I.R. NO. 2019-9

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ENGLEWOOD BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2019-085

ENGLEWOOD TEACHERS' ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee grants an application for interim relief filed by the Association against the Board alleging that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1) and (5), when it refused/failed to pay salary increments following the expiration of the parties' 2015-2018 collective negotiations agreement. The Designee finds that the Association has demonstrated a substantial likelihood of prevailing in a final Commission decision, irreparable harm to the negotiations process, relative hardship, and that the public interest will not be injured by an interim relief order and directs the Board to pay the salary increments immediately. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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ENGLEWOOD TEACHERS' ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Sciarrillo, Cornell, McKeever, & Osborne, LLC, attorneys (Dennis McKeever, of counsel and on the brief; Jaclyn M. Morgese, on the brief)

For the Charging Party, Bucceri & Pincus, LLC, attorneys (Louis P. Bucceri, of counsel and on the brief; Albert J. Leonardo, on the brief)

INTERLOCUTORY DECISION

On September 24, 2018, Englewood Teachers' Association (Association) filed an unfair practice charge against Englewood Board of Education (Board) alleging that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically subsections 5.4a(1) and (5),[1/] when it

1/ 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"; and "(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 (continued...)

refused/failed to pay salary increments following the expiration of the parties' 2015-2018 collective negotiations agreement (CNA). The Association's unfair practice charge was accompanied by an application for interim relief requesting that pursuant to the parties' 2017-2018 salary guide, the Board be ordered to pay salary increments retroactively for salary earned from September 1, 2018 and thereafter unless modified by the terms of a mutually-ratified successor agreement.

PROCEDURAL HISTORY

On October 1, 2018, the Director of Unfair Practices signed an Order to Show Cause directing the Board to file any opposition by October 12 and set October 18 as the return date for oral argument. On October 5, this matter was reassigned to me and oral argument was rescheduled to October 19. On October 19, counsel engaged in oral argument during a telephone conference call.

On October 20, 2018, I inquired with counsel regarding suspected omissions within the Board's submission. On October 22, the Association's counsel confirmed that his copy of the Board's submission contained the same suspected omissions. Later on October 22, the Board's counsel confirmed that there was in

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1/ (...continued)
refusing to process grievances presented by the majority representative."

fact one omission in its original submission and provided a complete version.

On October 22, 2018, pursuant to N.J.A.C. 19:14-9.3(c),[2/] I directed the Association to file a reply brief by October 24. On October 24, I granted the Board's request to file a sur-reply brief by October 25; I also advised counsel that no further submissions would be permitted thereafter.

In support of the application for interim relief, the Association submitted a brief, exhibits, and the certification of its President, David Vignola (Vignola). In opposition, the Board submitted a brief, exhibits, and the certification of its Business Administrator and Board Secretary, Cheryl Balletto (Balletto).[3/] The Association also filed a reply brief, exhibits, and the supplemental certification of Vignola. The Board also filed a sur-reply brief.

FINDINGS OF FACT

The Association represents all personnel employed by the Board excluding supervisors, directors, administrators, and non-professional personnel as specified in the recognition clause (Article I) of the parties' CNA. The Board and the Association

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2/ N.J.A.C. 19:14-9.3(c) grants the Commission Chair or Designee with the authority to permit additional briefing in an interim relief proceeding.

3/ As referenced above, the Board originally submitted Balletto's certification without page 5.

are parties to an expired CNA in effect from July 1, 2015 through June 30, 2018. The grievance procedure ends in binding arbitration.

Article VIII of the parties' expired CNA, entitled "Teacher Compensation," provides in pertinent part:

> A. It shall be clearly understood by both parties that the salary schedules (e.g. designated as Appendix I-A, I-B, Appendix II, and Appendix III included in this Agreement) do not guarantee an automatic salary increase.
>
> B. Withholding of Employment Increment Procedure
>
> > 1. The Board of Education may withhold, for inefficiency or other just cause, the employment increment of any teacher in any year. The Board of Education, within ten (10) school days, shall give written notice of any such action, together with the reasons thereof, to the teacher concerned.
> >
> > * * *
> >
> > 2. The term "employment increment" as used herein is intended to mean the next step on the salary guide at which step the teacher would be placed. If the employment increment is withheld, the individual in question shall remain at the step on the guide for the year during which the employment increment is withheld, even though that step shall be higher than the previous year.
> >
> > * * *
>
> E. Any teacher commencing work on or prior to December 1st shall receive a full year's salary credit on the salary guide for the next school year. Any teacher commencing

> work after December 1st shall not receive any credit on the salary guide in the next school year, but shall only receive a full year's salary credit on the salary guide for the subsequent school year.
>
> * * *
>
> H. In order to qualify for advancement from one salary guide to the next, advanced degrees, and college credits must be directly related to current approved jobs in the District.

