect pension statutes. The Commission Designee also concluded that Charging Party has not demonstrated that it would suffer irreparable harm if the requested relief was not granted.

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Appearances:

For the Respondent,  
(Melvin E. Mounts, Dep. Atty. General)

For the Charging Party,  
Dwyer & Canellis, Esqs.  
(Michael E. Buckley, Esq.)

INTERLOCUTORY DECISION

On March 13, 1986, the Council of New Jersey State College Locals (the "Charging Party" or "Union") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that the State of New Jersey (the "Respondent" or "State") had violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). More specifically, it is alleged that the State violated §§5.4(a)(1) and (5) of the Act by refusing to negotiate with the Union regarding the adoption of mandatory retirement policies for certain employees

of the State Colleges and the various procedures associated with the adoption of such policies.<sup>1/</sup>

Also on March 13, 1986, the Union filed an Order to Show Cause with the Commission, pursuant to N.J.A.C. 19:14-9.1 et seq., asking that the State be required to show cause why an order should not be entered directing the Respondent to (1) not adopt any mandatory retirement policies at the State Colleges prior to negotiations with the Charging Party; and (2) to refrain from implementing any mandatory retirement policies adopted pursuant to P.L. 1985, c. 73.

The Order to Show Cause was executed and made returnable on April 7, 1986. On that date, I conducted the Order to Show Cause hearing, having been delegated such authority to act upon requests for interim relief on behalf of the full Commission. Both parties submitted briefs and argued orally at the hearing.

The standards that have been developed by the Commission for evaluating interim relief requests are quite similar to those applied by the courts when confronted with like applications. The test is twofold: the substantial likelihood of success on the legal

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<sup>1/</sup> These subsections 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."

and factual allegations of the charge in the final Commission decision, and the irreparable nature of the harm that will occur if the requested relief is not granted.<sup>2/</sup>

Positions of the Parties

Charging Party states that in March 1985, the Governor signed Assembly Bill 1042, P.L. 1985, c. 73 ("c. 73") into law. C. 73 prohibits compulsory retirement on account of age in private and public employment. Under this law, certain institutions of higher education may adopt a policy requiring faculty members to retire at age 70. Charging Party alleges that certain State Colleges have adopted mandatory retirement policies for faculty who attain age 70. Charging Party states that the Colleges have failed and refused to negotiate with the Union regarding the adoption of mandatory retirement policies, the subject of retirement dates, the provision for waiver of the age 70 mandatory retirement policy or any other policies and procedures associated with the adoption of the mandatory retirement policies. Charging Party notes that there are 10 full-time faculty employed by State Colleges who will be adversely affected by the mandatory retirement policies.

Charging Party urges that its requested relief be granted inasmuch as it argues that it has a substantial likelihood of

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<sup>2/</sup> In re Twp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975); In re State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); and In re Twp. of Stafford, P.E.R.C. No. 79-9, 1 NJPER 59 (1975).

success on the merits of the case and that irreparable harm would result to its members if the requested relief is not granted. Charging Party contends that the establishment of a mandatory retirement policy is a mandatorily negotiable term and condition of employment. See, IFPTE Local 195 v. State of New Jersey, 88 N.J. 393 (1982). Charging Party contends that (a) such policies intimately and directly affect the work and welfare of public employees in that they will determine whether a given faculty member will remain on the State College staff; (b) no statutory preemption exists here because preemption occurs only where the applicable statutory language speaks in the imperative and leaves nothing to the discretion of the public employer. In this case, the Colleges were specifically granted discretion as to the creation of such policies; and (c) a topic is negotiable if it concerns a matter "on which negotiated agreement would not significantly interfere with the exercise of inherent managerial prerogatives pertaining to the determination of governmental policy" Paterson Police P.B.A., Local No. 1 v. City of Paterson, 87 N.J. 78 at 86 (1981).

Charging Party also contends that irreparable harm would result to members who are retired under these policies in that "retirement is irrevocable" and that retirement will have adverse effects on unit members' tenure rights.

The Respondent, State of New Jersey, argues that Charging Party's requested relief should be denied because there is no substantial likelihood of success on the merits and there would be

no irreparable harm to Charging Party or its members if the requested relief was withheld.

Respondent argues that whether a State College should have an age 70 mandatory retirement policy involves managerial and academic judgments similar to those regarding decisions of hire, transfer, promotion and discharge of personnel. Such decisions are matters of inherent managerial prerogatives and are nonnegotiable. Respondent further maintains that by the language of c. 73, the Legislature has expressly and comprehensively directed that the determination as to whether to enact an age 70 mandatory retirement policy is reserved solely to institutions of higher education.

