

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COMMUNICATIONS WORKERS OF AMERICA,  
AFL-CIO; CWA-SUPERVISORS, AFL-CIO;  
and CWA-SUPERVISORS (HIGHER LEVEL),  
AFL-CIO,

Charging Parties,

-and-

Docket No. CO-82-14

STATE OF NEW JERSEY,

Respondent.

SYNOPSIS

In an unfair practice case, the Chairman of the Commission, acting upon a request for interim relief filed by the Communications Workers of America and its affiliates, orders that the State of New Jersey pay salary increments which were due to employees in units represented by the CWA pursuant to a previously negotiated salary increment system as contained in a contract which expired June 30, 1981. In accordance with the decision of the Supreme Court in Galloway Twp. Bd of Ed v. Galloway Twp. Education Ass'n, 78 N.J. 25 (1978), and other Commission and Appellate Division decisions, the Chairman finds that the failure to pay the increments constituted an alteration of the status quo and interim relief was necessary to prevent irreparable harm.

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Appearances:

For the Charging Parties, Kapelsohn, Lerner, Reitman  
and Maisel, Esqs., (Sidney Reitman, of Counsel)

For the Respondent, James R. Zazzali, Attorney General  
of New Jersey (Michael L. Diller, of Counsel)

INTERLOCUTORY DECISION

On July 24, 1981, the Communications Workers of America, AFL-CIO; CWA-Supervisors, AFL-CIO; and CWA-Supervisors (Higher Level), AFL-CIO (the "CWA") filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that the State of New Jersey (the "State") was violating the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act").<sup>1/</sup> More specifically the charge alleges that the State violated subsections 5.4(a)(1) and (a)(5)<sup>2/</sup> by refusing to pay

<sup>1/</sup> The unfair practice charge was filed jointly by the CWA and its two supervisory affiliates. Among them these organizations represent four separate units of State employees. See In re State of New Jersey, D.R. No. 81-49, 7 NJPER \_\_\_\_\_ (¶ \_\_\_\_\_ 1981), request for review denied P.E.R.C. No. 82-24, 7 NJPER \_\_\_\_\_ (¶ \_\_\_\_\_ 1981). The use of the term CWA in this decision refers to the three organizations which are the Charging Parties.

<sup>2/</sup> 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

(Continued)

length of service salary increments to those employees with an anniversary date in State service of July 1 who allegedly became entitled to such increments on July 1, 1981.

The CWA coupled its filing of the unfair practice charge with an application for interim relief<sup>3/</sup> asking that the State show cause before the Commission why an interlocutory order should not be issued enjoining the State from refusing to pay eligible employees salary increments as required by the most recent collective negotiated agreements pending the final disposition by the Commission of the unfair practice proceeding.<sup>4/</sup>

An Order to Show Cause was executed which was made returnable on July 30, 1981 but was adjourned at the request of both parties until August 11, 1981. On that date, the undersigned conducted a hearing, having been delegated such authority to act upon requests for interim relief on behalf of the full Commission. Briefs were submitted on July 26 by the CWA and on July 28 by the State in accordance with a briefing schedule set forth in the

2/ (Continued) them by this Act. (5) Refusing to negotiate in good faith with a majority representative of the 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."

3/ See N.J.A.C. 19:14-9.1 et seq. and Englewood Board of Education v. Englewood Teachers Ass'n, 135 N.J. Super. 120 (App. Div. 1975).

4/ The contracts covering these four units of State employees had been negotiated by the State and the New Jersey Civil Service Association and New Jersey State Employees Association and their supervisory affiliates as the jointly certified majority representatives of these units. Following a series of PERC conducted elections, as indicated in the Commission decisions cited in footnote 1, supra, the CWA and its affiliates have now become the certified majority representative of these employees. As will be discussed in greater detail in this decision, these contracts had a term of July 1, 1979 to June 30, 1981. The parties are currently engaged in face to face negotiations for successor agreements.

aforementioned order. Additionally, the CWA filed a reply brief on August 10, 1981.

At the conclusion of the hearing, the parties were advised that pursuant to N.J.A.C. 19:14-9.5(a), and upon review of the entire record of this proceeding, a written decision on the instant dispute would issue.

