I. R. NO. 85-5

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF FANWOOD,

Respondent,

-and-

Docket No. CO-85-48

FANWOOD PBA, LOCAL 123,

Charging Party.

SYNOPSIS

The Designee of the Public Employment Relations Commission denies interim relief where the Charging Party claimed that the employer unlawfully denied salary increments to two employees otherwise due pursuant to contract and practice. The Employer alleged that the increments were denied due to unsatisfactory performance, and the Charging Party did not satisfy the substantial likelihood of success standard.

However, the Commission Designee retained jurisdiction to ensure that increments be provided to employees whose job performance is satisfactory.

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Appearances:

For the Respondent, Mark S. Ruderman, Esq.

For the Charging Party, Loccke & Correia, Esq.
(Manuel A. Correia, of Counsel)

DECISION ON MOTION FOR INTERIM RELIEF

On August 27, 1984 Fanwood PBA, Local 123 ("PBA") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the Borough of Fanwood ("Borough") had violated subsections 5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), [1/] by unilaterally refusing to pay salary increments to certain police officers who were allegedly entitled to the same. [2/]

On September 5, 1984, the PBA, pursuant to N.J.A.C. 19:14-9.2, filed an application for interim relief with supporting brief

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage 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."

2/ The Charge also alleged that the Borough unlawfully froze all non-emergency overtime. However, that portion of the Charge was not included in the interim relief request.

and verified complaint together with an Order to Show Cause which was signed on September 6, 1984 and made returnable on October 3, 1984. 3/ The Borough submitted a brief in opposition to the request for interim relief on October 1, 1984. A hearing was conducted on the return date as scheduled.

The standards that have been developed by the Commission for evaluating the appropriateness of interim relief are well settled. The test is twofold: the Charging Party must establish that it has a substantial likelihood of success in the final Commission decision on the legal and factual allegations, and, it must also establish that irreparable harm will occur if the requested relief is not granted. 4/

The Commission, and indeed the courts, have frequently and consistently held that automatic salary increments contained in expired agreements must be paid during the period the parties are negotiating for a new agreement. 5/ However, in affirming that holding the State Supreme Court in Galloway Twp. Bd/Ed v. Galloway Twp. Ed.Assn., supra, differentiated between "automatic"

3/ The Order was originally made returnable for September 20, 1984, but pursuant to the Borough's request it was rescheduled for October 3, 1984.

4/ See In re Twp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975); In re State of N.J. (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); and, In re Twp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975).

5/ See Galloway Twp. Bd/Ed v. Galloway Twp. Ed.Assn., 78 N.J. 25 (1978); In re Union County Reg. H.S. Bd/Ed., P.E.R.C. No. 78-27, 4 NJPER 11 (¶4007 1977); Hudson County Bd/Chosen Freeholders v. Hudson County PBA Local No. 51, App. Div. Docket No. A-2444-77 (4/9/79), aff'g P.E.R.C. No. 78-48, 4 NJPER 87 (¶14041 1978); Rutgers, The State University v. Rutgers University College Teachers Assn., App. Div. Docket No. A-1572-79 (4/1/81 aff'g P.E.R.C. No. 80-66, 5 NJPER 539 (¶10278 1979); In re City of Vineland, I.R. No. 81-1, 7 NJPER 324 (¶12142 1981) interim order enforced and leave to appeal denied, App. Div. Docket No. AM-1037-80T3 (7/15/81); In re Alexandria Twp. Bd.Ed., I.R. No. 84-5, 10 NJPER 1 (¶15000 1983); and, In re Carteret Bd.Ed., I.R. No. 85-2, 10 NJPER ___ (¶ 1984).

and "discretionary" increments. The Court held that automatic increments were those which were considered part of the status quo and that the withholding of the same would be an unlawful unilateral change, whereas, where the increment was discretionary, "the grant or denial of the increase would be a matter to be resolved in negotiations" Galloway, supra, 78 N.J. at 49-50.

One major issue presented in this case is whether the instant increments were automatic or discretionary. But another major issue was whether the instant increments were denied based upon performance considerations.

The facts show that the parties' first collective agreement was reached in 1972 and that its last effective collective agreement (Exhibit C-5), the 1982-83 agreement, contained a salary clause in Article 5 which did not make any specific reference to increments. However, the Borough has, since at least the early 1970's, operated under a Borough ordinance which concerns the advancement of police, i.e. increments, and that ordinance provides in pertinent part that:

> B. The Council, upon the recommendations of the Board of Police, may advance a policeman for especially good work or meritorious service. Upon recommendation, the Council may require a policeman in any class, except Class A, to serve for a longer period than herein specified because of unsatisfactory service. 6/

The facts further show that in 1973 one employee was denied an increment pursuant to the ordinance because of poor performance, but that since that time (and until the instant denials) no increments have been denied for any reason.

6/ Class A of that ordinance concerns patrolmen who have served for four or more years.

Although the contract herein is silent as to increments, I believe the Borough ordinance and the parties' practice demonstrate that the instant increments were meant to be and have been provided on an automatic basis. The very ordinance that the Borough relies upon permits increment denials only because of unsatisfactory performance, and the parties' practice shows that the only time an increment was denied was because of unsatisfactory performance. Consequently, unless the Borough is asserting unsatisfactory performance as the reason for an increment denial, the ordinance requires the automatic advancement of employees.

The Borough confuses the requirement to give automatic increments with its right to deny increments based upon performance considerations. Even the Supreme Court in Galloway recognized the right of the public employer to deny increments because of unsatisfactory performance. But the Borough's argument that the instant increments are discretionary is unsupported by the facts, and the PBA has otherwise satisfied the substantial likelihood of success standard. Therefore, the Borough does not have the right, absent unsatisfactory performance, to deny increments to unit employees.

With regard to the irreparable harm standard, this Commission has clearly found that the refusal to pay automatic salary increments during negotiations represents irreparable harm because it has a "chilling effect" that destroys the laboratory conditions of the negotiations process and adversely affects the ability of the majority representative to negotiate. See In re Union County Reg. H.S. Bd.Ed., supra; In re City of Jersey City, P.E.R.C. No. 77-58,

3 NJPER 122 (1977); In re State of N.J. (and CWA), I.R. No. 82-2, 7 NJPER 532 (¶12235 1981); and; In re City of Vineland, supra. Therefore, the Borough herein is required to continue to pay salary increments to unit employees whose job performance is satisfactory.

The above finding, however, does not conclude the analysis of the instant matter. The Borough in its brief, and oral argument, asserted that the instant increments were denied in accordance with the ordinance based upon unsatisfactory performance. Since the facts of the job performance issue were not litigated in this interim relief proceeding, there is no "substantial likelihood of success" on that issue, and the PBA's request for interim relief for the two affected individuals must be denied. However, since the Commission in In re East Brunswick Bd.Ed., P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984), appeal pending App. Div. Docket No. A-5596-83T6, found that decisions to withhold salary increments constitute disciplinary determinations that may be reviewed through negotiated arbitration procedures (providing no other statutory appeal procedure exists), the appropriateness of the instant incremental denials may be reviewable through the parties' grievance procedure. 7/

Accordingly, the instant application for interim relief for the two affected employees is hereby denied. But I shall retain jurisdiction for an Order in the event the Borough fails to pay increments to employees whose job performance is satisfactory.

By Order of the Commission

Arnold H. Zudick
Commission Designee

Dated: October 10, 1984
Trenton, N.J.

7/ Alternatively, a full hearing on the instant unfair practice charge may be appropriate if the Charge satisfies the Commission's complaint issuance standards.