P.E.R.C. NO. 88-116

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERNARDS TOWNSHIP,

Petitioner,

-and- Docket No. SN-87-73

BERNARDS TOWNSHIP
POLICEMEN'S ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission finds that a proposal made by the Bernards Township Policemen's Association cannot be submitted to interest arbitration. The proposal involves health insurance programs for current employees upon their retirement. The Commission finds that N.J.S.A. 34:13A-18 and 40A:10-23 bars this proposal from being submitted to binding arbitration.

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Appearances:

For the Petitioner, Kenney & Kenney, Esqs.
(Malachi J. Kenney, of counsel; Michael J. Gross, on the brief)

For the Respondent, Loccke & Correia, Esqs.
(Manuel A. Correia, of counsel)

DECISION AND ORDER

On May 14, 1987, Bernards Township ("Township") filed a Petition for Scope of Negotiations Determination. The Township seeks a determination that a proposal made by the Bernards Township Policemen's Association ("Association") cannot be submitted to interest arbitration. The proposal involves health insurance programs for current employees upon their retirement.

The Association is the majority representative of the Township's patrol officers and sergeants. The parties are engaged in interest arbitration proceedings to resolve a negotiations impasse.

The Township provides health benefits to all full-time employees, including those in the Association's unit, under a single group insurance policy. The Township pays all premiums. Retirees are permitted to be members of the insured group if they pay their own premiums. The Township does not pay any premiums for retired employees. The Township is not a participant in the New Jersey State Health Benefits Program. It contracts for group insurance as allowed by N.J.S.A. 40A:10-16 et seq.

During negotiations the Association proposed that the Township pay premiums for current employees upon their retirement. After impasse the parties began interest arbitration. The Township then contended that N.J.S.A. 34:13A-18 barred the proposal from interest arbitration. When the Association continued to press its proposal, the Township filed this petition.

In Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police and fire fighters.[1/] 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 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

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1/ 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 mandatory category of negotiations. Compare, Local 195, IFPTE v. State, 88 N.J. 393 (1982).

> 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. [Id. at 92-93; citations omitted]

This case involves only the first aspect of the Paterson test: whether interest arbitration is barred by a specific statute or regulation.

N.J.S.A. 34:13A-18 provides:

> The arbitrator shall not issue any finding, opinion or order regarding the issue of whether or not a public employer shall remain as a participant in the New Jersey State Health Benefits Program or any governmental retirement system or pension fund, or statutory retirement or pension plan; nor, in the case of a participating public employer, shall the arbitrator issue any finding, opinion or order regarding any aspect of the rights, duties, obligations in or associated with the New Jersey State Health Benefits Program or any governmental retirement system or pension fund, or statutory retirement or pension plan.

This statute prevents an arbitrator from ruling upon any change in health insurance coverage for employees of a participating employer in the New Jersey State Health Benefits Program, N.J.S.A. 52:14-17.28. The reason behind the ban is that the Health Benefits statute requires a participating employer to provide the same level

of health coverage to all of its employees. See New Jersey Policemen's Benevolent Assocation v. New Jersey Health Benefits Comm., 153 N.J. Super. 152 (App. Div. 1976). An award increasing coverage would affect the benefits of other units of employees not participating in interest arbitration. Accordingly, the statute removes the issue from interest arbitration. See Middlesex Cty., P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979), aff'd App. Div. Dkt. No. A-3564-78 (6/19/80); Lyndhurst Tp., P.E.R.C. No. 87-9, 12 NJPER 608 (¶17230 1986); Bradley Beach, P.E.R.C. No. 81-21, 6 NJPER 429 (¶11216 1980).

The Township is not a participant in the State Health Benefits Program. However, it contends that an interest arbitrator cannot award increased health coverage on retirement because the statute authorizing it to provide group health coverage to employees and retirees also requires uniform treatment.

N.J.S.A. 40A:10-23 provides:

> Retired employees shall be required to pay for the entire cost of coverage for themselves and their dependents at rates which are deemed to be adequate to cover the benefits, as affected by Medicare, of the retired employees and their dependents on the basis of the utilization of services which may be reasonably expected of the older age classification; provided, however, that the total rate payable by a retired employee for himself and his dependents, for coverage under the contract and for Part B of Medicare, shall not exceed by more than 25% the total amount that would have been required to have been paid by the employee and his employer for the coverage maintained had he continued in office or active employment and he and his dependents were not eligible for Medicare benefits.
>
> The employer may, in its discretion, assume the entire cost of such coverage and pay all of the premiums for employees who have retired on a disability pension or after 25 years' or more service with the employer, or have retired and

> reached age of 62 or older with at least 15 years of service with the employer, including the premiums on their dependents, if any, under uniform conditions as the governing body of the local unit shall prescribe.

