

P.E.R.C. NO. 99-69

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH,

Petitioner,

-and-

Docket No. SN-99-6

FMBA LOCAL NO. 9,

Respondent.

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of a terminal leave proposal submitted by FMBA Local No. 9 to interest arbitration for inclusion in a successor collective negotiations agreement with the City of Elizabeth. The Commission finds that the FMBA's proposal involves a declining supplemental retirement incentive for employees who retire with 25 to 34 years of service and is not mandatorily negotiable.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Genova, Burns & Vernioia, attorneys
(Robert C. Gifford, Jr., on the brief)

For the Respondent, Fox & Fox, LLP, attorneys
(Daniel J. Zirrith, on the brief)

DECISION

On August 3, 1998, the City of Elizabeth petitioned for a scope of negotiations determination. The City seeks a determination that a terminal leave proposal that FMBA Local No. 9 has submitted to interest arbitration is not mandatorily negotiable.

The parties have filed briefs and exhibits. These facts appear.

The FMBA represents the Township's uniformed firefighters, fire subcode officials, fire prevention specialists, and probationary firefighters. The parties' most recent contract expired on June 30, 1998. The parties have engaged in successor contract negotiations and the FMBA has petitioned for interest arbitration.

The FMBA's negotiations proposals dated January 22, 1998 included the following proposal:

Terminal Leave
Final year at 25th Year \$20,000.00
Sick time deducted from Balance per day (Expl.)
Declining Balance as years increase Terminal
Leave decreases

The City rejected the proposal.

On April 14, 1998, the FMBA submitted the following revised proposal:

Terminal leave \$20,000. Minus 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

The City also rejected this proposal.

On June 29, 1998, the FMBA filed its interest arbitration petition. The notice identified its terminal leave proposal as one of the economic issues:

Effective June 1, 1998, implement terminal
leave benefits for retiring Elizabeth
Firefighters with a maximum benefit of \$20,000.

The City contends that the FMBA's proposal is an illegal early retirement incentive that provides members who retire after twenty-five years of service with greater terminal leave benefits than members who retire after twenty-six or more years of service. It asserts that the FMBA proposal is similar to the early retirement incentive plan invalidated in Fair Lawn Ed. Ass'n v. Fair Lawn Bd. of Ed., 79 N.J. 574 (1979), where the Supreme Court held that a board of education lacked authority to agree to

a plan that rewarded early retirement rather than the amount and quality of work that a teacher had performed.

The City also relies on a December 12, 1991 memorandum from the Division of Pensions to certifying officers of the Police and Firemen's Retirement System (PFRS) and other State retirement systems. That memorandum advises that Fair Lawn bars local employers from offering early retirement incentive programs not specifically authorized by law. It states that while early retirement programs have been authorized for members of some public employee pension systems, no program is authorized for PFRS members.^{1/} The memorandum adds that PFRS' permanent benefit structure includes a special early retirement benefit of 65% of base salary for members with 25 years of service regardless of age. See N.J.S.A. 43:16A-11.1. The Division characterizes that permanent benefit as "substantially richer" than that provided by the special early retirement incentive programs.

The FMBA counters that its proposal is a mandatorily negotiable terminal leave provision that does not conflict with any pension statute or regulation and would not alter the statutory eligibility criteria for PFRS benefits. It asserts that the City's reliance on Fair Lawn -- and the 1991 Division of

^{1/} Early retirement programs for members of other pension systems were authorized in 1991 and 1993. See L. 1991, c. 229, c. 230, and c. 231; L. 1993, c. 44 and c. 163. A 1994 memorandum from the Division to certifying officers enclosed the 1991 memorandum, reaffirmed its validity, and noted the 1993 legislation.

Pensions memorandum -- is misplaced because its proposal would tie the compensation to years of service and unused sick leave and would reduce the lump sum payment by one day's pay for each sick day used. It asserts that it contacted PFRS Trustees about its proposal and was advised that the proposed payments would constitute extra compensation that would not be used in calculating an individual's pension.

Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the scope of negotiations analysis for police officers and firefighters:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable. [87 N.J. at 92-93; citations omitted]

This petition implicates two lines of cases. On the one hand, our 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, 79 N.J. at 588; State v. State Supervisory Employees Ass'n, 78 N.J. 54, 83 (1978). On the other hand, it is well established that parties must negotiate over proposals to compensate employees for unused leave allowances through either lump sum payments at retirement or at regular pay periods as terminal leave just prior to retirement. See Galloway Tp., P.E.R.C. No. 98-133, 24 NJPER 261 (¶29125 1998); Morris School Dist. Bd. of Ed., P.E.R.C. No. 97-142, 23 NJPER 437 (¶28200 1997), aff'd 310 N.J. Super. 332 (App. Div.), certif. denied, 156 N.J. 407 (1998); Monroe Tp. Bd. of Ed., P.E.R.C. No. 93-9, 18 NJPER 428 (¶23194 1992); State of New Jersey (State Troopers), P.E.R.C. No. 92-3, 17 NJPER 374 (¶22175 1991), recon. den. P.E.R.C. No. 92-15, 17 NJPER 409 (¶22195 1991), aff'd NJPER Supp.2d 278 (¶225 App. Div. 1992), certif. den. 130 N.J. 596 (1992); Middlesex Cty. Prosecutor, P.E.R.C. No. 91-83, 17 NJPER 219 (¶22093 1991), aff'd NJPER Supp.2d 280 (¶227 App. Div. 1992); Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987); River Vale Tp., P.E.R.C. No. 86-82, 12 NJPER 95 (¶17036 1985); Edison Tp., P.E.R.C. No. 84-89, 10 NJPER 121 (¶15063 1984); City of Newark, P.E.R.C. No. 83-143, 9 NJPER 296 (¶14137 1983); Somers Point, P.E.R.C. No. 77-48, 3 NJPER 99 (1977);

