P.E.R.C. NO. 80-113

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Respondent,

-and-

JERSEY CITY POLICE OFFICERS BENEVOLENT ASSOCIATION,

Docket Nos. CO-79-246-94 and CO-79-248-95

Charging Party,

-and-

JERSEY CITY FIREFIGHTERS, I.A.F.F., LOCAL 1066,

Charging Parties.

SYNOPSIS

The Commission having previously granted a motion of the charging parties to reconsider its earlier decision, the Commission modified and clarified its initial decision. The cases reached the Commission in the form of unfair practice charges filed by the charging parties. However, the parties had been directed to the Commission by the Superior Court in order to obtain a negotiability determination regarding a disputed parity clause. The Commission dismissed the unfair practice charges filed by the charging parties, noting that the charges were untimely filed and that the Commission is without authority to enforce arbitration awards. Additionally, the Commission reaffirmed its holding in In re City of Plainfield, P.E.R.C. No. 78-87, 4 NJPER 255 (¶4130 1978) that parity clauses are illegal subjects of negotiations.

In response to the orders of the Superior Court Judge, the Commission addressed the question of the negotiability of the disputed parity clauses which appear in the two contracts between the charging parties and the City and pursuant to which two grievance arbitrators had issued awards favorable to the charging parties. On reconsideration, the Commission concluded that the disputed parity clauses were not illegal at the time that they had been included in the parties' agreements. The clauses were entered into prior to the decision in Plainfield and such clauses had not been found to be illegal at that time. The clauses appeared in the contracts as a result, presumably, of good faith negotiations between them and it would not be equitable to deprive the unions of benefits under the contracts to which they had been found to be entitled by the two grievance arbitrators. Additionally,

it would be improper for the City to benefit from its failure to pay benefits due under the 1976-1977 agreements as a result of the City's failure to pay the benefits when they were due. The appeals process, although a legitimate right of all parties, cannot reasonably be used to justify a failure to pay benefits due under those 1976-1977 agreements. Thus, the parity clauses in the 1976-1977 agreements between the City and the charging parties were not illegal subjects of negotiations because they were entered into and performance was due prior to the Plainfield decision.

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Appearances:
For the Charging Parties, Schneider, Cohen & Solomon, Esqs., (David Solomon and J. Sheldon Cohen, of Counsel)

For the Respondent, Louis P. Caroselli, Corporation Counsel (Francis X. Hayes and Thomas Fodice, of Counsel)

DECISION AND ORDER ON RECONSIDERATION

Subsequent to the filing of two unfair practice charges, Docket Nos. CO-79-246-94 and CO-79-248-95, with the Public Employment Relations Commission by the Jersey City Police Officers Association and the Jersey City Firefighters, I.A.F.F., Local 1066, respectively, (the "Charging Parties" or "Unions") alleging that the City of Jersey City (the "City") violated portions of the Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq., the Commission, on October 31, 1979, rendered a decision and order, P.E.R.C. No. 80-55, 5 NJPER ___ (¶_____ 1979), dismissing the

consolidated complaint in its entirety.[1/] Thereafter, in accordance with an approved request for an extension of time within which to file, on November 26, 1979 the Charging Party filed a Motion for Reconsideration with the Commission pursuant to N.J.A.C. 19:14-8.4. The City filed a statement and supporting memorandum in opposition to the request. The City asserted that the motion had not been timely filed and that it rasied no "extraordinary circumstances" necessary for granting such motions. See N.J.A.C. 19:14-8.4. On January 17, 1980, we granted the motion for reconsideration and a request of the Charging Parties that oral argument be scheduled. The parties argued orally before us on February 19, 1980. Neither filed additional briefs although they were provided an opportunity to do so.