The standards that have been developed by the Commission for evaluating the appropriateness of interim relief are similar to those applied by the courts when confronted with similar applications. The test is twofold: the substantial likelihood of success on the legal and factual allegations in the final Commission decision, and the irreparable nature of the harm that will occur if the requested relief is not granted.<sup>5/</sup> These standards must be satisfied before the requested relief will be granted.

The Charging Parties between them represent the State employees in the following four units: 1) Administrative and Clerical Unit, 2) Professional Unit, 3) Primary Level Supervisors Unit, and 4) the Higher Level Supervisors Unit. The four collectively negotiated agreements covering these units all had a term of July 1, 1979 to June 30, 1981 and the State and CWA are currently in the process of negotiations for new agreements in all four units. The parties are still negotiating on a face to face basis and neither has filed a notice of impasse or otherwise felt the need to invoke the Commission's impasse resolution procedures.

It is undisputed that the salary structure which existed

<sup>5/</sup> See In re Township of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975); In re State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); and In re Township of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975).

under the four contracts contained salary ranges with minimums and maximums and a series of intermediate incremental steps based upon length of service, assuming satisfactory performance.<sup>6/</sup> These increments were paid to each employee on an annual basis until the employee reached the maximum step of his or her particular salary range. The effective date for the payment of the increment is one of the four uniform "anniversary dates" which most closely follows an employees entry into state service. For example, all employees hired between April 1 and June 30 of any year have an anniversary date of July 1 and their entitlement to an increment is effective on July 1 of each year regardless of the exact date within that period when their State service began.

The instant dispute involves those employees with anniversary dates of July 1 who completed another year of satisfactory service on June 30, 1981 at which time CWA alleges they became entitled to their next step increment. CWA contends that the withholding of that increment, during the pendency of negotiations for a new agreement, constitutes an unlawful unilateral alteration in the terms and conditions of employment of these employees. It is undisputed that since the expiration date of the contracts, the State has failed to pay increments. The State argues inter alia that the wording in the contracts does not require the payment of increments and that its past practice has been to not pay increments during negotiations for a new agreement after an existing

<sup>6/</sup> There is no dispute that the State still retains the authority to withhold these increments for unsatisfactory service; CWA so stipulated at the hearing on the Order to Show Cause. The unfair practice charge seeks only the continuation of the existing increment structure during the course of negotiations.

contract has expired. The State asserts contract waiver, specifically with reference to the following contract language from each expired contract: "Normal increments shall be paid to all employees eligible for such increments within the policies of the State Compensation Plan during the term of this Agreement."

The dispute in this matter, the payment of increments, is an issue which has been the subject of prior litigation and judicial review. Decisions of the Commission, the Appellate Division, and the Supreme Court have consistently held that salary increments contained in an expired contract must be paid during the period of negotiation for a new contract.<sup>7/</sup>

The New Jersey Supreme Court addressed the issue of the payment of increments after the expiration of a collective negotiations agreement, holding that a school board's unilateral withholding of increments during the course of negotiations was an unfair labor practice and constituted a refusal to negotiate. Galloway Township Board of Education v. Galloway Twp. Education Ass'n, fn. 7, supra. In Galloway, supra, the Board decided to refrain from paying the teachers the salary step increments that they would have normally received at the start of the new school year, 1975-76, and paid the teachers the same salaries that they

<sup>7/</sup> See Galloway Twp. Bd. of Ed. v. Galloway Tp. Ed. Assn, 78 N.J. 25 (1978); Hudson County Bd. of Chosen Freeholders v. Hudson County PBA Local #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 Ass'n, App. Div. Docket No. A-1572-79 (4/1/81) aff'g P.E.R.C. No. 80-66, 5 NJPER 539 (¶10278 1979); see also 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).

had received the previous year. This was at a time when the current contract had expired and negotiations for a successor agreement were in progress. In prior years there had already been an agreement in existence at the commencement of the school year except in 1971-72 when no agreement had been reached and increments also were withheld. The Commission found that the payment of salaries according to the schedule was a term and condition of employment and remained in effect until a new agreement was reached or until the negotiations obligation was exhausted. In so holding that terms and conditions of employment remained in effect during negotiations even though that agreement had expired, the Commission concluded that they constituted the status quo for the parties and that these existing conditions constituted the least disruptive situation during the period of continued negotiations. With respect to the payment of increments, the Commission found that the existing salary schedule with its length of service steps was part of that status quo and that therefore each teacher was entitled to a salary which corresponded to the appropriate step for their length of service.

