H.E. NO. 2013-16

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ATLANTIC,

Respondent,

-and-

Docket Nos. CO-2011-253,
CO-2011-254 & CO-2011-255

PBA LOCAL 243, FOP LODGE 34
and PBA LOCAL 77,

Charging Parties.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that Atlantic County violated subsections 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act when it ceased paying increments to unit members after the expiration of the parties' contracts. The Hearing Examiner found that the County repudiated provisions in the parties' contracts and should have paid the increments pursuant to the dynamic status quo doctrine.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 2013-16

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ATLANTIC,

Respondent,

-and-

Docket Nos. CO-2011-253, CO-2011-254 & CO-2011-255

PBA LOCAL 243, FOP LODGE 34 and PBA LOCAL 77,

Charging Parties.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that Atlantic County violated subsections 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act when it ceased paying increments to unit members after the expiration of the parties' contracts. The Hearing Examiner found that the County repudiated provisions in the parties' contracts and should have paid the increments pursuant to the dynamic status quo doctrine.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 2013-16

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ATLANTIC,

Respondent,

-and-

Docket Nos. CO-2011-253, CO-2011-254 & CO-2011-255

PBA LOCAL 243, FOP LODGE 34
and PBA LOCAL 77,

Charging Parties.

Appearances:

For the Respondent
James F. Ferguson, County Counsel

For the Charging Parties
Plotkin Associates, LLC
(Myron Plotkin, Labor Relations Consultant)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On December 29, 2010, the New Jersey State PBA Local No. 243 (Local 243), the Fraternal Order of Police Lodge No. 34 (Lodge 34), and the New Jersey State PBA Local No. 77 (Local 77) (collectively, the Charging Parties) filed separate unfair practice charges (C-3)[1/] with the Public Employment Relations

1/ "C" refers to Commission exhibits received into evidence during the hearing, "CP" and "R" refer to Charging Party and Respondent exhibits, respectively. "J" refers to documents jointly entered into evidence by the parties. Transcript references for the hearing conducted on September 6, 2012 are "1T," representing the transcript followed by the page number.

Commission (Commission) against the County of Atlantic (County) alleging that the County violated N.J.S.A. 34:13A-5.4a(1), (2), (3), (5) and (7)[2/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), when it did not pay increments to eligible employees included in their separate collective negotiations units after December 31, 2010. Each unfair practice charge was accompanied by an application for interim relief seeking an order directing the County to pay the increments retroactively to January 1, 2011 and to enjoin the County from engaging in conduct violative of the Act. On March 7, 2011, decisions were issued denying the interim relief applications (C-1). Subsequently, Lodge 34 individually filed a motion with the Commission seeking reconsideration of the interim relief determination. On September 27, 2011, the Commission denied Lodge 34's motion, leaving the interim relief decision unaltered (C-1).

2/ These provisions 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (7) Violating any of the rules and regulations established by the commission."

On April 27, 2012, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-3) and an Order Consolidating these cases (C-2). The Director determined that only the 5.4a(1) and (5) allegations in the charge, if true, might constitute an unfair practice and dismissed the 5.4a(2), (3), and (7) allegations (C-3).

On May 29, 2012, the County filed its Answer denying that it engaged in action constituting an unfair practice within the meaning of the Act. The County's Answer asserts as defenses that there exists no binding past practice which requires continued salary guide movement after the collective agreement has expired; the Charging Parties' claims for step increments is barred by legislative action effective June 21, 2010, which sets forth a 2% tax levy cap; the Charging Parties' claims are barred by N.J.S.A. 34:13A-16.7, which limits interest arbitrators from rendering any award which increases base salary items by more than 2%; the County has committed no unfair practice because it must have the ability to conform with current economic realities and cap laws tailored to limit governmental spending by freezing salaries once an agreement expires and, thusly, promotes responsible spending and budgetary management; and the County's actions have caused no chilling effect on negotiations, and, to the extent that there was a chilling effect, it was caused by State legislation mandating that the County adhere to the 2% tax levy cap.

