

STATE OF NEW JERSEY  
BEFORE A HEARING EXAMINER OF THE PUBLIC EMPLOYMENT  
RELATIONS COMMISSION

In the Matter of

CINNAMINSON TOWNSHIP BOARD OF  
EDUCATION,

Respondent,

-and-

Docket No. CO-78-286-14

CINNAMINSON TOWNSHIP TEACHERS  
ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Hearing Examiner denies a Motion to Dismiss Complaint filed by the Cinnaminson Township Board of Education prior to hearing.

The Cinnaminson Township Teachers Association charges the Board with a refusal to negotiate under the Act. The Association alleges it represents the Board's teaching staff members and other employees as statutory majority representative. It claims the existence of a practice and policy in the School District pursuant to which the family of a deceased employee has received on the employee's death a lump sum payment representing unused sick days, vacation days and personal days. The Association asserts that the Board has now unilaterally altered the terms and conditions of employment of members of the bargaining unit it represents by amending the practice without prior negotiation to exclude unused sick and personal days from the lump sum payment.

The Board's motion urges that by virtue of recent appellate court determinations affirming the Act's preclusion of negotiations with respect to the entire subject matter of public employee pensions, it lacks authority to negotiate with respect to the lump sum payments previously made on death and that such benefits constitute illegal subjects of bargaining. The Board reaches this conclusion by equating the lump sum payments to retirement benefits, including death benefits regulated under the comprehensive uniform state-wide Teachers' Pension Law.

The Examiner finds for the purpose of disposing of the motion that the lump sum payment constitutes a deferred compensation for services performed while the deceased employee was alive. Those services were performed in lieu of taking paid sick leave or personal days and provided a benefit to the Board recognized by it in the form of the practice of payment of the sums representing unused sick and personal days to the deceased employee's family. He concludes that the payment is distinguishable from the death benefit payable to survivors of members of the Pension Fund created by contributions from the compensation of members

and unrelated to the services actually performed by them. Accordingly, the Examiner finds the lump sum payments to be a term and condition of employment not subject to the Teachers' Pension Law. As the Board was thus required to negotiate with respect to the subject matter, any unilateral change in the payment would constitute a violation of its negotiation obligation under the Act. He therefore denies the motion.

Under the Commission Rules, the Hearing Examiner's ruling on this motion shall not be appealed directly to the Commission except by special permission of the Commission, but shall be considered by the Commission in reviewing the record, if exceptions to the ruling is included in the statement of exceptions filed with the Commission to the Hearing Examiner's Recommended Report and Decision issued after hearing.

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DECISION AND ORDER DENYING  
MOTION TO DISMISS COMPLAINT

By Notice of Motion dated August 30, 1978 and filed August 31, 1978, and accompanied by a memorandum of law in support, Respondent moves to dismiss the instant unfair practice complaint. On September 8, 1978, the Charging Party filed a memorandum of law opposing the motion.

The motion and opposing papers both raised issues regarding the reach of two recent court decisions, one an Appellate Division decision, Fair Lawn Education Association v. Fair Lawn Board of Education, Docket No. A-183-77, decided July 13, 1978, and the other, one of the six landmark Supreme Court decisions interpreting various aspects of the Act, State of New Jersey v. State Supervisory Employees' Association, et al., \_\_\_ N.J. \_\_\_, Docket No. A-162, decided August 2, 1978, both of which interpreted N.J.S.A. 34:13A-8.1<sup>1/</sup> to preclude negotiations with respect to the entire subject matter of public employee pensions.

<sup>1/</sup> Section 8.1, one of the amendments to the Act effective January 20, 1975 (C. 123, P. L. 1974), changed the prior provision by adding the word "pension" so that it now reads,

"Nothing in this Act shall be construed to annul or modify, or to preclude the continuation of any agreement during its current terms heretofore entered into between any public employer and any employee organization nor shall any provision hereof annul or modify any pension statute or statutes of this State."