Respondent further argues that negotiations on the age 70 mandatory retirement policy will "affect" pension statutes in violation of N.J.S.A. 34:13A-8.1, in that it will determine (1) when an employee may leave active service and retire and (2) payments out of the pension funds.

Finally, the Respondent notes that c. 73 contains a remedy of reinstatement with back pay plus interest if an individual is required to retire in violation of the law. Thus, it argues that no irreparable harm would occur to Charging Party in the event the requested relief was withheld.

Analysis

In order to rule upon the interim relief application made herein, two issues must be addressed: (a) is there a substantial likelihood that Charging Party will prevail on the merits of the case before the Commission and (b) will Charging Party or its members suffer irreparable harm in the event the requested interim relief is denied?

In Local 195, IFPTE v. State, 88 N.J. 393 (1982), ("Local 195"), the New Jersey Supreme Court adopted a three-part test for making scope of negotiations determinations. The Court stated:

...a subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. Id. at 404-405.

Clearly, the retirement policy intimately and directly affects the employees in that it directly determines whether or not they will remain employed.

The pertinent statutory language may preempt negotiations on this matter. Statutes which addressed the issue of mandatory retirement of public employees which preceded c. 73 (and which have apparently been displaced, in part, by c. 73) all speak of mandatory retirement in the imperative, e.g., N.J.S.A. 18A:66-43(b) states:

Any member in service who attains 70 years of age shall be retired by the board of trustees on a service retirement allowance forthwith on the first day of the next calendar month, or at such time within 1 year thereafter as it deems advisable. (emphasis supplied)<sup>3/</sup>

Thus, such statutes left public employers no discretion but to retire their employees at age 70.<sup>4/</sup>

In May, 1985, Assembly Bill No. 3294, L. 1985, c. 175 was signed by the Governor. That enactment states as follows:

8. a. The Legislature finds and declares that the public health, safety and welfare requires the ongoing health and fitness of all members of the New Jersey State Police so that they may safely and efficiently protect the public. The Legislature further finds and declares that such continued health and fitness cannot be determined except with reference to age, and therefore finds and concludes that retirement of all members of the State Police at age 55, except as provided for in subsection c. of this section, shall constitute a bona fide occupational qualification which is reasonably necessary to the normal operation of the State Police which qualification the Legislature hereby promulgates and establishes....

c. Except for the Superintendent of State Police, any member of the retirement system including a member appointed to the State Police under section 3 of P.L. 1983, c. 403 (C. 39:1-9.3), who has attained the age of 55 years

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<sup>3/</sup> See also, N.J.S.A. 43:15A-47(b).

<sup>4/</sup> See, Gordon v. NJ State Employees' Retirement System, 33 NJ Super 526 (App. Div. 1955) and Sobel v. Bd of Trustees of Teachers' Pension & Annuity Fund, 139 NJ Super 55 (App. Div. 1976).



shall be retired forthwith on the first day of the next calendar month following the effective date of this 1985 amendatory act. Any member of the retirement system so retired shall receive a service retirement allowance pursuant to this section or section 27 of P.L. 1965, c. 89 (C. 53:5A-27), as appropriate. (emphasis added)

The operative language of section c (supra) -- "shall be retired forthwith" -- is similar to the language used in N.J.S.A. 18A:66-43(b) (supra, at p. \_\_) and leaves the employer no discretion in the matter at all: employees must all be retired at age 55.<sup>5/</sup>

A profitable comparison may be made between the language used in the State Police Retirement Statute (c. 175) and the language used in c. 73.

C. 73 states, in pertinent part:

...Any provisions of law, executive order, rule or regulation to the contrary notwithstanding, no person other than a justice of the Supreme Court or a judge of the Superior Court pursuant to Article VI, Section VI, paragraph 3 of the Constitution of the State of New Jersey, or a judge of the Tax Court or a member of the Division of State Police, employed in the service of the State, or of any county or municipality thereof, or a member of a police or fire department employed in the service of the State or of any county or municipality thereof, shall be required to retire upon the attainment of a particular age unless the public employer can show that the retirement age bears a manifest relationship to the employment in question or that the person in the service of the State, or of any county or municipality thereof is unable to adequately perform his duties.

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<sup>5/</sup> Cf., EEOC v. State of New Jersey, 39 FEP Cases 516 (D.N.J. 1985).

