

P.E.R.C. NO. 87-144

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

STATE OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-86-253-175

COUNCIL OF NEW JERSEY STATE COLLEGE
LOCALS, NJSFT, AFT/AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission clarifies an earlier decision, P.E.R.C. No. 87-98, 13 NJPER ____ (¶ 1987) and finds that Dr. Joseph Pikus, a former faculty member who was denied reemployment as a result of the State of New Jersey's unilateral enactment of a mandatory retirement policy, should be reinstated to his former position with back pay and interest.

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Appearances:

For the Respondent, W. Cary Edwards, Attorney General
(Melvin E. Mounts, Deputy Attorney General)

For the Charging Party, Dwyer & Canellis, Esqs.
(Michael E. Buckley, of counsel)

DECISION ON MOTION FOR RECONSIDERATION

On February 6, 1987, we found, based upon a stipulated record, that the State of New Jersey and the University of Medicine and Dentistry of New Jersey violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5), when they issued policies concerning mandatory retirement without negotiations with the Council of New Jersey State College Locals, NJSFT, AFT/AFL-CIO ("Council") and the University of Medicine and Dentistry of New Jersey, Council of American Association of University Professors Chapters, the majority representatives of the affected employees. P.E.R.C. No. 87-98, 13 NJPER 154 (¶18068 1987). The parties had stipulated that the policies had been issued unilaterally and that

Dr. Joseph Pikus had requested but was denied an exemption from the Jersey City State College policy requiring mandatory retirement. The case rested on whether the policies pertained to a mandatory subject of negotiations and specifically whether the policies had been statutorily preempted. In finding the policies to be mandatorily negotiable, we stated:

N.J.S.A. 10:5-2.2, relied on by the State and UMDNJ, does not "speak in the imperative and leave nothing to the discretion of the public employer." Bethlehem [Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n., 91 N.J. 38 (1982)]. Rather, by its very terms, it gives to the institution the discretion whether to require employees to retire. Therefore, applying the requisite Bethlehem test, we hold that this statute does not preempt negotiations. We have considered but do not find persuasive, under the facts of this case, the respondents' claim that the Legislature intended the institution's discretion to be non-delegable. It is true that, where the Legislature "expressly, specifically and comprehensively" vests non-delegable discretion in a public employer in an otherwise negotiable area, that subject would not be mandatorily negotiable. However, the language of N.J.S.A. 10:5-2.2 does not expressly state that the public institution may not negotiate over procedures and policies concerning its "option" to mandatorily retire tenured faculty. Absent an express prohibition, we cannot conclude that the Legislature intended to preclude negotiations in this area when it vested discretion in the employer. Instead, as in Bethlehem and Wright [v. Bd. of Ed. of City of East Orange, 99 N.J. 112 (1985)], these respondents must negotiate over terms and conditions of employment within the range of their discretion as defined by the relevant statutes and regulations.

* * *

The respondents also argue that, even if the area is not preempted by statute, negotiations over retirement policies would "significantly interfere with the determination of governmental policy." Local 195 [, IFPTE v. State, 88 N.J. 393 (1982)]. Respondents cite Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983) and Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98

N.J. 523 (1985) for the proposition that decisions to retain or dismiss employees or abolish positions implicate inherent managerial prerogatives and are thus non-negotiable. We do not agree that those cases control. Negotiations over mandatory retirement at age 70 do not in any way restrict the respondents in decisions they may make to dismiss tenured faculty for cause or to reduce their work forces. In fact, even for those employees who cannot be required to retire at 70, the statute provides for mandatory retirement where the public employer can show that the employee is unable to perform his duties adequately. Therefore, applying the Woodstown-Pilesgrove Reg. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980) balancing test, we find this issue to be mandatorily negotiable. [13 NJPER at 156; footnotes omitted]

We ordered the State and UMDNJ to cease and desist from refusing to negotiate over mandatory retirement policies and to rescind any mandatory retirement policies implemented without negotiations.

On February 27, 1987, the Council filed a motion for reconsideration and clarification. It seeks an order from the Commission concerning Dr. Joseph Pikus' pension, salary and employment benefits which he allegedly is entitled to "as a result of the College's failure to grant his application for an exemption from Jersey City State's mandatory retirement policy." On April 20, 1987, the Chairman requested the parties to submit position statements. On May 1, 1987, the State responded. It states that Dr. Pikus' non-reemployment was directly related to the enactment of the mandatory retirement policy but that it did not violate our Act because the State was not obligated to negotiate mandatory retirement policies. It further states that even if it violated the

Act, an affirmative remedy is not necessary because "whatever the parties negotiate could be made retroactive to cover Dr. Pikus."

On May 18, 1987, the Council responded, reiterating the need for an affirmative remedy for Dr. Pikus.

We clarify our original decision and order Dr. Pikus to be reinstated to his former position with back pay and interest to make him whole. We do so because the stipulated record establishes that his non-reemployment was caused by the State's unilateral action which we have found to violate the Act. Therefore, a return to the status quo is necessary here to "effectuate the policies of this Act." N.J.S.A. 34:13A-5.4(c). We decline, however, to otherwise specify the pension or other benefits he would be entitled to. Our remedy is to order the State to compensate him for what he would have received if he had not been unlawfully terminated. That must recognize, to the extent practicable, what he would have received had he been employed in the 1986-1987 academic year. Further, the State's obligation is limited to reinstating Pikus only until it satisfies the negotiations obligation. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Sec., 78 N.J. 1, 11 (1978); Collingswood Bd. of Ed., P.E.R.C. No. 86-50, 11 NJPER 694 (¶16240 1985).

ORDER

The Order issued by the Commission on February 9, 1987 is amended to add:

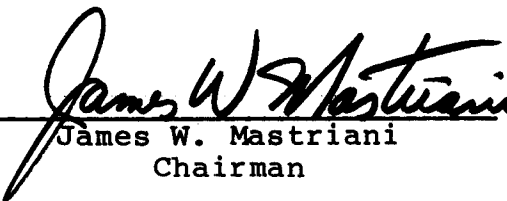
The State of New Jersey is ordered to take the following affirmative action:

1. Reinstate Dr. Joseph Pikus to a comparable position to which he was employed before being denied reemployment during the 1986-1987 academic year.

2. Make Dr. Joseph Pikus whole for lost wages and other benefits less income that should be credited in mitigation plus interest at the rate authorized by R. 4:42-11.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
May 20, 1987
ISSUED: May 21, 1987