Article XII of the parties' expired CNA, entitled "Advancement to Next Guide,"[4/] provides in pertinent part:

> Tenured teachers will be considered for advancement from one salary guide to the next only once per year. Teachers should make application by September 1st or March 1st each school year. If approved, payments for advancement will commence October 1st or April 1st of the same school year. There will be no retroactive salary guide advancements.

Article XXXIII of the parties' expired CNA, entitled "Miscellaneous Provisions," provides in pertinent part:

> A. This Agreement constitutes Board policy for the term of said Agreement, and the Board shall carry out the commitments contained herein and give them full force and effect as Board policy.

Article XXXV of the parties' expired CNA, entitled "Duration of the Agreement," provides:

> This Agreement shall be effective as of July 1, 2015, and continue in effect until June 30, 201 [sic]. If this Agreement expires, it

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4/ Article XII is entitled "Professional Development Program" within the CNA's Table of Contents.

> is expressly understood that all provisions and benefits contained herein shall remain in force until a new agreement is agreed upon and signed by the parties.[5/]

On April 17, 2018, the parties commenced negotiations for a successor agreement. On May 23, the Board provided the Association with proposals.

On May 29, 2018, the Association sent a letter to the Board demanding that salary increments be paid on September 14 – the first pay period of the 2018-2019 school year - even if the parties' CNA expired. Vignola certifies that the Board failed to respond.

On June 30, 2018, the parties' CNA expired. On August 15, the Association filed a Notice of Impasse (I-2019-035). To date, the parties have not reached a successor agreement. A mediation session is scheduled for November 13, 2018.

On September 14, 2018, the first paychecks of the 2018-2019 school year were issued. The parties agree that all Association members were paid based upon their placement on the 2017-2018 salary guide.

On September 24, 2018, the underlying unfair practice charge was filed together with the instant application for interim relief.

5/ It is undisputed that the parties' CNA expired on June 30, 2018.

Balletto certifies that the cost to make the requested payments for "approximately 321 teachers . . . would equate [to] $418,780, which is 1.17% of the total salary cost." According to Balletto,

> If salary increments are required to be paid upon expiration of the [CNA], the financial and operational impact upon the Board will be devastating. N.J.S.A. 18A:7F-38 binds the Board to a 2.0% tax levy cap. Under this statute, the Board may not raise taxes, and as a result their operating budget, by more than 2.0% over the previous school year without receiving public approval via a ballot vote. The 2.0% tax levy cap is placed upon the Board's budget as a whole. Accordingly, salaries are not the only financial item driving the increases to the Board's budget. Other line items impacting the 2.0% tax levy cap are decreases to revenue sources like state aid and tuition payments, as well as increases to other expenses such as health benefits and special education. Pursuant to recent Legislative action, the Board was categorized as an "overfunded" district due to its receipt of supposed overpayments of adjustment aid. As a result of this characterization, the Board received $4,000 less in state aid in 2018-2019 than was previously budgeted for or anticipated. Further, through 2025, the Board is projected – assuming enrollment levels remain the same – to receive $78,000 less in state aid. This loss of $78,000 in revenue must be accounted for when budgeting for the 2.0% tax levy cap.
>
> In addition to the loss of state aid revenue, the Board's tuition payments from non-resident students is also decreasing. As Board revenues drop, other costs such as health benefits, transportation, and special education, continue to grow. . . .As a member of the School Employees Health

> Benefits Program (SEHBP), the Board does not have the ability to negotiate on its own behalf to reduce renewal rates. The Board must simply account for the rise in insurance costs, and make payments. Effective January 1, 2018, SEHBP rates increased 13.0%. Since 2009, SEHBP rates have increased over 100%. While it was previously announced that SEHBP medical rates will decrease 1.1% in 2019, the Board's SEHBP prescription rates will increase, causing the overall cost of health benefits to increase 0.29%. The Board cannot be certain that such a small increase will continue in future years, particularly since SEHBP rates have risen so significantly over the last ten years.
>
> This imbalance between rising costs and decreasing revenue has already had significant operational impact on the Board. At the end of the 2017-2018 school year, the Board – facing a budget shortfall - implemented reductions in force (RIF) of staff. As a result of the RIF, the Board eliminated all vice-principal positions, as well as the positions of twenty (20) teachers. If required to pay automatic increments, the Board will have no ability to recall any of the RIF'ed teachers, nor will the Board be able to continue [to] offer certain student programs. By paying automatic increments, the Board would be required to again adjust its budget and potentially RIF additional teachers, resulting in further elimination of programs and courses for students.