On review of the Commission's decision, the Supreme Court, in affirming, stated:

A settled principle of private sector labor law under the LMRA is that an employer's unilateral alteration of the prevailing terms and conditions of employment during the course of collective bargaining concerning the affected conditions constitutes an unlawful refusal to bargain, since such unilateral action is a circumvention of the statutory duty to bargain. NLRB v. Katz, 369 U.S. 736, 743-47 (1962; NLRB v. J. P. Stevens & Co., Inc., Gulistan Div., 538 F. 2d 1151, 1162 (5th Cir. 1976). "Unilateral" in this regard refers to a change in the

employment conditions implemented without prior negotiation to impasse with the employee representative concerning the issue. The basis of the rule prohibiting unilateral changes by an employer during negotiations is the recognition of the importance of maintaining the then-prevailing terms and conditions of employment during this delicate period until new terms and conditions are arrived at by agreement. Unilateral changes disruptive of this status quo are unlawful because they frustrate the statutory objective of establishing working conditions through bargaining.

NLRB v. Katz, supra, 369 U.S. at 744.

Our Legislature has also recognized that the unilateral imposition of working conditions is the antithesis of its goal that the terms and conditions of public employment be established through bilateral negotiation and, to the extent possible, agreement between the public employer and the majority representative of its employees. It has incorporated a rule similar to that of Katz in the following provision of N.J.S.A. 34:13A-5.3:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

Indisputably, the amount of an employee's compensation is an important condition of his employment. If a scheduled annual step increment in an employee's salary is an 'existing rule [ ] governing working conditions,' the unilateral denial of that increment would constitute a modification thereof without the negotiation mandated by N.J.S.A. 34:13A-5.3 and would thus violate N.J.S.A. 34:13A-5.4(a)(5). Such conduct by a public employer would also have the effect of coercing its employees in their exercise of the organizational rights guaranteed them by the Act because of its inherent repudiation of and chilling effect on the exercise of their statutory right to have such issues negotiated on their behalf by their majority representative.

We must accordingly determine whether payment of the salary increment withheld by the Board constituted an element of the status quo whose continuance could not be disrupted by unilateral action. The answer to this question turns, to some extent, on whether the annual step increments in the teachers' salaries were 'automatic,' in which case their expected



receipt would be considered as part of status quo, or 'discretionary,' in which case the grant or denial of the salary increases would be a matter to be resolved in negotiations. 78 N.J. at 48-49.

The Supreme Court found that the increments structure set forth in the expired contract was automatic, assuming satisfactory performance, and therefore affirmed the Commission's finding that the increments should have been paid.

Subsequently, in In re Hudson County Bd. of Chosen Freeholders v. Hudson County PBA #51, supra, a similar charge was filed alleging that the County had violated the Act by unilaterally determining that regular increment payments received under a long standing practice rather than by a specific contractual salary guide could be denied. The County attempted to distinguish Galloway by arguing inter alia that the Supreme Court had relied in part on the existence of statutes in the Education Law which recognized increments and established salary guides in holding that the increments be paid. No such statutes existed for these employees. The Commission rejected these arguments and found that the County had violated the Act when it refused to pay the increments. The Commission stated that:

...the payment of increments constituted a term and condition of employment under which the parties have been operating and, therefore, was an element of the status quo. It cannot be disputed that any employee who completed an additional year of service during the winter or spring of 1976 would be entitled to an increment on his anniversary date under the established practice in effect at the expiration of the 1974-75 agreement. The Board's unilateral decision not to pay these increments was a negation of this benefit. Accordingly, there was an alteration of the status quo.

This decision was affirmed and enforced by the Appellate Division.

See footnote 7, supra.<sup>8/</sup>

This question was first addressed in an interim relief context in In re Union County Reg. H.S. Bd. of Ed., P.E.R.C. No. 78-27, 4 NJPER 11 (¶14007 1977), where the Commission's designee also found that the unilateral withholding of salary increments was unjustified. In that case, the Teachers Association, on behalf of certain non-professional employees which it represented, charged that the Board had violated sections 5.4(a) (1) and (5) by refusing to pay these employees incremental salary increases when due within the terms of the expired agreements. As in this case and other prior decisions, the salary schedule in effect under the expired contract specified a particular step for each year of an employee's service and the Commission's designee reasoned that an employee who had worked the prior year would then have been entitled to an increment of one step pursuant to the salary schedule in effect at the expiration of the agreements. At the time the charge was filed, no new agreements had been reached and negotiations were ongoing. The Board, like the employer in the earlier cases, argued that the status quo would only be maintained if employees remained on the existing step of the prior schedule. The Board, like the State herein, also argued that there had been a long standing practice to pay salary increments retroactively only after inclusion in an executed successor agreement. The Commission's