The hearing was conducted on September 6, 2012. The parties examined witnesses and presented documentary evidence. On November 14, 2012, the parties filed timely briefs. Upon the entire record, I make the following:

FINDINGS OF FACT

1. New Jersey State PBA Local No. 243, Fraternal Order of Police Lodge No. 34 and New Jersey State PBA Local No. 77 are public employee organizations within the meaning of the Act. The County of Atlantic is a public employer within the meaning of the Act (1T12-1T13).

Lodge 34

2. The County and Lodge 34 were parties to numerous collective negotiations agreements over the years including agreements covering the periods of January 1, 2003 through December 31, 2006 (J-3) and January 1, 2007 through December 31, 2010 (J-2). The typical course of the successor negotiations process resulted in there being no successor agreement in place by the date on which the then current agreement expired (1T34; 1T46). In the case of J-3, the successor agreement (J-2) was not executed until October 2011 (1T47). J-2 was the result of an interest arbitration award issued on April 2, 2010 (J-4).

3. Article V, Wages, in J-3 provides in a pertinent portion:

> The union and the employer agree that movements across grade (i.e., from 2003 to 2004) shall occur on January 1 of each year whereas movements through the steps of the grade shall occur on the anniversary date. The anniversary date for salary scale purposes shall be the first of the month following the actual anniversary date. Movement to the maximum step shall be January 1 of the officer's maximum year (i.e., an officer at step 6 in 2003 will move to step 7 on January 1, 2004).

The salary grid in J-3 shows horizontal movements along the salary guide in each year, 2003 through 2006, and 7 steps of vertical movement which occur on the employee's anniversary date of hire (J-3; 1T35-1T37; 1T52). Upon reaching step 7, the employee has reached the maximum step on the guide and no longer progresses vertically (1T45; 1T54). The employee who has reached the maximum step 7 still moves horizontally each year provided that an agreement is in place covering that particular calendar year (1T36-1T37).

4. The 2007 through 2010 collective agreement (J-2) also contains a salary guide in Article V. That guide shows horizontal wage increases in years 2007 through 2010 and 8 vertical steps (9 steps in 2010). Article V, B., Movement on the Above Guide, states the following:

> Movements across the grade (i.e., from year to year) shall occur on January 1 of each year whereas movements through the steps of the guide shall occur on an Officer's anniversary date. The anniversary date for salary guide purposes shall be the first (1st) of the month following the Officer's

> actual anniversary date. Movement to the maximum step shall be on January 1 of the Officer's maximum year (i.e., an Officer on step 7 in 2007 will move to step 8 in January 1, 2008).

5. J-2, Article XXIII, Miscellaneous Provisions contains paragraph D., Continuation of Benefits, which provides:

> All terms and conditions of employment, including any past or present benefits, practices or privileges which are enjoyed by the employees covered by this Agreement that have not been included in this Agreement shall not be reduced or eliminated and shall be continued in full force and effect.

6. As noted above, negotiations for a successor agreement were not completed by the time the predecessor agreement had expired. Until a successor agreement was reached, unit employees were not moved horizontally along the salary grid (1T35-1T37). Notwithstanding the fact that a successor collective agreement was not in effect, for at least 17 years, the County has automatically moved unit employees vertically on the salary grid, from one step to the next, on the anniversary of the employee's hire date, in accordance with the terms of the expired agreement (1T35-1T37; 1T52). Since the expiration of the 2003-2006 agreement (J-3), the County paid step increments to unit employees on their anniversary dates in 2007, 2008, 2009 and 2010 (1T47). All of the terms and conditions of employment set forth in J-3 were maintained until J-2 was effectuated in October 2011, with the exception of step increments which will be more fully

discussed below (1T53). By the time J-2 was executed in October 2011, that collective agreement had already expired on December 31, 2010 (1T47). The County implemented all of the terms set forth in J-2 with the exception of providing step increments to unit employees after January 1, 2011 (1T57).

