

P.E.R.C. NO. 2005-85

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF HARDING,

Petitioner,

-and-

Docket No. SN-2005-061

P.B.A. LOCAL NO. 340,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines that a retirement cost of living provision in an expired collective negotiations agreement between the Township of Harding and P.B.A. Local No. 340 is not mandatorily negotiable. The Commission concludes that the benefit in this provision is linked to future increases in the cost of living, not previously earned, but deferred, compensation. It is payable to retirees, supplements State-established pension benefits and is not otherwise authorized by statute.

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, Laufer, Knapp, Torzewski & Dalena, LLC, attorneys (Fredric M. Knapp, of counsel; Meredith B. Bastardi, on the brief)

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

DECISION

On February 28, 2005, the Township of Harding petitioned for a scope of negotiations determination. The Township seeks a determination that a retirement cost-of-living provision in its expired collective negotiations agreement with P.B.A. Local No. 340 is not mandatorily negotiable.

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

The PBA represents patrol officers and sergeants. The parties' most recent contract expired on December 31, 2004 and the PBA has petitioned for interest arbitration.

Article XVIII is entitled Retirement. Paragraph A provides:

Upon entering retirement, to the satisfaction of the Police and Fire Retirement System, each member of the Harding Township Police Department shall receive the following:

- A. An annual cost of living increase based upon figures published by the Federal Government for the year during which said member is in retirement and computed upon the amount of pension monies being received by him.

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 clause in question, only its negotiability. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police and firefighters.<sup>1/</sup> The Court stated:

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

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<sup>1/</sup> The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Compare Local 195, IFPTE v. State, 88 N.J. 393 (1982).

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]

The Township argues that this provision is an illegal supplemental retirement benefit and seeks its removal from the agreement. The PBA responds that this petition should be dismissed as premature since it has not "at this time" sought to include this clause in a successor agreement. Should we entertain the petition, the PBA argues that the clause is merely deferred compensation in the form of a lawful cost-of-living stipend for retirees. The Township replies that the petition is not premature because it has asserted in interest arbitration that the clause is illegal and has proposed its removal from the contract. It argues that this benefit is not deferred

compensation or terminal leave; retirees are neither being paid for accrued sick leave nor for any other type of unused leave.

We will not dismiss this petition as premature. The provision is in the expired contract and could be included in a successor agreement as part of an interest arbitration award. Arbitrators often carry forward all provisions in an expired agreement that are not in dispute in the arbitration proceeding. The PBA has not stated that it will not seek to have this provision included in a successor agreement.

N.J.S.A. 34:13A-8.1 provides that collective negotiations agreements may not "annul or modify any pension statute or statutes." Fair Lawn Ed. Ass'n v. Fair Lawn Bd. of Ed., 79 N.J. 574 (1979). Interpreting that statute, our Supreme Court has emphasized that the Legislature has determined that the entire subject matter of public employee pensions is to be insulated from negotiated agreement that would contravene or supplement its comprehensive regulation of that area. State Supervisory, 78 N.J. at 83. "Public employees and employee representatives may neither negotiate nor agree upon any proposal which would affect the sacrosanct subject of employee pensions." Ibid.

Fair Lawn barred two types of proposals or contract clauses: those that, by themselves or if adopted by others, would affect the actuarial integrity of a pension system and those that,

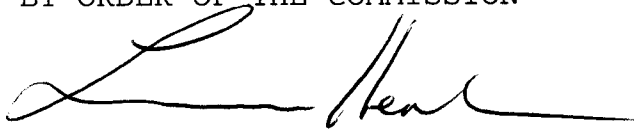
regardless of any such impact, would establish pension benefits that would contravene or supplement State-established benefits. This contract provision supplements State-established pension benefits and thus runs afoul of Fair Lawn's second prohibition. See also Borough of Butler, P.E.R.C. No. 2000-69, 26 NJPER 119 (¶31051 2000) (proposal for flat payment of 20% of salary upon retirement not mandatorily negotiable). It does not share the characteristics of negotiable benefits such as longevity pay, terminal leave, or payment for accumulated sick leave. Unlike those other benefits, the benefit under this proposal is not paid to current employees as a reward for years of service or for unused leave earned while in active status. Nor is it a form of deferred compensation. Contrast In re Morris School Dist. Bd. of Ed., 310 N.J. Super. 332, 342 (App. Div. 1998) (payment of unused sick leave upon retirement is negotiable form of deferred compensation). This benefit is linked to future increases in the cost of living, not previously earned, but deferred, compensation. It is payable to retirees, supplements State-established pension benefits, and is not otherwise authorized by statute. Contrast N.J.S.A. 40A:10-23 (authorizing employer to provide retiree health benefits); Pompton Lakes Bor., P.E.R.C. No. 95-103, 21 NJPER 223 (¶26141 1995) (90 days terminal leave is mandatorily negotiable); City of Newark, P.E.R.C. No. 88-106, 14 NJPER 336 (¶19126 1988) (longevity pay is a

mandatorily negotiable form of compensation); see also Galloway Tp., P.E.R.C. No. 98-133, 24 NJPER 261 (¶29125 1998) (pre-retirement longevity allowances not prohibited by pension statutes and regulations; terminal leave based on unused leave balances mandatorily negotiable). Accordingly, we hold that Article XVIII, Paragraph A. is not mandatorily negotiable.<sup>2/</sup>

ORDER

Article XVIII, Paragraph A. is not mandatorily negotiable.

BY ORDER OF THE COMMISSION



Lawrence Henderson  
Chairman

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

DATED: June 30, 2005  
Trenton, New Jersey  
ISSUED: June 30, 2005

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<sup>2/</sup> The PBA argues that the Township cannot terminate or reduce the benefits of current retirees and that it is equitably estopped from trying to do so. The Township responds that its petition will not terminate or reduce the benefits of current retirees. It seeks only to have the provision removed from the contract and have the change applied prospectively to future retirees. Accordingly, we need not address the PBA's arguments further. In addition, the PBA's brief refers to a Township argument about cost-of-living stipends for widows or widowers of deceased retirees. The Township notes that neither the contract provision nor its argument refers to widows or widowers. We need not address this issue either.