<sup>8/</sup> See also In re Rutgers, The State University, supra, note 7, where the Commission found that the University committed an unfair practice when it withheld increments from co-adjutants during the course of negotiations for the first contract for these recently organized employees. This result was reached even though the increment program had been established unilaterally by the University prior to the time these employees became organized. This decision was also affirmed and enforced by the Appellate Division.

designee rejected these arguments on the basis of prior Commission precedent, and found that the Association had established a substantial likelihood of success on the merits.

Additionally, on the question of irreparable harm, the Commission's designee found that more was at issue than the mere loss of the use of the money involved in the increment. He found that the unilateral withholding of the increments by the employer introduced illegal economic coercion into the negotiations process. The implication of such action is that if the employees agree to the employer's position, they get their increments immediately; however, if they continue to negotiate, they must wait for the increments, if they get them at all.<sup>9/</sup> This is totally antithetical to the public policy of this Act which is intended to substitute negotiations and impasse resolution procedures, such as mediation, for resort to economic and other forms of coercive pressure by either side. He found that monetary damages in the form of restored increments at the end of the case could not undo this "chilling effect" on the negotiations. Interim relief has the effect of depriving the employer of the ability to upset the balance in the parties' negotiations positions which the Act is designed to provide.

<sup>9/</sup> The Board's position in the negotiations in that case, like the State herein, included a continuation of the increment system. Thus, the situation there, like here, was not one in which the employer was trying to end the payment of increments in the new agreement and the organization was trying to continue them. It should be noted that in neither Union County nor any decision of the Commission, has the Commission held that an employer could not negotiate an alteration or modification of an incremental system. Rather, as in the instant case, the issue solely concerns the payment of increments pursuant to an incremental system which remains part of the status quo during the pendency of the negotiations. As will be discussed infra, the State's arguments herein appear to confuse these two situations.

In referring to this "chilling effect" on the negotiations process, the Commission's designee was actually anticipating the reasoning of the Supreme Court in the Galloway case. As quoted supra, the Supreme Court stated that:

Such conduct by a public employer would also have the effect of coercing its employees in their exercise of the organizational rights guaranteed them by the Act because of its inherent repudiation of and chilling effect on the exercise of their statutory right to have such issues negotiated on their behalf by their majority representative. 78 N.J. at 49. (emphasis added)

One further case which is significant to complete the historical treatment of the increment question is City of Vineland, I.R. No. 81-1, 7 NJPER 324 (¶12142 1981), enf'd Vineland P.B.A. No. 266 v. City of Vineland, App. Div. Docket No. AM-1037-80, July 15, 1981, another interim relief matter decided only shortly before this present one. In that case, the Commission's designee held that salary increments which were due police officers pursuant to the salary schedule in the expired contract should not have been withheld and that status quo included the obligation of the City to pay the salary increments based upon the prior contract's longevity structure. The City, like the State here, contended that it did not have to pay the increments designated in the salary schedule because the established past practice and status quo was for the City to withhold salary increments pending the completion of negotiations for a successor agreement. It was undisputed that upon the expiration of the previous two contracts, the City did not pay increments until a successor agreement had been executed.

The Commission's designee did not find this fact dispositive. Relying on the prior decisions discussed supra, he found that the failure to protest the City's illegal conduct in the past did not constitute a waiver of the right to seek to remedy it in this instance, nor did the City's illegal conduct in the past establish a binding past practice. Moreover, like the case herein, this was the first contract negotiated by the PBA with the City. Like the CWA herein, Local 266 had recently replaced the organization which had negotiated the prior contracts as the employees' majority representative. The Commission's designee would not permit the prior organization's acquiescence to the City's withholding of the increments to effectuate a permanent waiver of the new organization's right to pursue its statutory right to seek to remedy the unlawful conduct. Following the issuance of the interim relief decision, the City sought leave to appeal to the Appellate Division. The Commission cross-moved, at the PBA's request, for enforcement of the interim order. The Appellate Division denied the City's motion and granted the Commission's application for enforcement.