7. Had step increments been given in 2011 and beyond, it would have resulted in salary increases in excess of 2% for unit employees (1T69). The County never expressed to Lodge 34 a financial inability to pay the step increments (1T67).

Local 243

8. The County and Local 243 have been parties to numerous collective negotiations agreements. The agreement covering the period 2002 through 2005 (J-6) expired on December 31, 2005 (1T74). The County and Local 243 had not entered into a successor agreement by the time J-6 expired (1T74). In fact, for at least 25 years, the County and Local 243 had not reached a successor agreement by the time the then-current contract had expired (1T93). A successor agreement (J-5) covering the period of January 1, 2006 through December 31, 2009 was executed in early June, 2006 (1T75). Both J-6 and J-5 contained salary grids that were structurally similar to those contained in the collective agreements (J-3 and J-2) covering Lodge 34. Thus annually, employees would be moved horizontally for each of the

years covered by the agreement and would move vertically between steps 1 and 9 on the employee's anniversary date of hire (1T76; 1T79). During the period after the expiration of J-6 and the effectuation of J-5, all of the extant terms and conditions of employment as contained in J-6 were adhered to by the County, including the awarding of step increments to officers who reached the anniversary date as set forth in the collective agreement (1T77).

9. The County and Local 243 did not reach a successor agreement by the time J-5 had expired on December 31, 2009 (1T82). During calendar year 2010, all of the terms and conditions of employment contained in J-5 were adhered to by the County and while unit employees did not move horizontally on the salary guide, they did receive vertical step movements on their anniversary dates pursuant to the terms of the collective agreement (CP-3; 1T84; 1T88; 1T96). Article IX, D. of J-5 provided in relevant part that "[a]fter the initial calendar year of hire, each employee will be given an anniversary date for purposes of salary increase. . . ." For employees hired between November 16 and December 31 in any calendar year, the anniversary date assigned to them pursuant to the terms of the agreement is "1/1 (next)"; the "next" referring to the next calendar year. On February 16, 2010, Local 243 filed a petition with the Commission seeking interest arbitration to resolve their negotiations

disputes. An interest arbitration award was issued on March 14, 2012 (J-7). As part of its final offer submitted to the interest arbitrator, the County proposed that there be no movement on the salary guide at the expiration of the collective agreement on December 31, 2013, until a successor contract is reached (CP-4; 1T97-1T99; 1T109). This proposal was considered and rejected by the interest arbitrator (J-7, pg. 123, para. 6).

10. As of the date of the hearing in this matter, and notwithstanding the issuance of an interest arbitration award, the County and Local 243 had not executed a successor agreement to J-5 (1T95). However, in June 2012 the salary portion of the interest arbitration award was implemented (1T95). The County had not awarded step increments to eligible officers covered by Local 243 after January 1, 2011 (1T92; 1T121). Upon implementing the salary portion of the interest arbitration award, the County made retroactive payments to eligible employees represented by Local 243 and reinstated the step increment provision contained in the collective agreement, retroactive to January 1, 2011 (1T114-1T116). The cost of the salary award for Local 243 exceeded 2% when the cost of increments is included and was paid for by moving money around within the overall County budget (1T170; J-7).

Local 77

11. The County and Local 77 have been parties to numerous collective negotiations agreements (J-8; J-9; J-10; J-11). Since 1996 (J-11), every time the collective agreement between the County and Local 77 expired, there was a gap in time before a successor agreement was executed, yet all terms and conditions of employment, including the maintenance of the step increment system, were adhered to by the County during that gap. Thus, for the collective agreement covering January 1, 2003 through December 31, 2006 (J-9), a successor agreement covering the period January 1, 2007 through December 31, 2010 (J-8) was not executed until on or about early August 2009 (1T128). Similarly, the collective agreement covering January 1, 2003 through December 31, 2006 was not executed until October 2003 (1T123). The last collective agreement between the County and Local 77 expired on December 31, 2010 (J-8). No successor agreement had been reached during calendar year 2011 into 2012 (1T132). On January 1, 2011, the County advised Local 77 that it would discontinue increments for unit employees until a successor agreement was reached (1T138).

