P.E.R.C. NO. 95-66

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC COUNTY,

Petitioner,

-and- Docket No. SN-95-12

FRATERNAL ORDER OF POLICE,
ATLANTIC LODGE #34,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by the Fraternal Order of Police, Atlantic Lodge #34 against Atlantic County. The grievance asserts that the employer violated the parties' collective negotiations agreement when it announced that it would not pay an employee post-retirement health benefits. The Commission finds that an arbitrator can legally consider whether an employer contractually agreed to pay health care premiums to retirees credited with 25 years of service in the Police and Firemen's Retirement System. The employer asserted that when the contract was negotiated in 1993, it could not have legally agreed to pay health insurance premiums based on five extra years of credit as opposed to actual service. The narrow question before the Commission is not whether the employer could have legally agreed during negotiations in 1993 to pay for such premiums in the future, but whether any agreement to pay premiums can be honored now.

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, Terry J. Dailey, County Counsel
(Kenneth M. Shumsky, Assistant County Counsel/Labor Counsel)

For the Respondent, Szaferman, Lakind, Blumstein, Watter & Blader, attorneys (Sidney H. Lehmann, of counsel)

DECISION AND ORDER

On August 8, 1994, Atlantic County petitioned for a scope of negotiations determination. The County seeks a restraint of binding arbitration of a grievance filed by a correction officer represented by the Fraternal Order of Police, Atlantic Lodge #34. The grievance asserts that the employer violated the parties' collective negotiations agreement when it announced it would not pay an employee post-retirement health benefits.

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

Lodge #34 represents the employer's correction officers and sheriff's officers/penal. The parties entered into a collective

negotiations agreement effective from January 1, 1993 through December 31, 1995. The contract's grievance procedure ends in binding arbitration of contractual disputes. Article XIII is entitled Insurance and Worker's Compensation. Section E is entitled Retiree Coverage. This section provides:

> 1. Any employees covered under the terms of this Agreement who retire from County service under the Police and Fireman Retirement System or Public Employees Retirement System shall be eligible for paid health benefits coverage for three (3) years after retirement, commencing with the employee's retirement date.
>
> 2. Definition of Retiree for 3 Years Paid Health Benefits. The retiree has at least twenty-five (25) years vested in the Police and Fireman Retirement System or Public Employees Retirement System, or the retiree has been a permanent County employee for fifteen (15) years and is at least sixty (60) years of age at time of retirement.
>
> 3. Upon completion of the three (3) years paid health benefits coverage by the County, the retiree will then have the opportunity to remain in the group plan by reimbursing the County the amount of the monthly premium at the existing group plan rates.

In December 1993, the employer adopted an early retirement incentive program. That program and similar programs were authorized by N.J.S.A. 40A:10-23.3. Under these programs, employees retiring early are credited with five extra years of service for purposes of the Police and Fire Retirement System ("PFRS").

Ernest Messito is a correction officer. On June 3, 1994, he informed the employer's Health Benefits Office that he intended to retire pursuant to the early retirement incentive program. His

retirement date was to be December 31, 1994. He noted that as of that date, he would have 23 years and 4 months of service for PFRS purposes; he asserted that he would be entitled to five more years PFRS credit under the early retirement program, thus giving him over 28 years of service and allegedly entitling him to receive paid health benefits under Article XIII. The employer rejected his claim.

On June 11, 1994, Messito filed a grievance. He reasserted that he was entitled to paid health benefits upon retirement.

On June 20, 1994, an Employee Relations Manager denied this grievance. She ruled that five years of extra credit could not be added to Messito's service for the purpose of entitling him to paid health benefits.

Lodge #34 demanded arbitration. This petition ensued.

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. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the employer may have.

Under Local 195, IFPTE v. State, 88 N.J. 393, 404 (1982), a subject is mandatorily negotiable when:

> (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy.

Health benefits for future retirees are mandatorily negotiable as long as the particular benefit at issue is not preempted by statute or regulation. See, e.g., Maywood Ed. Ass'n v. Maywood Bd. of Ed., 131 N.J. Super. 551 (Ch. Div. 1974); City of Newark, P.E.R.C. No. 93-57, 19 NJPER 65 (¶24030 1992); Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 87-83, 13 NJPER 78 (¶18036 1986); Lyndhurst Tp., P.E.R.C. No. 87-9, 12 NJPER 608 (¶17230 1986).