From all of the preceding cases it becomes quite clear that the refusal to pay salary increments provided for in a recently expired collective negotiations agreement during the course of negotiations for a successor agreement, and prior to the exhaustion of the Commission's impasse resolution procedures, is a unilateral alteration of the status quo and an unfair practice. It has also been repeatedly held that the coercive and chilling effect on the ongoing negotiations process is significant and sufficiently irreparable to warrant the issuance of interim relief.

The positions of the parties have been clearly stated in the briefs and through oral argument before the undersigned on August 11, 1981. The Charging Parties allege that interim relief is appropriate in this case because of their likelihood of success on the merits and the irreparable harm resulting from the non-payment of increments due for certain employees on July 1, 1981. The Charging Parties rely on the Supreme Court's decision in Galloway Twp., and the other cases discussed supra for the proposition that a public employer is precluded from altering terms and conditions of employment without prior negotiations, and that this principle is particularly well settled regarding the non-payment of salary increments during negotiations. CWA cites these same cases to establish the irreparable harm to their current negotiations position from the State's unlawful economic pressure on the employees. CWA argues that the State's withholding of increments from those employees who have already become entitled by the satisfactory completion of another year of State service introduces economic pressure on CWA to concede to the State's positions on other subjects of negotiations unrelated to the merits of those proposals so that a contract can be completed and the increments paid.

The State does not dispute its obligation to maintain the status quo during negotiations; however, relying upon the language from Galloway, supra, that increments are only part of

the status quo if their payment is automatic as opposed to discretionary, it argues that the increments herein are now discretionary, at least until a new agreement is concluded which provides for their continued payment. The State further argues that interim relief is not appropriate due to the existence of sufficient factual disputes concerning whether the payment of increments is discretionary following the expiration of this contract to question CWA's success on the merits. The State contends that since the increment provisions in each of the four contracts provides that increments be paid to eligible employees "during the term of this Agreement," this language should be construed to limit its obligation to the calendar term of the agreements. The State asserts that the parties have no interim agreement to pay increments under such circumstances, and that prior practices of the State have been not to pay incremental raises after the expiration of a contract and before reaching a successor agreement. The State also asserts that, unlike Galloway, no statute requires the payment of incremental raises to its employees.

In a separate argument, the State contends that it is required to look to whether the Legislature has designated particular funds to pay salary increments for each fiscal year beginning on July 1 or, alternatively, whether payment of increments has been negotiated into new agreements for that particular fiscal year. The State reasons that unless increments are specifically funded by the State Legislature, payment of increments in recognition of prior additional length of service cannot be implemented. Thus, where as here neither of the two funding alternatives have occurred,

the State maintains it has properly opted not to pay increments during the period between the expiration of the labor agreement and the conclusion of successor agreements and that the proper forum for the resolution of the continuation of increments is the current negotiations process.

With respect to the CWA's assertion of irreparable harm, the State maintains that no irreparable harm would result to the Charging Parties as a result of the withholding of increments because assuming arguendo that the unfair practice charge was ultimately sustained, the affected employees could be made whole by the retroactive payment of earned increments. Additionally, no chilling effect upon the parties' negotiations as a result of the State's non-payment of July 1 increments could exist because pursuant to other expired contracts and to past practice, the affected employees could not have had any reasonable expectation of receiving such increments during the period between the expiration of the old contract and the inception of the successor agreement. Finally, the State asserts that the relative hardship to the State and its taxpayers resulting from such an order for relief outweighs any harm suffered by State employees as a result of not receiving their increments on time.

In its reply to the State's contentions, the Charging Parties assert that the increments in question are covered by statute, Civil Service regulation and the parties' collective agreement, and moreover that they are automatic. As support therefor, the Charging Parties rely upon N.J.S.A. 52:14-15.28 providing for "automatic" increases to be paid to State employees based upon length of



satisfactory service.<sup>10/</sup> Charging Parties further rely on N.J.A.C. 4:1-7.3(a)(2) providing for the Civil Service Commission to establish regulations for "normal increments," defined as "regular period increases within the salary range, subject to available appropriations based upon a period of service and performance rating." Finally, the Charging Parties assert that each of the collective agreements in question provides for the payment of "normal merit increments."