12. The salary guide in all of the collective agreements between the County and Local 77, at least since January 1, 1996 (J-11) were structurally similar to those found in Lodge 34's and Local 243's contracts (1T126). Step increments constitute

vertical movements on the guide and are awarded upon the employee reaching their anniversary date as provided in the agreement (1T125; 1T130). The language contained in Article III, Wages and Longevity, of each collective agreement between the County and Local 77 states that "all employees shall continue to receive anniversary increments in January, April, July or October" (J-8; J-9; J-10; J-11).

13. All four of the contracts between the County and Local 77, which were entered into evidence, contain an "Article XIX, Duration and Termination," which provides:

> All provisions of this Agreement will continue in effect until a successor Agreement is negotiated.

14. In correspondence dated December 22, 2010, the County advised the Charging Parties it would no longer provide step increments to employees included in the collective negotiations units represented by the Charging Parties. The County wrote in relevant part:

> Normally when contracts expire, the officers who remain on the salary guide continue to move through the guide of the expired contract and then salaries are adjusted retroactively when a successor agreement is reached. Although that practice is normally followed, the County believes that it is no longer efficacious or reasonable to do so. Effective January 1, 2011, the County will not move any officers through the salary guides on the expired contracts.
>
> The County believes that the entire negotiations landscape has undergone major

changes. The first was the change in the law effective this summer when the New Jersey Legislature passed and the Governor signed in to law legislation which imposed a 2% tax cap levy on governmental entities. The second major change was the recently enacted Bill which imposes a 2% cap on the base salary component of interest arbitration awards. The Bill's definition of base salary would include increments from a salary guide. This Bill was passed almost unanimously by both houses of the New Jersey Legislature and was signed by the Governor on December 21st. The County believes that these legislative changes have preempted the previous standards of practice and render continued salary guide movement impractical and unduly burdensome.

Both of these legislative enactments will significantly restrict the salary increases that can be given and this would include the increments from the salary guide. The County believes that the continued movement of officers through an expired salary guide will likely result in increases that exceed the amounts that can legally be granted under the recently enacted legislation which will have a detrimental impact upon both the County and the individual officer. If the new agreement results in lesser amounts, which is likely under the new "cap" laws, then an anomaly will be created whereby the individual officer would be required to remit the excess payments to the County. Such an adjustment process would be unfair to both the individual officers and a burden on the administrative personnel who would have to process myriad adjustments.

The County's action will not have a detrimental impact upon the individual officers because whatever salary guide provisions are contained in a new agreement, will be paid retroactively so the officers will be no worse off. [J-1]

15. The County does not dispute that in December 2010 it decided to discontinue the payment of increments to employees included in negotiations units represented by the Charging Parties whose collective agreements had expired (1T146-1T149). The County based its decision on numerous factors.

16. In 2010, P.L. 2010 c. 44 was enacted by the State Legislature and signed into law by the Governor. The statute reduced the previous cap on tax levies from 4% of the previous year's tax levy to 2%. The statute imposed a new formula which placed restrictions on the County's ability to fund and grow its budget in the successive year (1T149-1T150).

The tax levy cap law does not mandate a 2% limit applicable to any single line item, such as salaries. In general, subject to certain exemptions, P.L. 2010 c. 44 requires that the County's overall tax levy not exceed 2% more than the prior year's tax levy. Consequently, the tax levy cap statute does not mandate that the County limit any particular salary increase to a maximum of 2% (1T171-1T172; 1T195).

