

P.E.R.C. NO. 2013-83

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH HUDSON REGIONAL FIRE & RESCUE,

Respondent,

-and-

Docket No. CO-2011-153

NORTH HUDSON FIREFIGHTERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission affirms a decision of a hearing examiner finding that the North Hudson Regional Fire & Rescue violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1) and (5), when it unilaterally terminated a practice of paying terminal leave in one payment. The Commission rejects the Regional's exceptions, finding: that N.J.S.A. 40A:53(h) does not preempt the issue of lump sum versus installment payments; that receipt of terminal pay in installments instead of lump sum payments adversely affects firefighters' contractual rate of pay due to a substantial difference in availability and access to funds; that deferral to grievance arbitration is not appropriate; and that whether or not the Regional can afford terminal pay lump sum payments is not relevant to whether it violated its negotiations obligation under the Act. The Commission orders that the Regional restore the practice of lump sum terminal leave payment upon retirement, and negotiate in good faith over changes to the practice of offering retirees lump sum terminal leave payments.

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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Charging Party.

Appearances:

For the Respondent, Scarinci & Hollenbeck, LLC
(Ramon E. Rivera, of counsel and on the brief)

For the Charging Party, Cohen, Leder, Montalbano &
Grossman, LLC (Bruce D. Leder, of counsel and on the
brief)

DECISION

On August 13, 2012, the North Hudson Regional Fire and Rescue (Regional) filed exceptions to a Hearing Examiner Report and Recommended Decision which granted the North Hudson Firefighters Association's motion for summary judgment. The motion for summary judgment arose out the Association's unfair practice charge filed on October 15, 2010 against the Regional. The charge alleges that the Regional violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act^{1/} (Act), N.J.S.A. 34:13A-1 et seq., when it adopted a

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,
(continued...)"

resolution, without negotiations with the Association, that provided for the payment of terminal leave in equal annual installments over five (5) years, as opposed to a lump sum payment upon retirement.

A Complaint issued on September 16, 2011. Respondent filed its Answer on or about September 30. On November 1, the Association filed a motion for summary judgment together with a brief and Certification of Dominick Marino, its President. On December 12, the Regional filed a cross-motion together with brief and a Certification of Jeffrey Welz, its Director of Administration and Acting Chief Financial Officer. The Association then filed a brief in opposition to the Regional's cross motion. The motions were referred to Hearing Examiner Deirdre Hartman. N.J.A.C. 19:14-4.8(c).

On July 16, 2012, the Hearing Examiner issued her Report and Recommended Decision granting the Association's motion for summary judgment. H.E. 2013-3, 39 NJPER 136 (¶42 2012). She found that the Regional violated N.J.S.A. 34:13A-5.4(a) (1) and

1/ (...continued)
restraining or coercing employees in the exercise of the rights guaranteed to them by this act. . . . (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

(5) when it unilaterally implemented a practice of paying terminal leave in equal payments over the course of five years as opposed to in a lump sum payment.

On August 13, 2012, the Regional filed exceptions to the Hearing Examiner's Report and Recommended Decision. On September 4, the Association filed a response to the Regional's exceptions.

We adopt and incorporate the Hearing Examiner's findings of fact. H.E. at 5 - 6. We briefly summarize the relevant facts as follows. The Regional was formed as a joint meeting pursuant to the Consolidated Municipal Service Act of 1952, N.J.S.A. 40:48B-1 et seq., and consists of the following municipalities in Hudson County: Guttenberg, North Bergen, Union City, Weehawken and West New York. On or about January 11, 1999, the Regional commenced fire and rescue operations.

The Association is the exclusive majority representative of all firefighters employed by the Regional. The Regional and the Association are parties to a collective negotiations agreement effective July 1, 2004 through June 30, 2009. The Regional and the Association are currently participating in interest arbitration over a successor collective negotiations agreement.

Article 7 of the collective agreement sets forth the parties' agreed-upon grievance procedures, consisting of three

steps culminating in binding arbitration. Article 26, entitled "Terminal Leave", provides, in pertinent part:

For all employees employed by the Regional after regionalization, upon retirement for a pension approved by the New Jersey Pension Department, an Employee shall receive payment for unused accumulated sick leave and vacation days up to a maximum of \$120 per twenty-four (24) hour day up to a maximum benefit of \$15,000. Those employees who work less than a twenty-four hour day shall have a rate system adjusted proportionately in relation to the above.