The Charging Parties respond to the State's contractual waiver argument by arguing that the "during the term of the Agreement" language in no way diminishes the CWA's position that the existing increment program as set forth in that agreement constitutes part of the status quo which must be maintained during negotiations. In the alternative, the CWA argues that even "assuming arguendo" that the language was intended to limit the State's obligation to pay increments following the expiration of these contracts and the parties' failure to reach new agreements, the clause must be interpreted to refer only to the establishment of eligibility for increments as occurring during the term of the agreement and not the question of when the increment is to be paid. Otherwise, employees with July 1 anniversary dates would be deprived of an increment even though they worked a full year

<sup>10/</sup> N.J.S.A. 52:14-15.28 provides in relevant part: "...the Civil Service Commission shall establish automatic increases in such salary, based upon length of service, within the salary ranges established from time to time therefor, and such salary shall thereafter automatically be increased accordingly, unless the head of the department and the Civil Service Commission shall agree that the service record of the holder of such office, position or employment does not warrant any such increase in salary.

under the agreement just like all the other employees who had already received their increments on the prior anniversary dates. <sup>11/</sup>

The Charging Parties further assert that no specific designation of funds is required for the payment of increments. They point out that budgets are customarily considered in the spring of each year and collective agreements in the summer. The 1979 budget was completed prior to execution of the 1979-81 collective agreements; hence, no specific language for the payment of increments could have existed. Nevertheless, they were paid. As further support for this point, CWA notes that the State is currently paying increments to employees with July 1 anniversary dates who are in the negotiations unit represented by the American Federation of State, County, and Municipal Employees (AFSCME). The negotiations for the successor agreement for those employees were completed after the passage of the new fiscal year budget, the one which the State asserts does not provide for increments, yet eligible employees in that unit received their increments effective July 1, 1981. If sufficient statutory authority exists to pay them, CWA argues that sufficient authority exists for the payment of the increments in dispute herein. Moreover, CWA argues that

<sup>11/</sup> In support of this interpretation, Botany Mills v. Textile Workers Union, 59 N.J. Super. 23 (App. Div. 1968), and Emerson Electric Co. v. NLRB, \_\_\_ F.2d \_\_\_ (3 Cir. April 13, 1981), were cited. In Botany Mills, supra, the Court interpreted a clause providing for vacation pay to "each employee in the employ of the employer on each April 15 hereafter during the life of this agreement" as meaning that the eligibility had to accrue "during the life of the agreement"--not that the benefit was to be paid during the life of the agreement. In Emerson Electric, supra, the Court interpreted a sickness benefit clause using the accrual of rights to benefits theory, concluding that the relevant time was the accrual of the right and not the payment of the benefit, during the term of the agreement.

the budget provides an amount for salaries and "other benefits" which it asserts includes increments as well as other benefits which have remained in effect.

Finally, the Charging Parties argue that no basis exists for the State's waiver argument and its asserted past practice of not paying increments until the new agreement is concluded. As support therefor, the CWA relies upon the decision in City of Vineland as well as Galloway itself. The Charging Parties also contend that in order to establish a waiver, the Courts, the NLRB and PERC have uniformly required a clear showing of an unmistakable intent to abandon or forego a claimed contractual or statutory right, and the State has failed to meet this burden.

After a thorough review of the record herein and the arguments of the parties, I am convinced that there is a substantial likelihood that the Commission would find an obligation on the part of the State to pay the increments for those employees eligible to receive them on July 1, 1981, and that the refusal to pay them pursuant to the salary schedules negotiated in the prior agreement during the course of negotiations for the successor agreements constitutes an unlawful unilateral alteration in the status quo.

It is essential to note that neither party disputes that salary increments are mandatorily negotiable terms and conditions of employment and further, that a unilateral alteration in the status quo constitutes an unlawful change in terms and conditions of employment. The nub of the instant controversy is what constitutes the status quo in light of the present facts and circumstances

The salary guide structure at issue is virtually indistinguishable from those presented in disputes which have previously been reviewed by the Commission and the Courts. Thus, unless the State's arguments establish some basis for distinguishing these particular contracts or the facts of this case from those presented in the earlier cases, there is no reason to believe that the existing case law is not controlling. A review of these arguments indicates that they do not.