17. The ratable tax base is the fair value of property located in the County. The tax rate is derived from the value of the ratable tax base (1T151). In 2008, the County's ratable base was approximately $58.3 billion (R-1). In 2010, the ratable base was approximately $55.5 billion, and by 2012, the ratable base decreased to approximately $48.7 billion. Thus, between 2008 and

2012, the ratable base decreased by approximately $9.6 billion and between 2010 and 2012 the ratable base decreased by approximately $6.8 billion (R-1; 1T150-1T153). In recent years, casinos and others have filed tax appeals which have resulted in significant decreases in the ratable base and resultant tax revenues (1T154). In light of the ratable tax base decline, for the 2011 budget it is estimated that tax revenue will decrease by $6 million (1T149-1T150). As the ratable base decreases, the tax rate on the County's residents automatically increases (1T153-1T154). The change in the County's ratable base is not within the County's control (1T154).

18. At the end of 2010, the County employed 1,830 people (1T154). Wages and benefits represent approximately 60-65% of the County's budget (1T156). The employees represented by the Charging Parties are included in the public safety portion of the budget and comprise nearly 40% of the County's overall budget (R-1; 1T156). The annualized cost of increments for public safety employees would range from 5% to 6% (1T160). For the period of 2010 to 2012, non-public safety wages increased by 1.5% whereas public safety wages increased by 4.8% (1T161).

19. Since 2008, the County has cut its expenses by $1 million and has frozen or eliminated 98 positions (1T155-1T157). To save this money, County departments have cut public services and projects but have tried to avoid employee layoffs (1T157).

Non-public safety employees were involuntarily furloughed four days and the Sheriff's department laid off one public safety employee to save money (1T158-1T160). The Prosecutor and Sheriff also froze positions (1T158). However, the County is constrained from cutting its complement of public safety employees in the courts due to guidelines issued by the Administrative Office of the Courts and other State mandates pertaining to staffing levels in the jails (1T158). Public safety employees were exempt from the furloughs (1T159-1T160).

20. In 2010 and 2011, the County carried budget surpluses and limited its overall budget growth to under the allowable 2% tax levy cap (1T168-1T169). Notwithstanding all of the foregoing fiscal changes which have occurred in the County, the actions taken by the County to manage its fiscal circumstance has resulted in its being able to maintain fiscal stability (1T196). The County has maintained its good bond rating issued by the bond rating agencies (1T185).

ANALYSIS

The Charging Parties contend that the extant terms and conditions of employment were represented by the practice of the County continuing to adhere to the application of the step increment program for unit employees after the expiration of the respective collective negotiation agreements. See Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998), aff'd. 334

N.J. Super. 512 (App. Div. 1999), aff'd. 166 N.J. 112 (2000). The Charging Parties argue that for up to 25 years prior to 2011, employees were annually moved to the next vertical step on the salary guide regardless of whether the collective agreement was in effect or had expired. The Charging Parties seek a finding that the County violated the Act when it unilaterally discontinued paying increments as of January 1, 2011.

The County does not dispute that on January 1, 2011 it discontinued paying increments. The County contends that the payment of increments to unit employees is not a binding past practice in light of "[t]he financial constraints imposed by recent changes to the tax levy cap [which] preclude the automatic imposition of past practice and the resulting dynamic status quo." (County brief at pg. 15).

N.J.S.A. 34:13A-5.3 provides, in relevant part:

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

This provision incorporates the long-accepted principle in both public and private sector labor relations that the unilateral alteration of terms and conditions of employment during successor collective negotiations constitutes an illegal refusal to negotiate. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975).

East Hanover Bd. of Ed., P.E.R.C. No. 99-71, 25 NJPER 119 (¶30052 1999), aff'd. 26 NJPER 200 (¶31081 App. Div. 2000), certif. denied 165 N.J. 489 (2000), 26 NJPER 330 (¶31133 Sup. Ct. 2000), is the Commission's last, fully litigated pronouncement on the dynamic status quo concept. Although the Commission has issued interim relief decisions in which it weighed the relative hardship to the parties and harm to the public interest, the standards applicable in an interim relief determination differ from the legal standards applicable to a determination issued post hearing. See State Operated School District of the City of Paterson, P.E.R.C. No. 2012-3, 38 NJPER 132 (¶33 2011); Bloomfield Bd. of Ed., P.E.R.C. No. 2011-55, 37 NJPER 2 (¶2 2011). I do not apply interim relief case precedent here.