Vignola certifies that "the Board's May 23, 2018 proposal [during the parties'] negotiations for a successor to the 2015[-2018] CNA" demonstrates that "the Board's claim about the financial impact of a 1.7% increase is patently false." According to Vignola,

> A review of the Board's proposal (which is not covered by any negotiations confidentiality agreement or ground rule) shows:
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> a) The Board's salary proposal alternatives offered salary increase of 2.40%, 2.60% and 3.00% in each year of any new agreement;
>
> b) The Board proposed to add language barring the payment of salary increments after the conclusion of any new agreement.
>
> . . . Even the Board's rejected proposals include a far greater increase than would result from the payment of increments based on the 2017-18 guide.

LEGAL ARGUMENTS

The Association argues that it has satisfied the standard for interim relief. Specifically, the Association maintains that it has a substantial likelihood of prevailing in a final Commission decision because "the illegality of withholding increments due under a prior salary guide pending a new agreement is now a matter of settled law" particularly when "there is a provision in the CNA that provides all terms shall remain operative and binding upon the parties until a successor agreement becomes effective." The Association asserts that "the CNA language here is nearly identical to the language at issue in County of Atlantic" and therefore, "under both the Appellate Division's holding on the dynamic status quo doctrine . . . [and] the Supreme Court's holding on binding contract language

governing the duration of CNAs, the Commission must grant the Association's request for interim relief." The Association argues that because the salary guides at issue have only been in effect for three years, "application of the dynamic status quo doctrine does not run against the five-year threshold [in] N.J.S.A. 18A:29-4.1" and "the CNA is governed by labor law only . . . which requires the payment of the increments."[6/] The Association also contends that it has established irreparable harm because unilaterally changing terms and conditions of employment during negotiations has a "chilling effect . . . on the negotiations process" that "tends to undercut and eventually destroy the authority of a majority representative by wantonly usurping its right to fully negotiate any alteration of existing employment conditions."[7/]

In opposition, the Board argues that the Association has not satisfied the standard for interim relief. Specifically, the Board asserts the following arguments:

6/ In support of its position, the Association cites In re County of Atlantic, 445 N.J. Super. 1 (App. Div. 2016), aff'd on other grounds, 230 N.J. 237 (2017), Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass'n, 78 N.J. 25 (1978), Bd. of Educ. of Neptune Twp. v. Neptune Twp. Educ. Ass'n, 144 N.J. 16 (1996), and Cliffside Park Bd. of Ed., I.R. No. 2019-8, __ NJPER __ (¶__ 2019).

7/ In support of its position, the Association cites Granite City Steel Co., 167 NLRB No. 35, 66 LRRM 1070 (N.L.R.B. 1967), Galloway Twp. Bd. of Ed., 78 N.J. at 49, and Evesham Tp. Bd. of Ed., I.R. No. 95-10, 21 NJPER 3, 4 (¶26001 1994).

-the Association is not likely to succeed on the merits due to the existence of clear contract language that no retroactive salary guide advancements shall be paid;

-the Association will not suffer irreparable harm because salary increments, if agreed to by the parties, will be paid upon the execution of a successor agreement;

-the Association cannot establish that any hardship experienced is greater than that of the Board because paid salary increments cannot be recovered, creating significant injury to the public interest[8/];

-the dynamic status quo doctrine exempts school boards from the requirement of paying increments upon expiration of a collective negotiations agreement because:

-the dynamic status quo does not apply to school boards given that the Appellate Division did not consider the impact of N.J.S.A. 18A:28-5 upon schools boards in County of Atlantic;

-the Legislature's amendment of N.J.S.A. 18A:29-4.1 renders County of Atlantic moot;

-the financial implications of automatic increments must be considered in determining that the dynamic status quo does not apply to school boards because:

-the Association's reading of the dynamic status quo and N.J.S.A. 18A:29-4.1 would eliminate the need for bargaining a CNA's

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8/ In support of its position, the Board cites Bloomfield Bd. of Ed., I.R. No. 2011-12, 36 NJPER 330 (¶129 2010), recon. granted P.E.R.C. No. 2011-55, 37 NJPER 2 (¶2 2011), State Operated School District of the City of Paterson, I.R. No. 2011-17, 36 NJPER 376 (¶147 2010), recon. granted P.E.R.C. No. 2012-3, 38 NJPER 132 (¶33 2011).

