

I.R. NO. 84-9

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK PUBLIC LIBRARY,

Respondent,

-and-

DOCKET NO. CO-84-175-120

AFSCME, COUNCIL 52, LOCAL 2298,

Charging Party.

Synopsis

Upon application for Interim Relief, a Hearing Examiner appointed as the Commission's designee grants interim relief based upon a charge filed by AFSCME, Council 52, Local 2298, against the Newark Public Library. The charge alleges that the Library 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., when it refused, during negotiations for a successor contract, to pay salary increments due to eligible employees in accordance with the terms of an expired collective negotiations agreement. Finding that Local 2298 had established a substantial likelihood of success on the merits and that it would suffer irreparable harm if denied the requested relief, the Commission's designee ordered the Library to pay eligible employees the increments owed them in accordance with the terms of the expired collective negotiations agreement.

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Appearances:

For the Respondent

Michael L. Nelson, Assistant Corporation Counsel

For the Charging Party

Rothbard, Harris & Oxfeld, Esquires  
(Nancy I. Oxfeld, of Counsel)

INTERLOCUTORY DECISION

On January 9, 1984, AFSCME, Council 52, Local 2298 (the "Charging Party" or "Council 52") filed an Unfair Practice Charge with the Public Employment Relations Commission (the "Commission") alleging that the Newark Public Library (the "Respondent" or the "Library") had violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). More specifically, it is alleged that the Respondent violated subsections 5.4(a)(1), (3) and (5) of the Act by refusing to grant salary increments which were due to its employees in the collective negotiations unit represented by the Charging Party, under the terms of the parties' expired collective negotiations agreement. <sup>1/</sup>

<sup>1/</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 them by this Act. (3) Discriminating in regard to hire or tenure of employment (continued)

On April 23, 1984, Council 52 filed an amendment to the instant unfair practice charge and an Order to Show Cause with the Commission, asking that the Library show cause why an Order should not be entered directing the Respondent to pay the salary increments in accordance with the parties' most recently expired agreement.

The Order to Show Cause was executed and made returnable on May 10, 1984. On that date, the undersigned conducted the Order to Show Cause hearing, having been delegated such authority to act upon requests for interim relief on behalf of the full Commission. Both parties submitted briefs and argued orally at the hearing.

The standards that have been developed by the Commission for evaluating the appropriateness of interim relief are quite similar to those applied by the courts when confronted with like 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>2/</sup> Both standards must be satisfied before the requested relief will be granted.

The dispute in this matter concerns the non-payment of salary increments. That issue is one which has been the subject of prior litigations and judicial review. Decisions of the Commission and the Courts have addressed this issue in various factual settings.

<sup>1/</sup> (Continued) 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."

<sup>2/</sup> See, In re Twp. 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 Twp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975).

It has been held consistently that salary increments contained in an expired contract must be paid during the period of negotiations for a new contract. <sup>3/</sup>

The record reveals the following facts concerning the Charging Party's application for interim relief.

The parties herein (Newark Public Library and Council 52) had entered into a collective negotiations agreement covering the years 1981, 1982 and 1983 on September 23, 1981. That agreement expired on December 31, 1983. The collective negotiations agreement provides, at Article X and at Appendix B for the annual payment of salary increments to eligible employees. The pertinent language of Article X is as follows:

All eligible employees on recommendation of their department heads or supervisors shall receive in 1981, 1982, and 1983, a one step salary increase at the time of their anniversary date.

Appendix B, denominated Salary Scale/Increment Schedule, provides for each employee in an employment title covered by this agreement a salary range and an annual increment amount (at page 66 of the agreement).

The parties held a collective negotiations session in December, 1983, for a successor agreement to the 1981-83 agreement

<sup>3/</sup> 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).

that was then in effect. At that meeting, Council 52 was informed by representatives of the Library that the Library did not intend to pay unit employees increments in January, 1984. From January 1, 1984 through May 10, 1984, no employee in Council 52's unit herein has been paid a salary increment.

The Library has stated that its non-payment of increments to any employee was not for cause -- that is, employees' increments were not withheld due to unsatisfactory performance.

The Library argues that it is not governed by any statutes which would mandate the continued payment of increments after the expiration of the contract. The Library further argues that the language of the contract does not specifically provide for an automatic increment increase to employees. Rather, the Library argues that the contract provides that increments to employees represented by the Charging Party are given upon the recommendation of the employees' department head. The Library argues that the increments in this matter were discretionary with the public employer and were thus not part of the status quo which it was obligated to maintain. Accordingly, the Library contends that there is no entitlement to increments after the expiration of the parties' old agreement and prior to the execution of a successor agreement which provides for the payment of increments. The Charging Party broadly analogizes this situation to that of teachers. The Charging Party argues that N.J.S.A. 34:18A et seq., which regulates teacher increments, provides for the payment of salary increments upon satisfactory performance and for the withholding of increments upon unsatisfactory performance.

The Charging Party contends that teachers have been determined to be entitled to increment payments during negotiations, after the expiration of a contract and prior to the execution of a new contract.

In In re Galloway Twp. Bd/Ed, P.E.R.C. No. 76-32, 2 NJPER 186 (1976), the Commission held that terms and conditions of employment extant at the time of a contract's expiration remained in effect during the period of negotiations for a successor agreement. The Commission determined that the payment of salaries according to a negotiated salary schedule -- including the payment of increments -- was a term and condition of employment which remained in effect until a new collective negotiations agreement was entered or until the parties had exhausted their negotiations obligation. The Commission concluded that such terms and conditions of employment constituted the status quo for the parties and that maintenance of these conditions constituted the least disruptive situation during the period of negotiations for a contract.