In East Hanover Bd. of Ed., the Commission reiterated the history of the application of the static versus dynamic status quo concepts. It noted that in 1974, it was asked to consider how the unilateral change doctrine applied to negotiated salary systems which called for the payment of annual increments for each additional year of service and whether such payments would be required during the course of successor negotiations. It recognized two approaches at that time.

> Under the first approach, the focus is on the individual employee and maintenance of the status quo requires that the salary levels for each individual employee remain the same. Under the second, the focus is on the salary guide system and the status quo includes the

> extension of automatic increments beyond the life of the agreement because the salary guide system calling for such increments is a term and condition of employment. . . Put another way, the parties agreed on a salary system providing that an employee with a specified number of years of service would be paid a specified amount. Paying an employee with an extra year of service an extra increment of value maintains a status quo that ties compensation to experience. [Id., 25 NJPER at 121]

The Commission chose the second view, a view shared by a majority of labor relations agencies. Id. at 121.

Galloway Tp. Bd. of Ed., P.E.R.C. No. 76-32, 2 NJPER 186 (1976), involved an unfair practice charge filed by the teachers' association claiming that the board violated the Act by unilaterally discontinuing the payment of salary increments to unit employees after the collective agreement expired and the parties were engaged in successor negotiations. The Commission held that the board's unilateral determination not to pay increments after the expiration of the collective agreement impermissibly altered the existing salary guide system. The New Jersey Supreme Court affirmed. The Court noted that the status quo doctrine was incorporated into 5.3 of the Act. Galloway Township Board of Education v. Galloway Township Education Assn., 78 N.J. 25, 48 (1978). However, as correctly noted by the County, the Court ultimately premised its holding in Galloway on an education law, N.J.S.A. 18A:29-4.1, to require the Galloway

Board to pay the disputed increments. East Hanover Bd. of Ed. at 121.

From 1978 - the Court's decision in Galloway - until its decision in Neptune Bd. of Ed. v. Neptune Township Ed. Ass'n., 144 N.J. 16 (1996), the Commission required the continuation of automatic increment systems after contract expirations in both education and non-education settings (See East Hanover Bd. of Ed., fn. 2). Accordingly, while Neptune Bd. of Ed. changed the landscape in terms of certain employees subject to N.J.S.A. 18A:29-4.1, it had no impact on employees not covered by its provisions. In East Hanover Bd. of Ed., 25 NJPER at 122, the Commission stated:

> The Supreme Court reaffirmed that the Act prohibits an employer from unilaterally altering the status quo without negotiating to impasse. The Court further recognized that we have interpreted the Act to require a dynamic status quo, including the payment of increments under an automatic increment system tying the amount of compensation to the amount of experience. But the court held that under education law, a school board could not pay automatic increments under a three-year salary schedule to teaching staff members after the three-year contract expires.

The employees at issue in this case are not subject to the provisions of N.J.S.A. 18A:29-4.1. Consequently, under the tenets of the Act, there is no basis for an employer to unilaterally prevent the employees from receiving their automatic

increment payments pursuant to the dynamic status quo concept, long embraced by the Commission.

The record clearly establishes that over the course of numerous expirations of collective agreements executed by the parties, the County always continued to pay unit employees their step increments on their anniversary dates as expressly required by their respective collective agreements. Annually, for at least 17 years, the County automatically moved employees in Lodge 34 and Local 77 vertically on the salary guide. This occurred until January 1, 2011, regardless of whether a collective agreement was in effect or had expired. For at least 25 years, the County and Local 243 had not reached a successor agreement by the time that the predecessor agreement expired and yet until 2011, automatic increments were paid annually. I find the payment of annual automatic increments constituted a practice amounting to an existing term and condition of employment. See Middletown Tp. The unilateral change which the County effected on January 1, 2011, when it discontinued its practice of paying automatic increments violates 5.4a(1) and (5) of the Act.