The relevant facts were set forth in our initial decision and may be quickly summarized. The City and the Charging Parties, pursuant to an interest arbitration award in one case and to a voluntary agreement in the other, entered into contracts covering the term January 1, 1976 to December 31, 1977. Both contracts contained parity or "me too" clauses guaranteeing these unions any benefits subsequently obtained by other unions. Thereafter, organizations representing police and fire superior officers reached agreements with the City which the Charging Parties contended provided benefits in excess of those contained in their agreements with

1/ The Commission decided this case on a three to two basis with one Commissioner being absent and one position being vacant. Commissioner Hipp filed a separate written dissent in this case, a copy of which is attached to the majority decision.

the City. Citing the parity clauses, the Charging Parties argued persuasively to two separate grievance arbitrators that the Charging Parties herein were entitled to additional benefits. The arbitrators agreed and fashioned remedies. The City sought to vacate one of these awards and the union sought to confirm the other. Judge Kentz, who heard both matters, concluded that both cases raised negotiability and arbitrability issues appropriate for disposition by PERC and he directed the parties to refer the matters to PERC.[2/]

The leading Commission case on the negotiability of parity clauses is In re City of Plainfield, P.E.R.C. No. 78-87, 4 NJPER 255 (¶4130 1978) issued on July 5, 1978. This decision -- the timing of which is relevant to this case -- was issued subsequent to the time when the City entered into all four contracts mentioned above and subsequent to the issuance of the arbitration award in the case involving the Firefighters. The second arbitration award and Judge Kentuz's orders all occured subsequent to our issuance of Plainfield.

The Charging Parties raise several arguments. First, it is asserted that we misapplied or ignored our decision in Plainfield. Secondly, the Charging Parties argue that our decision "essentially legitimizes" the City's failure to pay benefits it had promised to pay -- purportedly in good faith -- and allows the City to profit from its conduct at the expense of stable and harmonious labor-management relations.

2/ This referral is in accord with the Supreme Court's guidelines in Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) at 153-156. The Court recognized that it may be necessary in some cases to go to both PERC and the Superior Court to resolve arbitrability questions.

Third, Charging Parties contend that our decision overlooked the charges of bad faith leveled by them against the City regarding the City's alleged claimed inability to pay additional wage and benefits due to fiscal considerations. The Charging Parties ask us to consider the equities in this case. They relied upon the City's representation that there was no money for additional benefits in 1976 and 1977. The contract protected the unions by guaranteeing them any additional benefits granted to other unions. Yet other unions received additional benefits, according to two grievance arbitrators, and the City refused to comply with either the terms of the contract or the arbitration award. Our decision, they argue, was inconsistent with our statutory duty to foster harmonious, stable labor relations.

Finally, the Charging Parties urge us to reconsider because we misstated the state of the law in New York State regarding the legality of parity provisions. The case referred to, decided by the Court of Appeals, is Niagara Wheatfield Administrators' Assn. v. Central School District, 11 PERB 7512 (1978).

The Charging Parties seek a determination from us that the disputed parity provisions are enforceable and, further, a remedial order enforcing the two grievance arbitration awards and ordering the City to pay the benefits due thereunder.[3/]

Our reconsideration of the arguments of the parties leads us to modify and clarify our initial decision.

3/ Transcript of oral argument, page 20.

First, we reaffirm our holding in Plainfield, supra, that parity clauses are illegal subjects of negotiations. In reaching this conclusion, we have again considered the arguments of the Charging Parties that parity should be a legal subject of negotiations.[4/]

Second, we believe that it would be helpful to discuss our role in this matter. These cases reached us because Judge Kentz directed the parties to refer them to us to answer a specific question with regard to negotiability. See note 2 supra. The Charging Parties filed unfair practice charges. These charges are untimely. They were filed in March 1979. The unions seek benefits allegedly due under thier 1976-1977 agreements with the City although the disputed $50 additional clothing allowance, while effective in 1976 and 1977, was not payable until January 1, 1978.[5/] Thus, even using that date, the charges were not filed until over 15 months after the City's failure to pay. We have held that filing grievances, which the Charging Parties did, does not toll the statutory six month period of limitation.[6/] Therefore, we must dismiss the charges.[7/] Furthermore, we are without authority to enforce the

4/ The Niagara Wheatfield case is one that we were aware of when we rendered our initial decision, it having been cited by the Charging Parties in their initial brief. Even if the New York Court of Appeals case implicitly reversed the PERB cases cited in our decision, we still believe that parity is an illegal subject and, furthermore, that that conclusion is consistent with the trend in public sector labor relations. In any event, these decisions, while instructive, are not binding upon us.