....4.(New section) Notwithstanding the provisions of section 1 of P.L. 1938, c. 295 (C. 10:3-1) and section 8 of P.L. 1962, c. 37 (C. 10:5-2.1), an employee who has attained 70 years of age who is serving under a contract of tenure or similar arrangement providing for tenure at a public or private institution of higher education may, at the option of the institution, be required to retire.

The purpose of c. 73, in part, is to prohibit adoption of policies which mandate the retirement of employees for the sole reason of their having attained a stated chronological age. However, several specific exceptions were carved into c. 73 for, among others, police employees, firefighters and "employees ... serving under a contract of tenure ... at an ... institution of higher education". N.J.S.A. 10:5-2.2.

Another variation of statutory language on this subject is found in section 5 of the New York State Education Law [Section 510.1(b)]. The pertinent language of Education Law §510 is:

Any member who has attained age 70 may be retired at his own request or at the request of his employer....

In In re Harrison Board of Education, 6 NY PERB 3041 (¶3017 1973), the Board argued that under Education Law §510, school districts have a nondelegable authority to decide whether or not to request a member of the Teachers' Retirement System to retire at age 70. PERB disagreed finding that Education Law §510 neither obligates a board of education (1) to retire a member of the Teachers' Retirement System at age 70 nor (2) does it vest a board of education with an absolute right to require a teacher to retire

at a predetermined age. PERB found that this statutory language did not circumscribe the board's exercise of power on this issue and therefore determined that the subject of compulsory retirement of members of the Teachers' Retirement System is mandatorily negotiable.<sup>6/</sup>

Thus, the language of c. 175 -- "any member ... who has attained the age of 55 years shall be retired forthwith" -- mandates that the Division of State Police retire all such employees. The language of New York State Education Law §510 -- "any member who has attained age 70 may be retired at his own request or at the request of his employer" -- does not mandate that the employer retire such employees nor does it give the employer an absolute right to require such employees to retire.

The language of c. 73 -- "an employee who has attained 70 years of age ... at an institution of higher education may, at the option of the institution be required to retire" -- clearly does not mandate that the employer retire such employees, as does c. 175. However, the c. 73 language is also significantly different from the §510 language. C. 73 has no provision which indicates that the retirement process may be initiated on an equal basis by either the

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<sup>6/</sup> See also, Sibley v. Health Commission, 87 LRRM 3091 (App. Ct., Ill. 1974) where the court determined that, absent specifically delegated legislative authority on the issue of compulsory retirement, the Cook County Health & Hospitals Commission had no inherent power to fix a compulsory retirement age for its employees.

employee or the employer; that authority is reserved only to the institution. A more important distinction, however, is that under §510, employees are requested to retire; under c. 73, they are required to retire. Finally, if the statute was worded -- "an employee who has attained 70 years of age ... may be required to retire." -- a persuasive argument could be made that compulsory retirement at age 70 was a mandatorily negotiable topic. However, the insertion of the phrase "at the option of the institution" between "may" and "be required to retire" has a significance which must be considered. The presence of that phrase may accomplish what the Harrison Board of Education argued §510 did: to vest in the employer the nondelegable right to require a faculty member to retire at age 70.

Negotiations on this topic may substantially interfere with the determination of governmental policy. The State likens the issue of compulsory retirement of employees to basic employer decisions regarding such matters as who to hire, retain, promote, transfer or dismiss. The State argues that decisions concerning such matters implicate inherent managerial prerogatives and are not negotiable. The Charging Party contends that negotiations concerning a compulsory retirement policy will not affect managerial prerogatives because so few faculty members are affected by such a policy.

In the private sector, it is firmly established that the age of compulsory retirement of employees is a mandatory subject of negotiations.<sup>7/</sup> However, the extent of applicability of such private sector precedent to public sector scope of negotiations issues has sometimes been limited by the courts.<sup>8/</sup>

The State also argued that negotiations on the age 70 mandatory retirement policy will "affect" pension statutes in that it will affect (1) when employees may leave active service and retire and (2) payments out of the pension fund. The State argues that such negotiations would be violative of N.J.S.A. 34:13A-8.1. The Charging Party disagrees with this interpretation.

N.J.S.A. 34:13A-8.1 states, in part:

...nor shall any provision hereof (the New Jersey Employer-Employee Relations Act) annul or modify any pension...statutes of this State.