A statement accompanying a recent amendment to this law reads:

> Assembly Bill No. 1573 amends N.J.S. 40A:10-23 in order to permit local governmental units to pay the health insurance premiums of employees who have retired on a disability pension.
>
> Under current law, local governmental units may pay such insurance premiums only for retirees who have accumulated 25 or more years of service with the local unit, or who have retired and reach the age of 62 years or older with at least 15 years service with the local unit, where the retirement was necessitated by medical illness or disability.
>
> The bill is permissive and, therefore, does not obligate any local governmental unit to assume any such insurance costs unless the governing body of the unit determines to do so. Should a governing body determine to pay such insurance premiums, the policy must be applied uniformly to all qualified retirees.
> [Senate County and Municipal Government Committee Statement, Assembly No. 1573 - L. 1983, c. 364; emphasis added]

This statute was construed in Gauer v. Essex Cty. Division of Welfare, 205 N.J. Super. 592 (Law Div. 1985), aff'd 211 N.J. Super. 706 (App. Div. 1986), rev'd, 108 N.J. 140 (1987). The employer in Gauer participated in the State Health Benefits Program and all employees were covered under a single group health insurance contract. 205 N.J. Super. at 596. Relying on the "uniform conditions" language of N.J.S.A. 40A:10-23 and the Committee Statement, the lower court held that the retired, former employees of the Essex County Welfare Board, who had become

employees of the County pursuant to reorganization under the Optional County Charter Act, could not continue to receive payment for their health insurance premiums where that benefit had not been provided to other retirees of Essex County. The Supreme Court reversed. While acknowledging "some language in the legislative history of 40A:10-23 indicating that retired employees were to receive uniform treatment;..." it found that because the plantiffs were employed by a formerly autonomous employer they were a specialized class of employees who could receive particularized treatment without violating the uniformity standards. 108 N.J. at 147.

The Township contends that under N.J.S.A. 40A:10-23 all qualified retirees must receive uniform treatment. It contends that the arbitrator is prohibited from rendering an award which will change the terms and conditions of employment of employees who are not parties to the interest arbitration proceeding or eligible for interest arbitration. The Township also argues that the statute requires that a decision to pay premiums apply to persons who are already retired as well as to current employees. Accordingly the arbitrator would be changing the benefits of persons who are not "employees" (i.e. retirees).

The Association contends that Gauer does not apply since the employer there was a participant in the State Health Benefits Program. It points out that all decisions barring interest arbitration of health benefits pursuant to N.J.S.A. 34:13A-18 have involved participants in the State Health Benefits Program. The Association asserts that its proposal would not necessarily apply to

persons who have already retired, citing language in N.J.S.A. 40A:10-22 which allows health insurance to be continued "after retirement for any employee," and arguing that this language distinguishes the State Health Benefits Program which requires identical treatment for both present and future retirees. Finally, the PBA attaches an unreported Chancery Division opinion construing N.J.S.A. 40A:10-23 while confirming a grievance arbitration award. The court held that a contract provision which required the employer to pay 50 percent, rather than all, of the premiums for retirees was not ultra vires and was consistent with N.J.S.A. 40A:10-23. However, uniformity was not an issue.

Since it reversed the lower court decisions in Gauer, the Supreme Court's comments concerning the uniformity requirement of N.J.S.A. 40A:10-23 could be viewed as dicta. Nevertheless, given the facts we find the comments to be pertinent. While the employer in Gauer was a State Health Benefits Plan participant, and the Township is not, both employers provide benefits under a single group contract. Therefore the two situations are analogous and N.J.S.A. 40A:10-23 requires uniformity among qualified employees within a particular group contract. Accordingly if the Township pays the premiums of police on their retirement, it would have to pay the premiums of all qualified employees on their retirements. Thus allowing an interest arbitrator to have jurisdiction over the Association's proposal could result in an award which changes the benefits of employees not represented by the Association. N.J.S.A. 34:13A-18 was enacted to prevent that situation and its rationale applies here.

We hold that where an employer which does not participate in the State Health Benefits Program provides health insurance coverage for all its employees under a single group contract, an interest arbitrator having jurisdiction over only a portion of that group may not award any change in premium payments for employees on retirement.[2/] The change, by operation of law, would apply to all employees in the insurance group including those in other units not involved in the interest arbitration proceeding or eligible for interest arbitration.

ORDER

The Association's proposal that the Township pay the cost of health insurance premiums for employees on retirement may not be submitted to interest arbitration.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Reid and Wenzler voted in favor of this decision. Commissioners Bertolino and Smith were opposed.

DATED: Trenton, New Jersey
April 27, 1988
ISSUED: April 28, 1988

2/ We need not decide whether a public employer outside the State Health Benefits Plan can enter into separate contracts for different groups of employees or the effect of N.J.S.A. 34:13A-18 in such cases. See N.J.S.A. 40A:10-17 and N.J.S.A. 40A:10-18(b).