The charge filed May 30, 1978, upon which complaint issued on August 3, 1978, alleges that the Association is the statutory majority representative of a unit consisting of teaching staff members, psychologists, nurses, librarian aides, secretaries, clerks, teacher aides and media assistants employed by the Board. The charge further alleges the existence of a past practice and policy in the Respondent's School District whereby on the death of an employee, the employee's family has received from Respondent a lump sum payment representing full pay for the employee's unused sick days, vacation days and personal days. The charge next alleges that on or about November 28, 1977, Respondent unilaterally amended the practice and policy without negotiation with the Association by excluding sick days and personal days from the lump sum payment accorded the family of the deceased employee. The conduct is claimed to have constituted a unilateral alteration of the terms and conditions of employees within the negotiating unit, in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5). <sup>2/</sup>

In Fair Lawn the Court weighed the legality of an early retirement remuneration plan included in a collective bargaining agreement between the parties. The plan provided a lump sum cash payment to teachers 55 years of age or over with at least 15 years of service in the district who chose to retire early. This payment was in addition to the benefits provided under the Teachers' Pension and Annuity Fund Law (Teachers' Pension Law), N.J.S.A. 18A:66-1 et seq. The Court held the plan to be illegal under both the Teachers' Pension Law and §8.1 of the Act. As the Teachers' Pension Law provides a comprehensive uniform state-wide plan for the payment of retirement benefits to teachers in New Jersey the Court was persuaded that the Legislature intended to preclude the exercise of any power by local boards of education with respect to such benefits. The Court found evidence of this intent in the Legislature's enactment of §8.1 in its amended form. Furthermore, the Court also concluded that payment of supplemental retirement benefits as an inducement to early retirement will impair the actuarial integrity of the Teachers' Pension Fund and will impose an unfair and improper burden on its other members. Thus, permitting enforcement of the provision in the parties' agreement would subvert the legislative aim in adopting a comprehensive pension scheme for teachers.

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<sup>2/</sup> In pertinent part, subsection (a)(5) prohibits public employers from refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning the terms and conditions of their employment, while subsection (a)(1) prohibits such employers from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act.

In the State of New Jersey case, the Supreme Court held that under the 1974 amendments to the Act, notably N.J.S.A. 34:13A-5.3 <sup>3/</sup> and N.J.S.A. 34:13A-8.1, while ambiguous and less than clear, the Legislature intended that collective negotiations are mandatory with respect to proposals governing any terms and conditions of employment which have not been set, and thus preempted, by specific statutes or regulations. However, "...the entire subject matter of public employee pensions is to be insulated from negotiated agreement which would contravene or supplement its comprehensive regulation of that area. Public employees and employee representatives may neither negotiate nor agree upon any proposal which would affect the sacrosanct subject of employee pensions." (Slip Opinion at 33 and 34) Fair Lawn, decided three weeks earlier, would thus appear to have anticipated State of New Jersey. Its result is entirely consistent with the Supreme Court's holding.

Having summarized these two recent appellate determinations, the issue nonetheless remains whether the death benefit paid to the heirs of a deceased teacher pursuant to the practice alleged <sup>4/</sup> constitutes a form of retirement benefit, and negotiation of which is an ultra vires act, or whether it is a form of compensation for past services unrelated to retirement benefits and thus mandatorily negotiable under the Act as a term and condition of employment, the unilateral modification of which violates the negotiation obligation under the Act. Galloway Township Board of Education v. Galloway Township Education Association, \_\_\_ N.J. \_\_\_, Docket No. A-134-135, August 1, 1978 (Slip Opinion at fn. 9, page 30); see also In the Matter of Hudson County Board of Chosen Freeholders and Hudson County P.B.A. Local 51, P.E.R.C. No. 78-48, 4 NJPER 87 (14041, 1978), appeal pending App. Div. Docket No. A-2444-77.

While impliedly recognizing that the lump sum payments in the case sub judice would not impair the actuarial integrity of the Teachers' Pension Fund,

<sup>3/</sup> This subsection had the following sentence added to it: "Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement."

