

P.E.R.C. NO. 2012-65

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY COLLEGE,

Petitioner,

-and-

Docket No. SN-2012-002

ESSEX COUNTY COLLEGE
FACULTY ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies a request of Essex County College, without prejudice, for a restraint of binding arbitration of a grievance filed by the Essex County College Faculty Association. The grievance asserts the College violated the Separation Agreement article in the parties' agreement. The Commission continues an interim restraint of arbitration for 30 days provided the article is submitted to the appropriate State agency for review.

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, Lum, Drasco & Positan, LLC,
attorneys (Daniel M. Santarsiero, of counsel)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum
& Friedman, attorneys (Robert A. Fagella, of counsel)

DECISION

On July 11, 2011, the Essex County College petitioned for a scope of negotiations determination. The College seeks a restraint of binding arbitration of a grievance filed by the Essex County College Faculty Association. The grievance asserts that the College refused to comply with Article 32-8.2 of the parties' most recent collective negotiations agreement. The article addresses separation agreements for senior faculty.^{1/}

^{1/} On February 14, 2012, a Commission designee granted the College's interim relief application seeking an interim restraint of arbitration while this matter was pending before the Commission. I.R. No. 20012-013. In addition, an unfair practice charge filed by the Faculty Association (CO-2011-487) has been held in abeyance pending this decision.

The Association represents all full-time teaching faculty and half-time lecturers. The Association and the College were parties to an agreement covering September 1, 2002 through August 31, 2006. That contract has been twice extended by memoranda of agreement covering September 1, 2006 through August 31, 2011 and September 1, 2011 through August 31, 2013. The 2002-2006 agreement includes Article 32-8, "Terminal Sabbatical."^{2/} As modified by a side-letter of agreement executed by the parties in 2007, Section 32-8.2, "Separation Agreement," provides, in pertinent part:^{3/}

After September 1, 2008, a faculty member with the following years of service may apply for the Separation Agreement as follows:

^{2/} The version of the Article 32-8 as it originally appeared in the 2002-2006 agreement is quoted in I.R. No. 2012-013 at 2-3.

^{3/} The description of the benefit as a "separation agreement" seems more apt than "sabbatical," a term implying that once the leave is over, the faculty member will resume teaching. See Lammers v. Bd. of Educ. of Pt. Pleasant, 134 N.J. 264, 273 (1993), noting, citing South Orange-Maplewood Education Association v. Board of Education of South Orange and Maplewood, 146 N.J. Super. 457, 462, (App Div. 1977), that teachers may negotiate for a contractual right "to a [sabbatical] leave and a return after the leave." Article 37 provides for the more typical sabbatical leave, the purpose of which includes: "the advantage to the applicant as a scholar and a teacher to be expected from such leave and the consequent advantage to his/her service to the College. . ." Article 32-7.7.

15 years of service	1 year at half pay or 2 years at 1/4 pay
20 years of service	1 year at 3/4 pay or 3 years at 1/4 pay
30 years of service	1 year at full pay or 2 years at half pay

Such application shall be submitted within 1 year of the anticipated separation date.

This revision followed a May 4, 2007 letter to the College from Susanne Culliton of the Division of Pensions and Benefits, reading:

In accord with our telephone conversations, please be advised that your proposed leave plan is not acceptable from the prospective (sic) of the Division of Pensions and Benefits. As stated, there are several issues that are unacceptable. You offer increased years of pay based upon increased years of service – thus creating an early retirement incentive, which is contrary to the law.^{4/}

After the addition of Article 32-8.2, separation agreements were processed in accordance with its terms over the next few years.^{5/} However, after receiving an advisory opinion from its

4/ The certification of the College's Human Resources Director does not list the dates, nor describe the details, of the phone conversations. In addition, a scope of negotiations petition (SN-2007-069), filed by the College on May 21, 2007, referenced the letter from the Division of Pensions and asserted that the Association could not include the original version of Article 32-8 in a successor agreement because it was illegal. That petition was withdrawn.

5/ Apparently 21 applications were made pursuant to Article 32-8.2 with start dates from September 1, 2007 to January 1, 2009. As of September 28, 2010, nine agreements were completed and the rest were in progress. On that date the

(continued...)

labor counsel, the College determined that the program was an unauthorized early retirement incentive. The Association filed a demand for arbitration and an unfair practice charge challenging the College's action. This petition ensued.

In their briefs to the Commission and to the designee, the parties discuss Commission and Court decisions reviewing contract language to determine whether the provisions are early retirement incentives and whether they are consistent with or contravene applicable statutes or regulations, including N.J.S.A. 34:13A-8.1 providing that collective negotiations authorized by the New Jersey Employer-Employee Relations Act not annul or modify any State pension statutes. We concur with the designee's description of the holdings of those cases, discussed in his opinion at pp 4-7.

In general, leaves of absence, including terminal leaves, are mandatorily negotiable and can be enforced through grievance arbitration unless they contravene a specific statute or regulation. See Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973); Borough of Hawthorne, P.E.R.C. No. 2008-45, 34 NJPER 41 (¶11 2008). Compare Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance & Custodial Ass'n, 152 N.J. Super. 235, 245-246 (App. Div. 1977) (contract article providing

5/ (...continued)
College passed a resolution ending the program, but allowing the agreements that were in progress to be completed.

prolonged paid leave of absence beyond maximum allowed by statute is unenforceable); Borough of Butler, P.E.R.C. No. 2000-69, 26 NJPER 119 (¶31051 2000) (payment of 20% of salary upon retirement was illegal supplemental retirement benefit). And, a negotiated agreement may not contravene pension laws. State of N.J. and State Supervisory Employees Ass'n, 78 N.J. 54, 83 (1978).