5/ Transcript of oral argument, page 42.

6/ N.J.S.A. 34:13A-5.4(c). See In re State of New Jersey and Council of N.J. State College Locals, P.E.R.C. No. 77-44, 2 NJPER 308 (1976) aff'd sub nom State v. Council of N.J. State College Locals, 153 N.J. Super. 91 (App. Div. 1977) certif. denied 78 N.J. 326 (1978).

7/ We hereby reaffirm our initial determination that, on the basis of the stipulated record, we do not believe that the City's conduct amounted to bad faith negotiations. See P.E.R.C. 80-55 at 68.

arbitration awards. Enforcement of these awards should be and has been pursued in accordance with the provisions of N.J.S.A. 2A:24-7 et seq. That is the proper forum.

However, as stated above, the orders of Judge Kentz indicate a desire on his part that we determine the legal issue regarding the negotiability of the disputed parity clauses. This issue would more appropriately have been presented in a scope of negotiations proceeding.[8/] Nevertheless, we shall address that issue at this time, recognizing the limits of our authority.[9/]

Third, as set forth above, this case arises in a rather unique context. The disputed parity clauses were agreed to in 1976 and were included in the 1976-1977 agreements. The City has failed to pay money which two arbitrators determined was due under the two contracts. Our Plainfield decision, supra, was issued in July 1978, after the two contracts at issue had expired. We are now asked to pass upon the negotiability of the disputed parity clauses at the direction of Judge Kentz who must determine whether to confirm the two grievance arbitration awards which were rendered under the

8/ See N.J.A.C. 19:13-1 et seq. and N.J.S.A. 34:13A-5.4(d) which states that, "The Commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The commission shall serve the parties with its findings of fact and conclusions of law. Any determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court."

9/ See P.E.R.C. No. 80-55 at 5 and 6 for a fuller statement of the point.

1976-1977 agreements and which turned upon the parity clauses contained in those agreements.

The logical starting point for this examination is our Plainfield decision, supra where we said that parity proposals are illegal because they have "...a natural and unavoidable coercive effect." In that same paragraph we concluded that:

> "The mere existence of the clause is sufficient to chill the free exchange between a public employer and an employee organization by permitting a third employee organization, not a party to the negotiations, to have impact upon those negotiations. Parity clauses must be and shall henceforth be illegal subjects of negotiations."

In the next paragraph, we stated that employers could consider "...traditional patterns of wage and benefits relationships including 'comparability' with the different employee organizations it has previously negotiated with." We pointed out that a reopener provision would not offend the Act because it did not guarantee a particular result. Finally, our last paragraph addressed the issue of remedy after we had determined that the disputed clause in Plainfield was an illegal subject of negotiations. The language speaks for itself.

> The remedy is prospective and not retroactive. That is to say that the City shall refrain from giving effect to the clause in the future. Economic benefits already received are not affected by this decision.[7] By reaching the determination that a parity clause is an illegal subject of negotiations, all public employers and all employee organizations are on notice that this Commission will not enforce such a clause and that the requirement for such a clause in negotiations or the insistence on giving effect to such a clause would constitute an unfair practice.

7/ Teamsters Local 37 filed a letter subsequent to its receipt of the Hearing Examiner's Report regarding the intended effect of the proposed order. Our order is prospective and not intended to cause a recission of benefits already received. 5 NJPER at 256 and 257.

Thus, we found parity to be an illegal subject of negotiations and we put the parties on notice that we would not enforce such provisions. However, in the interests of stability, we did not intend to cause economic benefits already received to be rescinded while at the same time ordering the City not to give effect to the clause in the future.

The question is whether the disputed parity clauses were illegal (and thus unenforceable) at the time they were included in the parties' agreements. On reconsideration, we think not.[10/] There are three reasons for the conclusion. First, at the time the parity clauses were included and were to be performed, such clauses had not been found to be illegal. It would be neither proper nor equitable to give retroactive effect to our Plainfield decision under the circumstances of the case.[11/] Second, the parties presumably

10/ See P.E.R.C. No. 80-55 where we said that "...parity clauses, even those reached prior to Plainfield, will be found to be illegal and unenforceable." at 8. That is the sentence which we are changing in this decision on reconsideration.