The record further establishes that the Charging Parties' respective collective negotiations agreements contain language addressing the payment of increments to eligible unit employees. Lodge 34's agreement (J-2) states that ". . .movements through the steps of the guide shall occur on an officer's anniversary

date." Local 243's agreement (J-5) provides for each employee to be assigned one of four anniversary dates after the initial date of hire including an anniversary date of "1/1 (next)"; denoting an intent of the parties to continue step increments into the future. Local 77's collective agreement (J-8) contains a provision which states that all employees shall continue to receive anniversary increments on specified dates inclusive of an anniversary date of 1/1 (next). Additionally, Lodge 34 (J-2, Article XXIII, D.) and Local 77 (J-8, Article XIX, C.) contain provisions in their respective agreements which address the continuity of benefits, expressed or implied. The negotiated provisions in the agreements constitute the parties' agreed upon terms and conditions of employment and cannot be unilaterally changed during the term of the agreement or after its expiration. N.J.S.A. 34:13A-5.3; Hunterdon Cty. and CWA, 116 N.J. 322 (1989). Accordingly, regardless of the issue of practice, I find that the parties have expressly agreed in their respective collective negotiations agreements to continue the automatic step increment payments notwithstanding the expiration of the contract. Thus, when the County unilaterally discontinued paying increments to employees represented by the Charging Parties, it repudiated the express terms of the collective negotiations agreements in violation of the Act without first engaging in negotiations. See

State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

The County contends that the financial constraints imposed by recent legislative changes to the tax levy cap requirement preclude the imposition of what it concedes has been the past practice of paying automatic increments after the expiration of the respective collective agreements. Clearly, the adoption of P.L. 2010 c. 44 was designed to limit tax revenue growth. It is also evident that the ratable tax base has declined significantly since 2008. Indeed, since 2008, the ratable tax base has declined some $9.6 billion as the result of tax appeals filed by casinos and others which has caused the County's revenues to decline substantially. At the same time, notwithstanding the general downturn in the overall economy, the tax rate imposed on the County's residents has automatically increased. In its noble effort to avoid layoffs of employees, the County has imposed temporary furloughs, cut services and projects, and reduced the rate of wage increases for its non-public safety employees. As the result of good fiscal management, the County has reduced its expenses by $1 million and maintained a good rating among the bond rating agencies. Given the apparent success of the County's efforts, the County has never claimed an inability to pay increments and, in fact, has made all of the retroactive payments

required under the terms of the interest arbitration award involving Local 243, including the payments of increments.

However, nothing in P.L. 2010 c. 44 provides that the tenets of the Act have been relaxed or abrogated. As Hearing Examiner, I am bound to the mandates of the Act and decisional case law as set forth by the courts and the Commission. Policy changes are the province of the Commission. For non-education employees, the case law requires the application of the dynamic status quo. The County's departure from the dynamic status quo -- in this case, the refusal to pay automatic increments -- constitutes a unilateral change in a mandatory subject of negotiations in violation of the Act. The County was aware that its obligation to continue to pay increments after the expiration of the agreements is a mandatory subject of negotiations as demonstrated by its efforts to have that obligation expressly removed from future contracts during negotiations with the parties. The County unsuccessfully tried to add a provision into the successor agreements which would have prohibited movement on the salary guide until after a new contract was reached.

The County argues that the imposition of a 2% tax levy cap changes the labor relations landscape. Clearly, P.L. 2010 c. 44 has a significant impact. However, c. 44 does not impose a 2% cap on each budgetary line item and, notwithstanding c. 44, the County has still been able to operate with budget growth at the

rate of less than the mandated 2% tax levy cap. Thus, while there can be no doubt that the County has struggled to maintain service levels given c. 44, there is no evidence that it would have been prevented from maintaining its operations given the 2% cap, had it adhered to its obligation under the Act to pay employees represented by the Charging Parties the increments to which they were entitled pursuant to the application of the dynamic status quo as currently exists.

