P.E.R.C. NO. 93-57

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and- Docket No. SN-92-59

NEWARK FIREMEN'S UNION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission issues a scope of negotiations decision addressing certain provisions of an existing collective negotiations agreement which the Newark Firemen's Union seeks to have retained in a successor contract with the City of Newark. With respect to existing provisions concerning health benefits for retirees, the Commission is not persuaded that either N.J.S.A. 40A:10-23 or Bernards Tp., P.E.R.C. No. 88-116, 14 NJPER 352 (¶19136 1988), precludes a successor agreement from maintaining current health benefits. Given the limited nature of that contention and the absence of any proposals to change the current benefits, the Commission does not have jurisdiction in this case to consider whether Newark's health benefits system for employees and retirees, assembled over the course of 15 years, should be invalidated. The City may seek a declaratory judgment from the Superior Court if it wishes to present any broader arguments or seek broader relief. The Commission also holds mandatorily negotiable a proposal to include holiday pay in base pay for pension purposes.

P.E.R.C. NO. 93-57

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and- Docket No. SN-92-59

NEWARK FIREMEN'S UNION,

Respondent.

Appearances:

For the Petitioner, Gregory J. Franklin, Labor Relations and Compensation Officer

For the Respondent, Fox and Fox, attorneys (David I. Fox, of counsel, Stacey B. Rosenberg, on the brief)

DECISION AND ORDER

On November 25, 1991, the City of Newark petitioned for a scope of negotiations determination. The City asserts that existing contract articles concerning retirement benefits and including holiday pay in base salary are preempted by statute and may not be continued in any successor agreement.

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

The Newark Firemen's Union ("NFU") represents rank-and-file firefighters, line workers, and fire alarm operators. The January 1, 1989 through December 31, 1991 contract contains these retiree health coverage provisions:

Article 12, Section 3

Eligible retirees, with twenty-five (25) years of continuous service, who retired prior to September 1, 1984, and their qualified dependents are entitled to: Blue Cross Hospitalization Plan; Prudential 1400B Medical-Surgical Plan; and Prudential Major-Medical Plan. Said coverage is to continue until such time as the retiree attains age sixty-five (65) and is thereby eligible for coverage under Medicare. For retirees who attain age sixty-five (65) and have a spouse who is under age sixty-five (65), this coverage shall continue for the spouse until she attains age sixty-five (65).

Eligible retirees, with twenty-five (25) years of continuous service, who retired on or after September 1, 1984, and their qualified dependents are entitled to: Blue Cross Hospitalization Plan; Blue Shield 14/20 Medical-Surgical Plan; Rider J ($125.00 annual allowance); Medical and Accidental Emergency Room Riders; and Prudential Major-Medical Plan. Said coverage is to continue until such time as the retiree attains age sixty-five (65) and is thereby eligible for coverage under Medicare. For retirees who attain age sixty-five (65) and have a spouse who is under age sixty-five (65), this coverage shall continue for the spouse until she attains age sixty-five (65).

Article 12, Section 12.

Effective August 1, 1987, eligible retirees with twenty-five (25) years of continuous service who retired on or after January 1, 1987, and their eligible dependents (dependent coverage for eligible children shall apply until the end of the calendar year in which the child's twenty-third (23) birthday occurs) shall be entitled to a prescription plan with a $1.50 co-payment per prescription, and coverage shall continue until such time as the retiree attains the age of sixty-five (65) years.

Eligible retirees with twenty-five (25) years of continuous service, who retired on or after January 1, 1988, and their eligible dependents (dependent coverage for eligible children shall

> apply until the end of the calendar year in which the child's twenty-third (23) birthday occurs) shall be entitled to a prescription plan with a $1.50 co-payment per prescription; and without an age limitation on the retiree.
>
> Article 12, Section 14.
>
> Effective August 1, 1987, eligible retirees with twenty-five (25) years of continuous service who retired on or after January 1, 1987, and their eligible dependents (dependent coverage for eligible children shall apply until the end of the calendar year in which the child's twenty-third (23) birthday occurs) shall be entitled to dual choice dental care coverage as outlined in Section 13 above; and coverage shall continue until such time as the retiree attains the age of seventy (70) years.