Fair Lawn, quoted at length by the designee, recites the analysis for determining whether a program of payments to long-term employees is an unauthorized early retirement incentive. Morris School District Bd. of Ed. and The Ed. Ass'n of Morris, 310 N.J. Super. 332, 337-338 (App. Div. 1998); certif. den. 156 N.J. 407 (1998), dissects the Fair Lawn holding:

The payment was dependent upon age, not years of service, and was structured to provide greater benefits to those retiring at an earlier age. The principal purpose was to encourage early retirements in order that tenured teachers could be replaced with less experienced instructors whose salary levels would be much lower. Because an Attorney General's opinion indicated that a similar plan adopted in another district constituted an impermissible modification of the uniform pension plan applicable to teachers, the union brought a declaratory judgment action. Both the union and the local board contended that the plan was valid. The Teachers' Pension and Annuity Fund (TPAF) was joined as a third party defendant and opposed the plan. A plenary hearing was conducted in which the TPAF presented substantial evidence indicating that if the plan were widely adopted, its pension costs would be "significantly increased."

As the Association points out, the terms of the separation plan are tied to length of service rather than age. However, that distinction may not be sufficient to determine whether the separation agreements constitute early retirement incentives. A plan that supplements the benefits that are provided as a pension is unlike negotiable benefits such as longevity pay, terminal leave, or payment for accumulated sick leave. See Butler.

The above passage also highlights a procedural difference between Fair Lawn and this dispute. On May 4, 2007, apparently based upon verbal descriptions of "terminal sabbatical" in the 2002-2006 agreement, an official of the Division of Pensions issued a letter stating that the benefit was illegal.

In 2007, when the parties modified their agreement, apparently in response to the letter from the Division of Pensions, and recast the benefit as a separation agreement, there was apparently no follow-up contact between the College and the Division as to whether the change cured any defects.^{6/}

And, in 2010, the record before us shows that the College ended the program based on advice of counsel, not any further communique from the Division of Pensions.

^{6/} The designee's decision, I.R. No. 2012-013 at 5, n. 1 recites that counsel for the College noted that Article 32-8.2 had not been sent for approval to the Division of Local Government Services in the Department of Community Affairs.

Morris, 310 N.J. Super. at 338, notes that, before a ruling was made in Fair Lawn that the benefit was an unauthorized early retirement incentive, the issue received a full airing:

A plenary hearing was conducted in which the TPAF presented substantial evidence indicating that if the plan were widely adopted, its pension costs would be "significantly increased."

The designee's opinion cited N.J.S.A. 43:8C-2.1. "Incentive Program to Encourage Retirement, Termination of Employment of County Employees," allowing a County to create an early retirement incentive subject to review and approval by the Division of local Government Services in the Department of Community Affairs (DCA). In the designee's view the absence of approval warranted granting an interim restraint of arbitration.

To the extent that the designee's opinion concludes that the plan is not enforceable because it was not reviewed by the appropriate State agency, it describes a procedural obstacle that can still be overcome. We think it is premature to hold that the substance of the program is outside the legal scope of negotiations. There has been no opinion from either DCA or the Division of Pensions that Article 32-8.2 is illegal. Nor has there been a plenary proceeding as occurred in Fair Lawn.^{7/}

^{7/} We do not determine what internal mechanism or procedures that a State agency with jurisdiction to review Article 32-8.2 should or must follow.

Given our limited jurisdiction and the regulatory responsibility of other agencies, we cannot say whether the benefit is either fish or fowl. The most prudent course is to allow the College to seek review of Article 32-8.2, which it agreed to through bi-lateral, arms-length, collective negotiations, from the appropriate body. In order to allow that process to occur we will continue the interim restraint of arbitration for an additional 30 days to allow the College to submit the program for review. Absent submission of the issue within 30 days, the restraint of arbitration will be dissolved. If a timely filing is made the restraint will continue pending the action of the appropriate State agency.^{8/}

ORDER

A. The request of Essex County College for a permanent restraint of arbitration is denied without prejudice.

B. The interim restraint of arbitration is continued for an additional 30 days of the date of this order provided that Article 32-8.2 is submitted for review and approval to the appropriate State agency with jurisdiction to review its terms.

C. Absent a filing as required by B, above, the interim restraint of arbitration shall automatically dissolve.

^{8/} We note that the May 4, 2007 opinion letter followed on the heels of a phone conversation between a college official and an official of the Division of Pensions. We would anticipate that the College should be able to obtain a response within a comparable time frame.

D. If a filing in accordance with B, above, is made, the restraints will continue to allow the appropriate State agency with jurisdiction to review the legality of Article 32-8.2, to make a determination.

E. Essex County College shall notify the Essex County College Faculty Association of any contacts it makes with the appropriate State agency with jurisdiction to review the terms of Article 32-8.2 and shall serve copies of all filings and submissions on the Association.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Eskilson, Krengel, Voos and Wall voted in favor of this decision. None opposed. Commissioner Jones was not present.

ISSUED: May 31, 2012

Trenton, New Jersey