On August 17, 2010, the Regional's Management Committee adopted a resolution which provides, in pertinent part, as follows:

Any existing (whether in whole or in part) or future "severance liabilities" of the NHRFR [North Hudson Regional Fire and Rescue] shall be paid in equal annual installments over a period of five years pursuant to Public Law 2010, Chapter 46 [N.J.S.A. 40A:4-53]

From the creation of the Regional in 1999 until August 17, 2010, retirees had the option of receiving payment of terminal leave in a lump sum payment and were not required to accept it in installments.

The Regional contends that it has a managerial prerogative to determine the method of terminal leave payment. It also asserts that the Hearing Examiner ignored the express language of N.J.S.A. 40A:4-53, which is a statute that permits a local municipality to adopt an ordinance authorizing special emergency

appropriations for contractually required severance liabilities. It further contends that this matter should be deferred to arbitration for interpretation of the term and application of "payment" in Article 26 of the collective negotiations agreement which sets out the requirements for payment for terminal leave, and that the Association failed to exhaust its administrative remedies. Finally, it also asserts that there is a disputed issue of material fact - - mainly whether the Regional has the ability to pay the lump sum terminal leave, which precludes summary judgment.

The Association responds that there is no preemption since the Regional has the option whether or not to adopt an ordinance providing for the installment payments for terminal leave, and that there is no case law to support the Regional's assertion that the method of payment for terminal leave is a managerial prerogative. It further argues that deferral is not appropriate because the agreement is silent on the method of terminal leave payment.

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. No credibility determinations may be made and the motion must be denied if material factual issues exist. N.J.A.C. 19:14-4.8(e); Brill v. Guardian Life Ins. Co. of America, 142

N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). The summary judgment motion is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

This case asks us to consider whether the Hearing Examiner was correct in granting the Association's motion for summary judgment and finding that the Regional violated N.J.S.A. 34:13A-5.4(a) (1) (that the Regional interfered with the rights afforded to Association members by the Act) and (5) (finding that the Regional failed to negotiate) when it adopted an ordinance which set out that terminal leave payments would be paid in installments over the course of five years as opposed to a lump sum payment at retirement. We first address the Regional's exception that this matter is preempted by N.J.S.A. 40A:53(h), which provides, in pertinent part, as follows:

A local unit **may** adopt an ordinance authorizing special emergency appropriations for the carrying out of any of the following purposes:

(h) Contractually required severance liabilities resulting from the layoff or retirement of employees. Such liabilities shall be paid without interest and, at the sole discretion of the local unit, may be paid in equal annual installments over a period not to

exceed five years. [emphasis added].

The Regional asserts that the Hearing Examiner failed to address the use of the words "sole discretion" in subsection (h), and it contends that those words "expressly dictate that the Legislature did not intend that the method of payment to be negotiable." However, a statute preempts negotiations over a term and condition of employment only when that statute "speaks in the imperative and eliminates the parties' discretion to vary that condition in a negotiated agreement." Hillsborough Bd. of Ed., P.E.R.C. No. 2006-97, 32 NJPER 97 (2006). "An allegedly preemptive statute must be examined to see if it expressly, specifically, and comprehensively fixes an employment condition so firmly that it cannot be changed through negotiations." Hillsborough, citing Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Educ. Ass'n, 91 N.J. 38, 44 (1982). The Regional failed to address that the statute begins with stating that a local unit **may** adopt an ordinance authorizing special emergency appropriations. The statute does not preempt since the local unit is not mandated to adopt the ordinance, but rather has the option to do so.

The Regional next asserts that while the payment of terminal leave is mandatorily negotiable, the method of payment for terminal leave is not. It relies on Morris County Sheriff's

Office v. Morris County Policeman's Benevolent Ass'n., Local 208, 418 N.J. Super. 64 (App. Div. 2011), to support its argument that because the method of payment for terminal leave impacts governmental policy considerations, namely its prerogative to determine its budget and "spend public funds wisely", it is not mandatorily negotiable. However, the facts of Morris County Sheriff's Office are inapposite to the facts here. In Franklin Township v. Franklin Township PBA Local 154 et al., 424 N.J. Super. 369, 381 - 82 (App. Div. 2012), the Appellate Division found as follows:

Our comments in In re Morris County Sheriff's Office were directed to curb the abusive practice of "featherbedding", where officers chose to work holiday shifts receiving overtime rates of pay, but performed no services. 418 N.J. Super. at 77-78, 12 A.3d 214. The Morris County policy that ended this practice did not adversely affect any officers' contractual rate of pay or diminish annual weekly work hours; the newly enacted policy merely eliminated an unnecessary abusive overtime practice.