A provision stating that holiday pay would be included in base pay for pension purposes was added to the parties' most recent agreement through the supplemental interest arbitration award described in City of Newark, P.E.R.C. No. 92-20, 17 NJPER 416 (¶22200 1991), recon. den. P.E.R.C. No. 92-33, 17 NJPER 472 (¶22226 1991), app. pending App. Div. Dkt. No. A-1069-91T2. That provision states:

> Holiday pay will be paid as an hourly component of base salary and longevity bi-weekly for pension purposes.

During negotiations for a successor agreement, the City asserted that the retiree health care and the holiday pay contract provisions are illegal. Neither side proposed during negotiations that health benefits for future retirees be changed. On November 25, 1991, the NFU petitioned to initiate interest arbitration. The City then filed this petition.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

> 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 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: does a specific statute preempt inclusion of the challenged provisions in a successor agreement? If the answer is no, then it is undisputed that the provisions are mandatorily negotiable. In order to preempt negotiations over a mandatorily negotiable subject,

a statute must expressly, specifically and comprehensively regulate that term and condition of employment, leaving no room for an employer to exercise discretion. See Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978).

Retiree Health Benefits

The City asserts that prior to 1978 health coverage for all retirees was uniform. It states that interest arbitration awards issued since 1978 have changed the benefits for retirees, producing a "splintered, open-ended, multi-tiered retiree benefit structure," in which retirees of different negotiations units and retirees within the same negotiations unit may have different benefits, depending on the retiree's negotiating unit and/or the year of retirement. The City now has more than 50 subgroups within its Blue Cross/Blue Shield contract and approximately 15 subgroups within its Prudential contract.

Since 1978, when the interest arbitration statute was implemented, this topic has been the subject of the parties' negotiations process. Until now this issue has not been presented to us. The City did, however, raise this issue during the course of a 1989 interest arbitration involving the police unit now represented by PBA Local 3. The arbitrator found a proposal to change health coverage for current employees upon retirement to be valid. The City sought to vacate the award on the ground that N.J.S.A. 40A:10-23 mandated uniform coverage for retirees. The

Court confirmed the award. FOP v. City of Newark. L. Div. Docket No. L-18375-89 (4/16/90).

We begin by setting forth the statutory scheme for providing health insurance benefits to employees and retirees of employers that do not participate in the State Health Benefits Plan ("SHBP"). The City relies only on one part, N.J.S.A. 40A:10-23, of this statutory scheme.

N.J.S.A. 40A:10-16 et seq. authorizes municipal employers to provide health insurance for their employees and retirees. N.J.S.A. 40A:10-17 and 18 address health insurance for current employees. They provide:

N.J.S.A. 40A:10-17

> Any local unit or agency thereof, herein referred to as employers, may:
>
> a. Enter into contracts of group life, accidental death and dismemberment, hospitalization, medical, surgical, major medical expense, or health and accident insurance with any insurance company or companies authorized to do business in this State, or may contract with a nonprofit hospital service or medical service corporation with respect to the benefits which they are authorized to provide respectively. The contract or contracts shall provide any one or more of such coverages for the employees of such employer and may include their dependents;
>
> b. Enter into a contract or contracts to provide drug prescription and other health care benefits, or enter into a contract or contracts to provide drug prescription and other health care benefits as may be required to implement a determination by a local unit to provide such benefit or benefits to employees not included in collective negotiations units.

N.J.S.A. 40A:10-18

> The contract shall exclude from eligibility:
>
> a. Employees and dependents active or retired, who are otherwise eligible for coverage but who, although they meet the age eligibility requirement of the Federal Medicare Program, are not covered by the complete Federal program;
>
> b. Any class or classes of employees who are eligible for like or similar coverage under another group contract covering the class or classes of employees.

N.J.S.A. 40A:10-22 and 23 address health insurance coverage and premiums for retirees. They provide:

N.J.S.A. 40A:10-22

> The continuance of coverage after retirement of any employee may be at rates and under the conditions as shall be prescribed in the contract, subject, however, to the conditions set forth in N.J.S.A. 40A:10-23. The contribution required of any employee toward the cost of coverage may be paid by him to his former employer or in such manner as the employer shall direct.

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

> 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.