In Fairhaven Education Assn. v. Fairhaven Board of Education, 79 NJ 574 (1979), the court held that a supplemental

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<sup>7/</sup> Inland Steel Co. v. NLRB 170 F2d 247, 22 LRRM 2506 (1948, CA7) affd 339 US 382, 94 L Ed 925, 70 S Ct 674, 26 LRRM 2084. McMullans v. Kansas, Okla & Gulf Ry, 37 LRRM 2373 (10th Cir. 1956). Accord, In re Harrison Bd/Ed, supra, at p. 9. Other than the Harrison case (which as indicated above, might be distinguished from this matter based upon the underlying statutory language), no public sector precedent was located on the compulsory retirement issue.

<sup>8/</sup> Local 195, IFPTE v. State of New Jersey, 88 NJ 393 (1982). Accordingly, in the context of an interim relief matter, without having any Commission decision on point, to rely solely on such private sector precedent does not seem advisable.

retirement benefits program which provided incentive for early retirement was invalid because it could substantially affect the retirement age of employees and thus affect the actuarial assumptions of the Teachers' Pension & Annuity Fund.<sup>9/</sup>

Any factor which affects employees' retirement age may affect certain of the actuarial assumptions underlying a given pension system, e.g., such matters as the payout of the pension funds and the employer's contribution to the pension system. Fairhaven, supra. Based upon the position the Union has taken in this matter, it would appear that the Union would not seek to lower the mandatory retirement age through negotiations but rather, to make it higher. Theoretically, such a change would not have an adverse effect upon the pension system. However, there are very few facts in the record on this issue and the parties spent little time addressing this matter during their oral arguments. Accordingly, based upon such limited information and the limited caselaw on this issue, I am unable to conclude that negotiations on the issue of an age 70 mandatory retirement age would not affect pension statutes.

The Charging Party contends that absent the relief it has requested, its members will be irreparably harmed. Charging Party states that retirement is an irrevocable step and that some of its

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<sup>9/</sup> Accord, Jacobs v. N.J. State Highway Authority, 54 NJ 393 (1969). See also, State of N.J. v. State Supervisory Employees' Assn., 78 NJ 54 (1978); and Opinions of Counsel, 8 NY PERB 5008 (1975).

affected members could die before the Commission decides the issue in a plenary decision.

The State argues that any changes which occur as a result of the mandatory retirement policies may be remedied subsequently and that the statute (c. 73) itself provides for a remedy of reinstatement and back pay plus interest for any improperly retired employee.<sup>10/</sup>

Based upon this record, I am not convinced that employees who may be retired under the mandatory retirement policies adopted by the State would not receive adequate, appropriate remedies subsequent to the Commission's deciding the case in full. The Commission may, where it deems it to be appropriate, order employees reinstated with back pay and interest on monies lost.

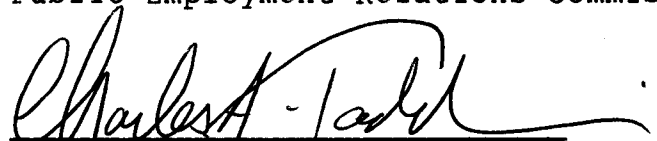
The parties have stated that they believe the factual record in this matter is largely uncontested. Accordingly, this matter should promptly proceed to a final disposition, thereby minimizing the number of employees who will be retired under the disputed policies and the extent of any dislocations to employees who have been retired under the policies.

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<sup>10/</sup> The Charging Party notes that it is not contending that Respondent's mandatory retirement policies are improper under c. 73. Rather, they are contending that Respondent's actions herein constitute unfair labor practices. Regardless of whether Respondent's actions constitute violations of c. 73, if they are determined to be unfair practices within the meaning of the Act, under appropriate circumstances, the Commission has the authority to impose remedies which include reinstatement, back pay and interest thereon.

Based upon the foregoing discussion, I conclude that the age 70 mandatory retirement policy does intimately and directly affect the work and welfare of public employees. I conclude that the pertinent language of c. 73 may be interpreted to vest in institutions of higher education the nondelegable authority to set an age 70 mandatory retirement policy. I am unable to conclude that negotiations on the issue of age 70 mandatory retirement policies would not interfere with the determination of governmental policy and/or affect pension statutes. Thus, the Charging Party has not demonstrated a substantial likelihood of success on the legal and factual issues of the charge in the final Commission decision. Further, Charging Party has not demonstrated that irreparable harm will occur to it and its members if the requested relief is not granted. Accordingly, Charging Party's request for interim relief is denied.

Public Employment Relations Commission



Charles A. Tadduni  
Commission Designee

DATED: April 25, 1986  
Trenton, New Jersey