Responding to the comments made above by the Appellate Division, the Regional asserts that making terminal leave payments in installments over five years as opposed to in a lump sum payment does not adversely affect firefighters' contractual rate of pay. We disagree. While under the installment payment option firefighters will ultimately receive the same amount of money that they would have received in a one-time lump sum

payment, there is a substantial difference in the employees' availability and access to funds with the installment payment option.

The Regional's next exception is that it disagrees with the Hearing Examiner's finding that the Association's unfair practice charge should not be deferred to grievance arbitration because the agreement is silent on the method of terminal leave payment. It asserts that the use of the word "payment" in Article 26 of the Agreement should be interpreted by a grievance arbitrator. Deferral to the parties' negotiated grievance procedure is appropriate when "a charge essentially alleges a violation of subsection 5.4(a)(5) interrelated with a breach of contract claim." State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419, 420 (¶15191 1984). Deferral is generally appropriate when a contract clause could be subject to more than one interpretation. Id. The gravamen of this dispute does not center around an interpretation of Article 26, which sets forth language on the rate of pay of terminal leave and provides a cap on the total amount of terminal leave to be paid to a retiree. Rather, the gravamen of this dispute centers around the method of payment for terminal leave, which is not addressed in Article 26. Moreover, it undisputed that since 1999 through the Regional's adoption of the emergency ordinance,

firefighters' have had the option of receiving their terminal leave payment in a lump-sum. Accordingly, deferral is not appropriate in this case. Given this finding, we need not address the Regional's argument that the Association failed to exhaust its administrative remedies.

Finally, we reject the Regional's argument that there is a disputed material fact set out in Welz's certification - - mainly whether the Regional can afford to make terminal leave payments in a lump sum- which precludes the granting of summary judgment. First, whether or not the Regional can continue to afford to pay terminal leave payments in a lump sum upon retirement is not relevant to whether it violated the Act when it discontinued that practice without negotiations. Moreover, Welz's certification sets out that the Regional, like most other municipalities, has been generally facing an economic downturn due to various contributing factors, but it does not state that the Regional cannot afford to pay terminal leave in a lump sum. Also, the Regional raises this argument for the first time in its exceptions, and in its cross-motion for summary judgment asserted that there were no material facts in dispute. The Regional should explore the installment payment option and other cost-saving measures in its negotiations with the Association.

ORDER

We hereby ORDER as follows:

A. That the North Hudson Regional Fire & Rescue cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing a practice of affording firefighters upon retirement the option of receiving payment of terminal leave in a lump sum.

2. Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, particularly by unilaterally changing a practice of affording retirees the option of receiving payment of terminal leave in a lump sum.

B. North Hudson Regional Fire & Rescue take the following affirmative action:

1. Restore the practice of affording retirees the option of receiving payment of terminal leave in a lump sum upon retirement.

2. Negotiate in good faith with the North Hudson Firefighters Association over changes to the practice of affording retirees the option of receiving payment of terminal leave in a lump sum.

3. Provide retirees who are currently receiving payment of terminal leave in installments pursuant to Regional's August 17, 2010 Resolution the option of receiving the balance of the terminal leave due to them in a lump sum.

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Regional's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

5. Within twenty (20) days of receipt of this decision, notify the Chair of the steps it has taken to comply with this Order.

BY ORDER OF THE COMMISSION

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

ISSUED: May 30, 2013

Trenton, New Jersey

**NOTICE TO EMPLOYEES
PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,**

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing a practice of affording firefighters upon retirement the option of receiving payment of terminal leave in a lump sum.

WE WILL cease and desist from refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, particularly by unilaterally changing a practice of affording retirees the option of receiving payment of terminal leave in a lump sum.

WE WILL take the following affirmative action:

1. Restore the practice of affording retirees the option of receiving payment of terminal leave in a lump sum upon retirement.

2. Negotiate in good faith with the North Hudson Firefighters Association over changes to the practice of affording retirees the option of receiving payment of terminal leave in a lump sum.

3. Provide retirees who are currently receiving payment of terminal leave in installments pursuant to Regional's August 17, 2010 Resolution the option of receiving the balance of the terminal leave due to them in a lump sum.

Docket No. CO-2011-153

NORTH HUDSON REGIONAL FIRE & RESCUE
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

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APPENDIX "A"