11/ See P.E.R.C. No. 78-87, 4 NJPER 130 at 256. There is a well established principle of general contract law, which the Commission finds applicable herein, that the validity and enforceability of a contract is determined by the law in effect at the time the contract was entered into. Accordingly, a subsequent change in the law cannot make an agreement illegal which was legal when it was made. Silverstein v. Keane, 19 N.J. 1, Deerhurst Estates v. Meadow Homes, Inc., 64 N.J. Super. 134, on remand 71 N.J. Super. 255, Gibraltor Factors Corp. v. Slapo, 41 N.J. Super. 381, aff'd 23 N.J. 459. It is equally established that, notwithstanding a contract's legality when made, if such an agreement is subsequently prohibited as a matter of law, the contract's continued performance is illegal and neither party can recover for a breach of the contract which occurred subsequent to the change in the law. Pittsburgh Plate (Continued)

engaged in good faith negotiations at the time the parity clauses were included. It would be inequitable, especially under these circumstances where the employees accepted no increase in 1976 and an $800 increase in 1977, to deprive the unions of the modest benefits which they did receive.[12/] Third, we believe that it would be improper for the City to benefit (and for the employees represented by the Charging Parties to suffer) as a result of the City's failure to pay benefits due under the 1976-1977 agreements, as determined by the two arbitrators. Had the City paid the benefits when due, as it should have done, the benefits would have been paid by early 1978, well before our Plainfield decision. Thus, the benefits would have been received and, as we stated in Plainfield, it was our intention that economic benefits already received were not to be rescinded. In fact, one of the grievance arbitration awards had been issued prior to Plainfield and still the City failed to pay. Although we respect the right of parties to appeal adverse decisions, we do not believe that the City can utilize the appeals process to justify its failure to pay benefits due in 1976-1977 or, at the latest, by January 1, 1978.

11/ (Continued) Glass Co. v. Jarrett, 42 F. Supp. 723, modified on other grounds, 131 F.2d 674, see generally Kugler v. Koscat Interplanetary, Inc., 120 N.J. Super. 216, Oates v. E. Bergen County Multi-Listing Service, 113 N.J. Super. 371. On both points of contract law see generally 17 C.J.S. Contracts, Para 22 and 24.

In applying these points of law to the facts in this case, it is clear that the contract in dispute was entered into at a time when parity provisions were not illegal. Moreover, although the issue of its enforcement is now before the court, performance of the clause was to have been totally completed prior to the time the Plainfield decision was issued.

12/ Exhibit J-1 in evidence. The arbitrator was persuaded that the financial plight of the City had been amply demonstrated and that the City was in "dire straights". But he awarded the parity clause so that his binding award "...not be used as an excuse for the City to now negotiate increases with other units..." The City did not appeal this award of the interest arbitrator and in fact voluntarily agreed to the inclusion of an identical provision in its contract with the IAFF which it is also attacking at this time.

Therefore, for the reasons set forth above, on reconsideration we agree with the Charging Parties that we misapplied our Plainfield decision when we held that the parity clauses herein were illegal. We now hold that the parity clauses in the 1976-1977 agreements between the City and the Charging Parties,[13/] having been entered into and performance being due prior to our Plainfield decision, were not illegal subjects of negotiations. However, we reaffirm our order in P.E.R.C. No. 80-55 dismissing the unfair practice complaints in their entirety for the reasons discussed herein. A copy of the decision will be forwarded to Judge Kentz so that he can proceed.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Graves, Hartnett, Hipp, Newbaker and Parcells voted for this decision. None opposed. Commissioner Hartnett concurred in the result; Commissioner Newbaker concurred in dismissal of the Complaint but opposed modification of initial decision.

DATED: Trenton, New Jersey
April 3, 1980
ISSUED: April 3, 1980

13/ We recognize that the City disagrees with the awards of the two grievance arbitrators on the merits of the cases. However, those arguments have no bearing on the negotiability disputes and cannot be considered by us.