The State's argument that its prior practice of withholding increments in the past until a new agreement is reached justifies its refusal to pay them now is similar to the arguments made and rejected in prior cases as set forth earlier in this decision. Similarly, the State's attempts to minimize the irreparable harm to the negotiations process from its conduct are disposed of by the arguments made in these earlier cases. The fact that the State's similar conduct in the past may have tempered the employees' expectations of the prompt payment of their increments is hardly a persuasive reason to deny the Charging Parties their requested relief, particularly in a situation where the law is clear and the State concedes that its own position in negotiations provides for the continuation of the increment system.

The State's assertion that the absence of specific legislation providing for increments prevents it from paying them to these employees is sufficiently refuted by the fact that it is paying increments to some employees under existing budget law, and that that law does appropriate funds for the payment of

salaries and other benefits. It must also be noted that prior experience cited by CWA appears to indicate that in past years increments have been paid as soon as the new agreements have been executed notwithstanding that the Legislature was not available to make immediate changes in the budget. Additionally, the language of N.J.S.A. 52:14-15.28 would appear to provide statutory support for the continuation of the increment program as an integral and automatic part of the State salary structure as long as funds are reasonably available for the payment of salaries. The State has not suggested that adequate appropriations do not exist to fund the increments. Therefore, the State's arguments pertaining to the absence of specific statutory authorization for the payment of increments would appear to be without merit.

Nor do I find that the State's argument concerning the language of these agreements provides a sufficient basis for distinguishing these cases from the ample precedent discussed earlier. It must be emphasized that it is not the contracts per se which are being extended. Rather, it is the terms and conditions of employment which were in effect at the time that the contracts expired which are being maintained. Those terms included a salary structure which provided for the payment of increments upon the passage of additional periods of service measured by assigned anniversary dates. The employees involved herein have successfully completed that additional period of service. Their proper placement on the salary guide which remains in effect requires that they move up one step and receive the appropriate salary increment. See In re Rutgers, The State University, Appellate Division decision

supra, fn. 7.

The fact, as indicated in the affidavits supplied by the State, that the State has successfully negotiated agreements in the past covering these and other units of employees which have modified the normal incremental system, does not support the argument that the language "during the term of this Agreement" was meant to be a waiver of the obligation to pay increments under the facts of this case. That argument misconstrues the intent of Galloway and the principle of maintaining the status quo. CWA concedes that the State is free to attempt to negotiate a modification in the increment system for the successor agreement.<sup>12/</sup> The language of the prior contracts as well as the affidavits appears only to support that proposition. Absent strong evidence of a clear and unmistakable waiver of CWA's right to insist that the status quo on increments be maintained during the period of negotiations for the new agreements and prior to the exhaustion of the Commission's impasse procedures, the State is not free to unilaterally refuse to pay increments as provided for by the existing compensation plan. I do not believe that the Commission would conclude that the contract language or the information provided by the State's affidavits would amount to a waiver of that right.<sup>13/</sup>

<sup>12/</sup> Again, however, the State has apparently not availed itself of that right in these negotiations.

<sup>13/</sup> Alternative support for this conclusion exists in the CWA's accrual of rights versus payment of benefits argument discussed earlier.

An examination of the contracts introduced into evidence with respect to these units of employees as well as other units of employees represented by other employee organizations also supports the Charging Parties' position that the language "during the terms of this Agreement" does not have the meaning urged by the State and could not constitute a waiver of the principle established in Galloway and other cases. In the few instances where the State and an employee organization did agree to any modification in the normal increment system for a successor contract, such intent was set forth in clear and unambiguous language.

For example, with respect to the employees in the four units in dispute herein, the State and CSA/SEA, CWA's predecessor, did agree to modify the normal increment system for fiscal year 1975-76. This was done through negotiations of a supplemental agreement negotiated in December 1975 which became part of and modified the existing July 1, 1974 to June 30, 1977 agreement. However, this one time modification was set forth in great detail in Article V, Section A of the contract as a Special Salary Program and was again specially noted in Article XXXV, the Term of the Agreement, and in two memorandums of understanding appended to the contracts, one of which specifically makes reference to the non-waiver of other rights as to increments by the CSA/SEA. Moreover, the Special Salary Program of Article V, Section A, specified repeatedly that it was for the fiscal year July 1, 1975 to June 30, 1976. Admittedly, these contract provisions pertain to a specific modification of the normal increment program as it had existed in