CONCLUSION OF LAW

The County violated N.J.S.A. 34:13A-5.4a(1) and (5) when it unilaterally discontinued paying increments to employees represented by the Charging Parties on January 1, 2011.

RECOMMENDED ORDER

I recommend that the Commission **ORDER** the County of Atlantic to cease and desist from:

A. Interfering with, restraining or coercing employees included in the New Jersey State PBA Local 243, FOP Lodge 34 and New Jersey State PBA Local 77 in their exercise of the rights guaranteed to them by the Act, particularly by unilaterally discontinuing the automatic increment program as of January 1, 2011, pending the effectuation of a successor collective negotiations agreement, in violation of N.J.S.A. 34:13A-5.4a(1).

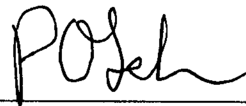
B. Refusing to negotiate in good faith with the Charging Parties concerning terms and conditions of employment of employees in those negotiations units listed in paragraph A., above, by repudiating the collective negotiations agreements' provisions pertaining to the payment of increments and unilaterally discontinuing the payment of automatic increments in accordance with the salary guides in the parties' collective negotiations agreements and pursuant to past practice, in violation of N.J.S.A. 34:13A-5.4a(5).

C. The County of Atlantic should take the following affirmative action:

1. Immediately pay all eligible employees included in the collective negotiations units represented by FOP Lodge 34 and PBA Local 77 their increments as provided in their respective collective negotiations agreements, retroactive to January 1, 2011, plus interest pursuant to R. 4:42-11. Since employees included in the collective negotiations unit represented by PBA Local 243 received their increments pursuant to the interest arbitration award (J-7) issued on March 14, 2012, the County of Atlantic will pay employees represented by PBA Local 243 interest on the withheld increment payments pursuant to R. 4:42-11 for the period between January 1, 2011 and the time payment of their increments was delivered.

2. Post in all places where notices to employees are customarily posted copies of the attached notice marked as Appendix "A." copies of such notice on forms to be provided by the Commission, will be posted immediately upon receipt thereof and after being signed by the Respondent's authorized representative, will be maintained by it for at least sixty (60) consecutive days. Reasonable steps will be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials; and

3. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to employ this ORDER.



Perry O. Lehrer
Hearing Examiner

DATED: March 1, 2013
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by March 11, 2013.

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees included in the New Jersey State PBA Local 243, FOP Lodge 34 and New Jersey State PBA Local 77 in their exercise of the rights guaranteed to them by the Act, particularly by unilaterally discontinuing the automatic increment program as of January 1, 2011, pending the effectuation of a successor collective negotiations agreement, in violation of N.J.S.A. 34:13A-5.4a(1).

WE WILL cease and desist from refusing to negotiate in good faith with the Charging Parties concerning terms and conditions of employment of employees in those negotiations units listed in the paragraph above by repudiating the collective negotiations agreements' provisions pertaining to the payment of increments and unilaterally discontinuing the payment of automatic increments in accordance with the salary guides in the parties' collective negotiations agreements and pursuant to past practice, in violation of N.J.S.A. 34:13A-5.4a(5).

WE WILL immediately pay all eligible employees included in the collective negotiations units represented by FOP Lodge 34 and PBA Local 77 their increments as provided in their respective collective negotiations agreements, retroactive to January 1, 2011, plus interest pursuant to R. 4:42-11. Since employees included in the collective negotiations unit represented by PBA Local 243 received their increments pursuant to the interest arbitration award (J-7) issued on March 14, 2012, the County of Atlantic will pay employees represented by PBA Local 243 interest on the withheld increment payments pursuant to R. 4:42-11 for the period between January 1, 2011 and the time payment of their increments was delivered.

Docket Nos. CO-2011-253, 254, 255 — County of Atlantic (Public Employer)

Date: ______________ By: ______________

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"