P.E.R.C. NO. 2005-68

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF EMERSON,

Petitioner,

-and- Docket No. SN-2005-044

EMERSON P.B.A. LOCAL 206,

Respondent.

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of a proposal made by Emerson P.B.A. Local 206 for inclusion in a successor collective negotiations agreement with the Borough of Emerson. The proposal seeks paid health benefits for current employees when they retire. The Commission holds that interest arbitrators may consider union or management proposals that seek to change, for the negotiations unit involved in the proceeding, a non-SHBP employer's payment obligation with respect to retiree health insurance premiums. The Commission holds that unions or employers may also continue to propose changes that are contingent on the same changes being effected for other units, but such "contingency" clauses are no longer a precondition for negotiability or consideration by interest arbitrators. The Commission stresses that this holding is grounded in its interpretation of the phrase "uniform conditions" in N.J.S.A. 40A:10-23. Where a health benefit (or other) scheme requires identical treatment for all employees, the contingency option is required.

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, Ruderman & Glickman, P.C., attorneys (Mark S. Ruderman, of counsel and on the brief; Littie E. Rau, on the brief)

For the Respondent, Loccke & Correia, P.A., attorneys (Michael A. Bukosky, on the brief)

DECISION

On January 18, 2005, the Borough of Emerson petitioned for a scope of negotiations determination. The Borough seeks a determination that a proposal made by Emerson P.B.A. Local 206 for inclusion in a successor collective negotiations agreement is not mandatorily negotiable and cannot be submitted to interest arbitration. The proposal seeks paid health benefits for current employees when they retire.

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

The PBA represents all Borough police officers except the chief. The parties' collective negotiations agreement expired on

December 31, 2003 and on January 8, 2004 the PBA petitioned for interest arbitration. Among the unresolved issues it listed was "retiree benefits."

The Borough's ability to provide retiree health coverage is governed by N.J.S.A. 40A:10-22 and -23. N.J.S.A. 40:10:22 states that an employer may continue an employee's health coverage after retirement subject to the conditions set forth in N.J.S.A. 40A:10-23. That statute permits an employer to pay the premiums for eligible employees who retire and their dependents "under uniform conditions as the governing body of the local unit shall prescribe."

The Borough's other unionized group does not have retiree health benefits, but the PBA has proposed that future retirees in its negotiations unit "be carried under the same medical plan as has been provided for current Chief Saudino and prior Chiefs Hackbarth and Solimando and prior Municipal Clerk Arlene Raymond." The record does not include specifics about the retiree coverage for these individuals.[1/]

The Borough asserts that the PBA's proposal is not mandatorily negotiable because, under Bernards Tp., P.E.R.C. No.

1/ The Borough contends that any retiree coverage for a few individuals provided without an authorizing resolution or ordinance would be "arguably unlawful." It does not, however, assert that these benefits have been provided unlawfully.

88-116, 14 NJPER 352 (¶19136 1988), and related cases, an interest arbitrator may not award a proposal for a new retiree health benefit that would create non-uniform conditions among Borough employees and, therefore, by virtue of N.J.S.A. 40A:10-23, require that the arbitrator-awarded coverage be extended to non-unit employees over whom the arbitrator lacks jurisdiction.[2/]

The PBA counters that Bernards Tp. has been undermined by court cases that have construed the "uniform conditions" requirement in N.J.S.A. 40A:10-23 to require only uniformity within a negotiations unit. In particular, it relies on an unpublished Appellate Division opinion, Shelbrick v. Mayor & Tp. Committee of Middletown Tp., Dkt. No. A-1079-90T1 (App. Div. 10/10/91). It also asserts that the statute arguably requires the Borough to extend retiree health benefits to all employees by virtue of the coverage provided to the retired managerial employees.

The Borough responds that Bernards has not been overruled and that the unpublished opinion in Shelbrick has no precedential value.

2/ The Borough urges that the existence of retiree coverage for the noted individuals does not remove this proposal from the ambit of Bernards Tp. because N.J.S.A. 40A:10-23 requires uniformity only among all negotiations units. It argues that N.J.S.A. 40A:10-23 does not prohibit distinctions between organized employees and those employees (managerial executives and confidential employees) who are exempt from our Act.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states: "The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations." We do not consider the wisdom of the clauses in question, only their negotiability. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a 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 and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire fighters, 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 fire fighters, 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. [Id. at 92-93; citations omitted]

Health benefits for future retirees are mandatorily negotiable as long as the particular benefit is not preempted by statute or regulation. Atlantic Cty., P.E.R.C. No. 95-66, 21 NJPER 127 (¶26079 1995). The only issue in this case is whether the "uniform conditions" language in N.J.S.A. 40A:10-23 preempts an interest arbitrator from considering the PBA proposal.