see also Camden v. Dicks, 135 N.J. Super. 559 (Law Div. 1975); New Jersey Civil Service Ass'n v. Mayor and City of Camden, 135 N.J. Super. 308 (Law Div. 1975); Maywood Ed. Ass'n v. Maywood Bd. of Ed., 131 N.J. Super. 551 (Ch. Div. 1974) (rejecting contentions that local employers lacked authority to pay employees for unused sick leave and/or that such payments were an unconstitutional gift of public funds). The issue is whether the FMBA has proposed a mandatorily negotiable terminal leave payment, as it contends, or an early retirement incentive, as the City asserts.

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

We now analyze the FMBA's proposal in light of this framework. We conclude that the proposal is not mandatorily negotiable because it proposes an early retirement incentive.

Preliminarily, we disagree with the FMBA that the proposal is simply designed to compensate employees for 25 or more years of service and unused sick leave. All unit members would be entitled to a \$20,000 payment if they retired after 25 years of service, regardless of how much unused sick leave they had accumulated in the first 24 years of employment. The payment thus is not simply compensation for unused sick leave. The fact that sick leave taken during the last year would be deducted from the lump sum payment does not change its overall character as one not primarily related to accumulated leave balances.

Similarly, we disagree with the FMBA that the proposal would compensate members for each of their 25 years of service. Preliminarily, we think that, in distinguishing compensation for services from other financial incentives, Fair Lawn contemplated payments that varied based on an individual employee's length or quality of service. Id. at 580; see also Newark, 9 NJPER at 297 (proposal for lump sum payment for unused leave was directly tied to compensation for services actually rendered). In any case, the plan in Fair Lawn applied only to teachers with a minimum of 15 years of service and the board characterized the plan payments as, in part, a reward for such service. But the Court nevertheless found that the plan was a retirement incentive because the payments declined with age and each additional year of service. 79 N.J. at 580. The same analysis pertains here.

We deem it crucial that, under the FMBA's proposal, the "reward for service" payment would decline by \$2,000 for each additional year of service after 25 years. Thus, a unit member retiring with 30 years of service would receive \$10,000 and a member who retired after 35 years would receive no payment. Given these features, the proposal does not predominantly involve the mandatorily negotiable subjects of compensation for years of service or unused leave but rather proposes a declining supplemental retirement incentive for those who retire with 25 to 34 years of service. Because the Legislature has preempted the field of retirement benefits, Fair Lawn, 79 N.J. at 587, the proposal is not

mandatorily negotiable. This is so even though, as the FMBA emphasizes, the proposal does not alter statutory criteria for pension eligibility. Negotiations are prohibited over proposals that supplement as well as contravene the State's comprehensive regulation of pensions and retirement benefits. Fair Lawn, 79 N.J. at 582-583, 587; State Supervisory at 83. Similarly, it is not significant that, as the FMBA argues, the proposal does not explicitly link payments to age: like the plan in Fair Lawn, payments would decrease with each additional year of service and, therefore, with each additional year of age.

We also find, based on logic and economics, that a proposal that would decrease lump sum payments for each additional year of service after 25 would tend to induce employees to retire at closer to 25 rather than 35 or more years of service. Fair Lawn, 79 N.J. at 584-585. The plan thus falls within the ambit of Fair Lawn's prohibition against adopting early retirement incentive programs not authorized by law. 79 N.J. at 588.

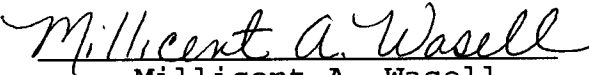
The Division of Pension documents submitted by the parties buttress our conclusions. The FMBA relies on a Division of Pension letter stating that lump sum terminal leave payments are excluded from creditable salary for pension purposes. See N.J.A.C. 17:4-4.1. However, the letter does not address the issue here: the legality of lump sum payments at retirement that decline with additional years of service. Moreover, the Division's 1991 and 1994 memoranda to local public employers emphasize that the only early

retirement incentive programs that they may adopt are those specifically authorized by law. The memoranda also state that the plan in Fair Lawn was invalidated both because of the potential harm to the State-administered retirement system and because retirement benefits were not a proper subject of negotiations in the public sector. The memoranda thus support our conclusion that the instant proposal is not mandatorily negotiable.

ORDER

The FMBA proposal is not mandatorily negotiable and may not be submitted to interest arbitration.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn and Ricci voted in favor of this decision. None opposed.

DATED: January 28, 1999
Trenton, New Jersey
ISSUED: January 29, 1999