N.J.S.A. 40A:10-23 is codified under the title Payment of Premiums After Retirement. A legislative committee statement explains the requirements of this statute:

> 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 Committee Statement, Assembly No. 1573 - L. 1983, c. 364; emphasis added]

When this statutory framework is viewed as a whole, it appears that N.J.S.A. 40A:10-17 allows a non-SHBP employer to provide basic health care coverage to its current employees either under a single group contract or under separate contracts which

cover different classes of employees or negotiating units.[1/] N.J.S.A. 40A:10-22 allows employees to continue their health care coverage after retirement. The coverage continued is presumably the same coverage for current employees in that class or negotiating unit at the time of the employees' retirement. If the retired employees meet the eligibility requirements of N.J.S.A. 40A:10-23, then the employer may pay the premiums for the continued coverage. But an employer agreeing to pay the premiums for some retirees must establish uniform conditions for the payment of premiums of all retirees meeting the eligibility requirements. Non-eligible retirees must pay their own premiums.

The City has entered several agreements with insurance carriers to provide coverage. Whether these are termed separate contracts or "subgroups" of a single contact is an issue of form, not substance, because the statutes allow a non-SHBP employer to have more than one group contract. The City has not asserted that its arrangements for the coverage of current employees violate N.J.S.A. 40A:10-17 and 18. It does not address the NFU's contention that health coverage for all current employee groups, both uniformed

---

1/ N.J.S.A. 40A:10-17(b) authorizes an employer to provide optional coverages, such as a prescription plan. There is no requirement that all employees have such optional coverages. New Jersey Policemen's Benevolent Association v. New Jersey Health Benefits Comm., 153 N.J. Super. 152 (App. Div. 1976) so construes N.J.S.A. 52:14-17.29(F), a part of the State Health Benefits Act that is worded identically to N.J.S.A. 40A:10-17(b).

and non-uniformed, is essentially the same because all current employees receive basic hospitalization and major medical benefits. We therefore assume that the health benefit arrangements for current employees are legal. We further assume that the City has legally agreed to continue that coverage for retirees pursuant to N.J.S.A. 40A:10-22.

The City's sole contention is that retiree health coverages are different and that N.J.S.A. 40A:10-23 and Bernards Tp., P.E.R.C. No. 88-116, 14 NJPER 352 (¶19136 1988), preempt negotiations because they require that non-SHBP employers must provide the same health care coverage for all retirees. We now address that contention.

The City reads the text of N.J.S.A. 40A:10-23 too broadly. The statute speaks only of premiums, not coverage. Further, all the cases construing this statute have concerned the conditions under which an employer may agree to pay all or part of the premiums for retiree health coverage. See Gauer v. Essex Cty. Div. of Welfare, 108 N.J. 140 (1987); Belleville Tp., P.E.R.C. No. 92-74, 18 NJPER 68 (¶23030 1991); Morris Cty. Prosecutor, P.E.R.C. No. 91-120, 17 NJPER 347 (¶22155 1991); Little Egg Harbor Tp., P.E.R.C. No. 90-123, 16 NJPER 398 (¶21165 1990); Bernards Tp.; Town of Kearny, P.E.R.C. No. 83-12, 8 NJPER 441 (¶13208 1982). None has held that the health coverage for all retirees of a non-SHBP employer must be uniform. We conclude that the uniformity required by N.J.S.A. 40A:10-23 applies to premiums only and specifically means that an employer who agrees to pay premiums for some retirees must also pay premiums for all other eligible retirees.

The City asks us to apply Bernards beyond its precise holding to a different situation. Bernards holds that where an employer provides all employees with identical coverage through a single group contract, an interest arbitrator may not award a change in premium payments because that change would also apply to employee units not subject to the interest arbitration. Only the payment of premiums, not the level or type of benefits, was at issue in Bernards. Further, the rationale of Bernards does not apply here because the City has entered several agreements with insurance carriers rather than a single agreement as in Bernards and because no change in payments has been proposed. Thus, any ruling would not directly affect the benefits of other negotiations units. We are therefore not persuaded that either N.J.S.A. 40A:10-23 or Bernards Tp. precludes a successor agreement between the City and the NFU from maintaining current health insurance benefits for retirees.