A statute will not preempt negotiations unless the statute fixes an employment condition specifically, expressly, and comprehensively, thus eliminating the employer's discretion to vary that employment condition. See, e.g., Hunterdon Cty. Freeholder Bd. v. CWA, 116 N.J. 322, 330-331 (1989); Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). The employer contends that N.J.S.A. 40A:10-23, as recently amended, is such a preemptive statute. We disagree.

N.J.S.A. 40A:10-23 specifies the conditions under which employers not in the State Health Benefits Plan may pay their retirees' health insurance premiums. Before May 26, 1994, N.J.S.A. 40A:10-23 barred an employer from paying premiums unless an employee

had retired on a disability pension or had twenty five years or more of service with the employer or had retired and reached age 62 or older with at least fifteen years of service with the employer. Had Lodge #34 tried to arbitrate Messito's grievance before that date and had a scope petition been filed, we would have restrained binding arbitration. Messito's claim would have been preempted because he would not have met the statutory requirements then in effect. See, e.g., Little Egg Harbor Tp., P.E.R.C. No. 90-123, 16 NJPER 398 (¶21165 1990).

On May 26, 1994, an amendment adding a new section (23.3) to N.J.S.A. 40A:10-23 was signed into law. N.J.S.A. 40A:10-23.3 provides:

> Notwithstanding the provisions of N.J.S. 40A:10-23 to the contrary, an employer which pays the premiums for health benefits for retirees pursuant to that section and which has adopted or adopts an early retirement incentive program pursuant to P.L.1993, c.99, P.L.1993, c.138, or P.L.1993, c.181 may, by adoption of a resolution by its governing body and filing a certified copy of the resolution with the Director of the Division of Pensions and Benefits or by inclusion of appropriate language in its resolution adopting the early retirement incentive program, elect to pay the premium for a retiree under that program who retires on the basis of 25 years or more of service credit in a State or locally administered retirement system, including any additional service credit provided under the early retirement incentive program, and a period of service from 0 to 15 years with the employer at the time of retirement, such period to be determined by the employer and included in its resolution.

N.J.S.A. 40A:10-23.3 gives certain public employers not in the State Health Benefits Plan the discretion to grant or deny paid

health insurance to retirees with twenty five years of service credit (as opposed to actual service). Under State Supervisory and other preemption cases, that discretion may be exercised through collective negotiations. The statutory requirements that the employer adopt and file a resolution are not conditions preempting the duty to negotiate; instead these conditions may be met consistent with that duty. Thus, if an employer agrees to pay health care premiums to retirees credited with 25 years of service, it will be obligated to adopt and file a resolution to put its agreement into effect. As N.J.S.A. 40A:10-23.3 now stands, this employer could legally pay health insurance premiums for Messito and other employees with twenty five years of service credit and an agreement requiring it do so can be enforced through arbitration.

The employer asserts that when Article XIII was negotiated in 1993, it could not have legally agreed to pay health insurance premiums based on the five extra years of credit as opposed to actual service. However, no dispute existed at that time concerning the negotiability of Article XIII. Contrast Belleville Tp., P.E.R.C. No. 92-74, 18 NJPER 68 (¶23030 1991). The narrow question before us at this stage is not whether the employer could have legally agreed during successor contract negotiations in 1993 to pay for such premiums in the future, but whether any agreement to pay premiums can be honored now. We do not determine whether such an obligation in fact exists because the applicability of the contractual provision to the present facts is the precise question

contractual provision to the present facts is the precise question to be answered by the arbitrator.[1/]

We repeat that we cannot and do not consider the merits of the contractual claim. Ridgefield Park. We simply hold that an arbitrator can legally consider whether the employer contractually agreed to pay the premiums of employees in Messito's position.

ORDER

The request of the County of Atlantic for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Boose, Buchanan, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioner Finn abstained from consideration. Commissioner Wenzler was not present.

DATED: February 28, 1995
Trenton, New Jersey
ISSUED: March 1, 1995

1/ See PBA Local 145 v. PERC, 187 N.J. Super. 202 (App. Div. 1982), certif. den. 93 N.J. 269 (1983). The Court's analysis of the relationship between an existing clause and subsequent legislation is instructive here.