Where an employer participates in the State Health Benefits Program and is subject to a requirement that all employees be awarded the same health insurance benefits, neither party may seek to arbitrate for a change in benefits for one unit of employees only. That principle was first articulated by the Appellate Division in Middlesex Cty. v. PBA Local 152, 6 NJPER 338 (¶11169 App. Div. 1980), aff'g in part, rev'g in part, 5 NJPER 194 (¶10111 1979), where the employer was a member of the State Health Benefits Program (SHBP) and thus subject to SHBP regulations. Middlesex held that an interest arbitrator could not award a PBA proposal for retiree health benefits where then-existing SHBP regulations allowed an employer to pay retiree health premiums only if it did so for "all eligible present and future pensioners." See New Jersey State PBA v. State Health Benefits Comm'n, 153 N.J. Super. 152, 154 (1977). The Court reasoned that such an award, through operation of the SHBP

regulations, would also bind the employer to provide that benefit to other employees who were not participants in the arbitration.

In Bernards, we applied this reasoning to proposals concerning payment of retiree health premiums by non-SHBP employers. The analytical linchpin of Bernards and subsequent cases was our construction of the term "uniform conditions" in N.J.S.A. 40A:10-23. We read that phrase to mean that an employer that agrees to pay premiums for some retirees must also pay premiums for "all other eligible retirees." See City of Newark, P.E.R.C. No. 93-57, 19 NJPER 65 (¶24030 1992). Based on that interpretation, the logic of Middlesex applied. See Bernards (PBA proposal that the Township pay retiree premiums for PBA unit members could not be considered by an interest arbitrator because, if awarded, the benefit would have to be extended to non-unit members over whom the arbitrator had no jurisdiction); Verona Tp., P.E.R.C. No. 97-71, 23 NJPER 48 (¶28032 1996) (interest arbitrator could not consider employer proposal to eliminate payment of retiree premiums for new hires in a PBA unit where any change would, by operation of N.J.S.A. 40A:10-23, apply to all employees in the Township's insurance group).

As Bernards and subsequent cases recognized, the courts have held that N.J.S.A. 40A:10-23 does not bar all distinctions between employee groups. See Bernards, citing Gauer v. Essex Cty. Div. of Welfare, 108 N.J. 140 (1987); Borough of Matawan,

P.E.R.C. 99-107, 25 NJPER 324 (¶30140 1999), citing Gauer and Fair Lawn Retired Police v. Bor. of Fair Lawn, 299 N.J. Super. 600, 605-606 (App. Div. 1997), certif. denied, 151 N.J. 75 (1997); see also Manalapan Tp., P.E.R.C. No. 98-136, 24 NJPER 269 (¶29128 1998). However, Gauer and Fair Lawn both upheld distinctions between individuals who had already retired and current employees and did not provide a direct basis to hold that an interest arbitrator could, consistent with N.J.S.A. 40A:10-23, award a change in future retiree benefits for one negotiations unit without obligating the employer to effect the same change for other units. The 1991 Shelbrick decision by Judges Pressler and D'Annunzio, first brought to our attention in this proceeding, does adopt such a construction of the statute.

In Shelbrick, a former Township employee who had retired from the blue collar negotiations unit claimed a right to employer-paid retiree health premiums even though he did not meet the age and service requirements for that benefit set forth in the blue collar agreement. He argued that because the agreement for the police unit afforded such benefits to "all employees who have retired," the Township was obligated by virtue of N.J.S.A. 40A:10-23 to extend that same benefit to all of its retirees. Drawing on Gauer, Shelbrick rejected that contention. It reasoned that the Gauer Court had recognized that only "similarly situated" employees must receive uniform treatment and, further,

had held that N.J.S.A. 40A:10-23 permits different treatment of distinct groups. Shelbrick also concluded that police personnel, who were in a separate negotiations unit, were such a distinct group. Further, it found that the blue collar agreement complied with the statute because it pertained to all "similarly situated" retirees - i.e., those who had been members of that unit. Finally, Shelbrick concluded that the Township's payment of some of the appellant's medical bills did not confer any rights on him. It observed that implementation of N.J.S.A. 40A:10-23 requires formal action by the governing body and that conferring paid retiree health benefits in individual cases would violate the statute's uniformity requirement.