We have answered the only contention posed to us. Given the limited nature of that contention and the absence of any proposals to change the current benefits, we do not have jurisdiction in this case to consider whether Newark's health benefit system for employees and retirees, assembled over the course of 15 years, should be invalidated. If the City wishes to present any broader arguments or seek broader relief, it may seek a declaratory judgment from the Superior Court.

Holiday Pay

In City of Newark, we held that the employer's challenge to the legality of this contract provision was untimely. That case is

on appeal. Because the NFU seeks to have this benefit included in a new agreement, the City may now challenge its negotiability.

The City contends that including holiday pay in base pay for pension purposes violates the pension laws. We disagree.

N.J.A.C. 17:6-2.1 defines salary for the purpose of calculating an employee's pension. It provides:

> (a) Salary shall not include retroactive salary adjustments if the increases are not of a normal, overall published program of increases. Bonus or overtime payments are not to be considered for the purpose of the act. Longevity, terminal leave or vacation payments will not be considered if paid in a lump sum or other than as a regular salary disbursement.
>
> (b) All claims involving an increase of more than 15 percent over that of the previous year, as reported to the pension fund shall be investigated. Those cases where a violation of the statute is suspect shall be referred to the [Consolidated Police and Firemen's Pension Fund] commission.

This regulation does not expressly, specifically or comprehensively bar including holiday pay as part of base pay. Nor has the Division of Pensions ruled that enforcing such a provision would defraud the pension system.

The City quotes a February 19, 1991, letter from an Executive Assistant of the Division of Pensions which addresses including holiday pay in base pay. That letter and a November 28, 1989 letter from the then Director of the Division of Pensions are part of the record in P.E.R.C. 92-20. They state that no pension statute or regulation prohibits including holiday pay in base pay

for pension purposes. In fact, the Division of Pensions has been accepting pension contributions for other City employees which are calculated on a base salary including holiday pay.

We also reject the contention that this proposal contravenes N.J.S.A. 34:13A-8.1.[2/] This section of the Employer-Employee Relations Act states:

> Nothing in this act shall be construed to annul or modify, or to preclude the continuation of any agreement during its current term heretofore entered into between any public employer and any employee organization, nor shall any provision hereof annul or modify any pension statute or statutes of this State.

This statutory language bars an agreement which would "annul or modify" a pension enactment. The Department of Pensions has found that this contract provision did not contravene any pension statutes. It is true that State Supervisory says that "public employees and employee representatives may neither negotiate nor agree upon any proposal which would affect the sancrosanct subject of employee pensions." Id. at 83. But section 8.1 is not triggered unless an agreement would annul or modify a pension statute and courts have enforced negotiated agreements that, like this proposal, mention pensions but do not violate pension statutes. See PBA Local No. 145 v. PERC, 187 N.J. Super. 202 (App. Div. 1982), certif. den. 93 N.J. 269 (1983).

2/ We need not address whether N.J.S.A. 34:13A-18 would bar interest arbitration since no modification of this existing benefit has been proposed. See Seaside Park Bor., P.E.R.C. No. 93-33, 18 NJPER 499 (¶23230 1992).

In Borough of Paramus, P.E.R.C. No. 86-17, 11 NJPER 502 (¶16178 1985), we held mandatorily negotiable a proposal that police officers entering their 23rd year of service should have 6% added to their longevity payments in lieu of paid holidays and clothing allowance. We stated that the employer's contention that this proposal was a fraud on the pension system had to be pursued before the Division of Pensions. We further reasoned that the proposal affected compensation, a mandatorily negotiable subject, and was not preempted. In Newark v. Prof. Fire Officers Ass'n of Newark, Local 1860, IAFF, App. Div. Dkt. No. A-4450-87 (3/22/89), the Appellate Division approved our reasoning in Paramus. Thus, we do not believe that this issue is preempted.[3/]

ORDER

The article including holiday pay in base pay and Sections 3, 12 and 14 of Article 12 are mandatorily negotiable.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Grandrimo, Goetting, Regan and Wenzler voted in favor of this decision. None opposed. Commissioner Smith abstained.

DATED: December 17, 1992
Trenton, New Jersey
ISSUED: December 18, 1992

3/ We also reject the City's argument that it was exercising a prerogative when it decided to grant this benefit to two negotiating units of superior officers in the police department, but declined to extend that benefit to rank-and-file employees.