In Galloway Twp. Bd/Ed v. Galloway Twp. Ed. Assn., 78 N.J. 25 (1978), the Supreme Court affirmed the Commission and stated as follows:

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, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962); NLRB v. J.P. Stevens & Co., Inc., Gulistan Div., 538 F. 2d 1152, 1162 (5 Cir. 1976). "Unilateral" in this regard refers to a change in the employment conditions implemented without prior negotia-

tion 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, 82 S. Ct. at 1112.

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 the status quo, or "discretionary," in which case the grant or denial of the salary increases would be a matter to be resolved in negotiations.

Analytically helpful in this inquiry is stating the issue in an alternative manner -- could the Board have been found to have violated the Act if it had granted, rather than withheld, the salary increments. Under the rationale of Katz, supra, the answer to the question is in the affirmative if the increments were discretionary and in the negative if they were automatic. See 369 U.S. at 746-47, 82 S. Ct. 1107. In Katz, the Supreme Court

...distinguished between automatic and discretionary wage increases and held that discretionary increases during contract negotiations violated the employer's duty to bargain in good faith. Automatic increases are sanctioned because they do not represent actual changes in conditions of employment but continue the status quo in the sense that they perpetuate existing terms and conditions of employment. Because the employees expect these benefits and readily

recognize them as established practice, the increases do not tend to subvert employee's support for their bargaining agent or disrupt the bargaining relationship.

[NLRB v. John Zink Co., 551 F. 2d 799, 801 (10 Cir. 1977)]

In the instant case, PERC took the position that the payment of the scheduled annual salary increment was one of the existing terms and conditions of employment for the employees represented by the Association. It thus viewed the Board's failure to pay the increment upon the start of the new school year to constitute a unilateral alteration of the status quo. PERC felt that the payment of the annual step increment was "automatic" in the sense that the teachers' entitlement thereto was established by the commencement of an additional year of teaching service. <sup>10/</sup> PERC's reasoning is consistent with Katz, supra: if the unilateral grant of an automatic scheduled increase is not unlawful, then the withholding of that same increase would be an unlawful unilateral change in the status quo.

<sup>10/</sup> There is no allegation in this case that the increments for all teachers in the school system were withheld for cause pursuant to N.J.S.A. 18A:29-14.

Galloway, supra, at 48-50.

In In re State of New Jersey, I.R. No. 82-2, 7 NJPER 532 (¶12235 1981), a case involving the employer's non-payment of salary increments which were allegedly due to employees pursuant to the terms of the parties' expired agreement, the State raised these defenses:

The State argues inter alia that the wording in the contracts does not require the payment of increments....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 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 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 also asserts that, unlike Galloway, no statute requires the payment of incremental raises to its employees. In re State of New Jersey, supra, at pp. 4, 5, 13 and 14.

In In re State of New Jersey, supra, the Chairman of the Commission ordered the employer to pay the salary increments which were due to employees pursuant to the terms of the parties' expired agreement. The Chairman stated:

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....The nub of the instant controversy is what constitutes the status quo in light of the present facts and circumstances.

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. (emphasis added). In re State of New Jersey, supra, at pp. 18-22.

In the instant matter, the Library raises similar arguments. The facts that the contract is expired, that there is no statutory direction to pay increments and that the contract addresses payment of increments only during the years 1981-83 do not affect the employer's obligation to continue to effectuate all terms and conditions of employment extant at the moment of the expiration of the parties' last contract. See In re State of New Jersey, supra, at p. 20. That contract provides for the payment of an annual increment to all eligible employees.

The Respondent next argues that increment payments are discretionary and are not part of the status quo which must be continued in effect. However, the undersigned rejects the Library's characterization of the increment payment system herein as discretionary. The Supreme Court's analysis of this issue (discussed supra, at p. 5 herein) is instructive.

In both the Galloway and State of New Jersey cases, supra, the employers argued that because the payment of increments was premised upon satisfactory job performance, the payment of increments

was not automatic but discretionary. In the instant matter, the employer acknowledged that the requisite supervisor's recommendation for increment receipt was attendant upon satisfactory job performance. Thus, an employee eligible to receive an increment was one who performed satisfactorily for one year.

In both Galloway and State of New Jersey, as in the instant matter, it was established that the increments were not withheld from individual employees for cause (i.e. poor performance) but rather were withheld across the board from all employees. Performance was not a factor in the increment withholding herein. Given that fact, the increments were automatic. Thus, based upon all of the foregoing, the payment of the increments should have been made on appropriate employee anniversary dates.

The Courts and the Commission have recognized the irreparable nature of the harm resultant from the denial of increments during negotiations. In Galloway, the Supreme Court stated:

...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."

...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.

Galloway, supra, n. 5, at pp. 48-49.  
See also, In re State of New Jersey,  
supra, p. 5.

Based upon the foregoing, the undersigned finds that Council 52 herein has a substantial likelihood of success on both the law and the facts at a plenary hearing and further concludes that Council 52 will suffer irreparable harm if it is denied the requested interim relief.

ORDER

It is hereby ordered that the Newark Public Library pay to the eligible employees in the unit represented by Council 52, Local 2298 their salary increments in accordance with the increment provisions contained in the parties' collective negotiations agreement covering the period 1981-1983.

BY ORDER OF THE COMMISSION

  
Charles A. Tadduni  
Commission Designee

DATED: May 15, 1984  
Trenton, New Jersey