In sum, Shelbrick held that N.J.S.A. 40A:10-23 prohibits retiree health benefits from being conferred on a selective, individual basis but does not mandate identical benefits for all employees, given a labor relations framework in which benefits are generally determined unit-by-unit. We find this analysis persuasive from a statutory construction and labor relations perspective and therefore decide to follow it. While we recognize that an unpublished decision is not binding precedent, see Pressler, N.J. Court Rules, R.1:36-3, we choose to be guided by the opinion, just as, in the past, we have relied on other unpublished court decisions construing N.J.S.A. 40A:10-23. See Essex Cty. Sheriff, P.E.R.C. No. 97-26, 22 NJPER 362 (¶27190

1996) (relying on unpublished Chancery Division decision holding that employer could, consistent with N.J.S.A. 40A:10-23, pay some but not all costs of retiree health benefits).

With respect to statutory construction, the phrase "under uniform conditions as the governing body of the local unit may prescribe" is not explicit or self-defining and does not lead inevitably to the conclusion that the Legislature intended that paid retiree health benefits had to be extended, if at all, to all current employees when they retire. In that vein, the language is much less emphatic than that in the pre-1999 SHBP regulations, which required that an SHBP employer choosing to provide paid retiree health benefits had to do so for all eligible present and future pensioners.[3/] Those regulations would not have been susceptible to the "distinct group" analysis set forth in Gauer and refined in Fair Lawn and Shelbrick.

Shelbrick also meshes with Fair Lawn, where the Court noted that, in enacting an ordinance that provided different benefit levels for current and future retirees, the employer was attempting to implement recent negotiated agreements providing for enhanced retirement benefits for current employees. It stated that, to the extent possible, it would interpret the

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3/ That requirement was changed by the Legislature in 1999. See N.J.S.A. 52:14-17.38 (providing that the obligations of local SHBP employers to pay retiree health benefits may be determined by binding negotiated agreements).

statute to carry out that purpose. 299 N.J. Super. at 606. Like Fair Lawn, Shelbrick gives effect to both N.J.S.A. 40A:10-23 and the applicable negotiated agreements.

From a labor relations perspective, Shelbrick's approach makes good sense. It more easily accommodates negotiations over what we and the courts have consistently held to be a mandatorily negotiable topic. Health benefits is one of the most important matters in negotiations and this approach allow both employees and employers to negotiate freely for both employer payments and employee co-payments.

Accordingly, we overrule Bernards and hold that interest arbitrators may consider union or management proposals that seek to change, for the negotiations unit involved in the proceeding, a non-SHBP employer's payment obligation with respect to retiree health insurance premiums. Unions or employers may also continue to propose changes that are contingent on the same changes being effected for other units, but such "contingency" clauses are no longer a precondition for negotiability or consideration by interest arbitrators. We stress that our holding is grounded in our interpretation of the phrase "uniform conditions" in N.J.S.A. 40A:10-23. Where a health benefit (or other) scheme requires identical treatment for all employees, the contingency option is required. See Borough of Belmar, P.E.R.C. No. 2005-67, 31 NJPER

__ (¶__ 2005). Within this framework, we hold that the PBA proposal is mandatorily negotiable.

We address two final points. First, under the approach we have adopted, benefits may be determined by negotiations unit and need not be the same for all retirees. Our analysis thus implicitly rejects the PBA's contention that the alleged extension of benefits to the chief, former chiefs, and former municipal clerk obligates the Borough to extend the same benefits to all other employees. Second, and also because of the Shelbrick analysis, we are not persuaded by the Borough's contention that N.J.S.A. 40A:10-23 requires uniformity among all negotiations units, but permits distinctions between these employees and employees who are exempt from our Act. Neither Gauer nor Fair Lawn nor Shelbrick supports a reading of the statute whereby only employees exempt from our statute could constitute a "distinct group" under N.J.S.A. 40A:10-23.

ORDER

The PBA proposal is mandatorily negotiable.

BY ORDER OF THE COMMISSION

Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed. Commissioners Katz and Mastriani were not present.

DATED: April 28, 2005
Trenton, New Jersey
ISSUED: April 28, 2005