<sup>4/</sup> In accordance with the standard applicable to a determination of the instant motion, I must view the allegations of the complaint and all inferences which may be drawn therefrom in a light most favorable to the Charging Party. In the Matter of Township of North Bergen, P.E.R.C. No. 78-28, 4 NJPER 15 (14008, 1978).

the Respondent relies on the other rationale in Fair Lawn holding that the Legislature has wholly preempted it from exercising any authority to establish a death benefit plan. To buttress this argument the Respondent refers to the provisions of N.J.S.A. 18A:66-1 et seq. which provides for death benefits payable to the survivors of members of the pension fund. <sup>5/</sup> These benefits are payable out of funds created by accumulated contributions from the compensation of members who elect to participate (or out of members' accumulated deductions in the case of the accidental death benefit). They are unrelated to the actual compensation received by the member while actively employed and they are in no way related to or based upon actual services performed by the member while employed.


In contrast, the benefit payable to the deceased employee's heirs under the practice alleged in the instant complaint constitutes a deferred lump sum compensation for services performed while employed and is based upon the rate of compensation actually received while so employed. As noted by the Charging Party in its memorandum, the Commission has determined that payment for accumulated sick leave is a form of compensation, thus a term and condition of employment which is mandatorily negotiable. City of Somers Point, P.E.R.C. No. 77-48. State of New Jersey has now confirmed, as the Commission there held, that a board of education does not lack the authority to make such payments (which may even be triggered on the employee's death as in the case sub judice) because a specific legislative grant of authority is lacking. The collective negotiations provision which the Commission there found to be negotiable, and arbitrable if otherwise arbitrable under the parties' agreement, actually provided that upon retirement, death or honorable termination of employment, an employee would be compensated for each day of accumulated sick leave. Such a form of compensation recognizes and rewards those employees who, although eligible for paid sick leave (or personal days and vacation), refrain from taking such leave and provide the employer with the benefit of the performance of their actual services and the savings resulting from the avoidance of hiring a substitute to perform the same services

<sup>5/</sup> See §66-26 establishing a death benefit fund for payment of additional death benefits upon death of a member electing the additional benefits; §66-53 providing for Optional Death Benefits on purchase of additional coverage; §66-46 providing for accidental death benefit; and §66-38, providing an alternative death benefit where no accidental death benefit is payable under §66-46.

in the employee's absence. The benefit is earned and accrued by the employee by failing to use the paid sick or personal leave days. Acceptance of Respondent's overly broad interpretation of the death benefits regulated by the Pension Fund would lead to a rejection of the recognition the Respondent previously accorded unused sick leave or personal days by its policy of compensating them for such unused time upon their death.

The accumulated benefit payable on death is not unlike the payment of accrued salary upon death which the Respondent would be hard pressed to claim is a "death benefit" regulated by the Teachers' Pension Fund and thus an ultra vires act if engaged in by the employer. By the same reasoning, the accumulated sick leave or personal days paid to the employee's family on death under the practice alleged, is a form of compensation fully earned while employed but the payment of which had been deferred and is not regulated by the Teachers' Pension Fund as either a form of pension or death benefit as those terms are defined or used under the Pension Law. The practice neither modifies nor amends the laws establishing the fund and thus does not contravene §8.1 of the Act or the Supreme Court's holding interpreting that section in State of New Jersey. Its modification without negotiation, if proven, thus would constitute a unilateral alteration by the Respondent of the terms and conditions of employment of the members of the unit represented by the Charging Party in violation of its negotiation obligation under N.J.S.A. 34:13A-5.3(a)(5) and, derivatively, its obligation to refrain from interfering with its employees' rights under N.J.S.A. 34:13A-5.3(a)(1).

Accordingly and for the foregoing reasons, IT IS HEREBY ORDERED that the Respondent's Motion to Dismiss the Complaint be, and the same hereby is, denied.

  
Robert T. Snyder  
Hearing Examiner

DATED: Trenton, New Jersey  
October 5, 1978