> duration and place an unnecessary roadblock in negotiations;
>
> -requiring that the Board pay increments would place an irretrievable financial burden on the Board and severely impact its ability to negotiate effectively and best represent the taxpayers of [Englewood].

The Association replies that "[t]he Board's reliance on Neptune and the overruled decisions of Bloomfield and Paterson is misplaced." The Association argues that the Appellate Division's decision in County of Atlantic "cited the Commission's decisions in and reliance on Bloomfield and Paterson in describing the Commission's errors" and "expressly rejected the economic arguments raised by the public employers in that case." The Association asserts that the "Appellate Division's express reversal of that [economic hardship] rationale has a direct impact on the viability of the decisions in Paterson . . . and Bloomfield, . . . and requires that they be abandoned as the misguided debris of an aberrant past." The Association maintains that the fact that the Supreme Court affirmed the Appellate Division's decision in County of Atlantic on other grounds "does not constitute a reversal of the lower court's decision" particularly because "a published opinion . . . is binding on State administrative agencies."[9/] The Association also notes

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9/ In support of its position, the Association cites State v. Rembert, 156 N.J. Super. 203, 206 (App. Div. 1976), McCarthy (continued...)

that in County of Atlantic, the court acknowledged that Neptune "expressly enforced and applied the [dynamic status quo] doctrine to contracts between the employer and non-teaching staff members." The Association argues that N.J.S.A. 34:13A-33, a "statute that was ignored in Bloomfield . . . and Paterson," "mandates the continuation of benefits in school employee cases" including "the payment of salary increments in this case." The Association asserts that because the parties' expired CNA was "a three (3) year contract, there is no statutory bar [under N.J.S.A. 18A:29-4.1] to maintaining . . . the status quo by the payment of increments for a fourth or fifth year." The Association maintains that the Board's claim that paying "a 1.17% increment" constitutes "severe economic harm" is undermined by the Board's May 2018 salary proposals. Finally, the Association asserts that the Board's argument that "school districts are unable to recoup money from tenured teachers" is "false"; that it "has long been the law that school districts can freeze salaries in order to recoup salary."[10/]

9/ (...continued)
v. Ehrens, 212 N.J. Super. 249, 259 (Law Div. 1986), and Kosmin v. N.J. State Parole Bd., 363 N.J. Super. 28, 40 (App. Div. 2003).

10/ In support of its position, the Association cites DeLyon v. Old Tappan Bd. of Ed., 97 N.J.A.R.2d (EDU) 499, 1997 N.J. AGEN LEXIS 249 (Comm'r of Ed., April 14, 1997), rev'd in pt. EDU 1102-96, C 183-97, SB 48-97 (N.J. State Bd. of Ed., (continued...)

In sur-reply, the Board reiterates that in County of Atlantic, "[n]either the Appellate Division nor the Supreme Court . . . addressed the application of the dynamic status quo on educational entities"; the court "did not reconcile" the fact that "educational entities are prohibited by tenure laws from reducing salaries of certificated educational employees" with "the award of automatic increments." The Board maintains that local boards of education and education associations "have not relied upon the dynamic status quo as the base line for salary guide increments for the last twenty years" and "[t]o disturb that understanding after the expiration of the parties' collective negotiations agreement would completely alter the meeting of the minds between the parties, to the detriment of the Board and the public." The Board also argues that if the County of Atlantic decision must govern the decision in this matter, "the Commission Designee cannot ignore the clear contract language which exists [within] Article XII" and "any further inquiry into the intent of the parties must be rejected." The Board contends that "if the Commission[] Designee determines that it is necessary to explore the understanding and intent of the

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10/ (...continued)
February 2, 2000)
(https://www.nj.gov/education/legal/sboe/2000/feb/sb48-97.pdf) and Cohen v. South River Bd. of Ed., 94 N.J.A.R.2d (EDU) 242, 1994 N.J. AGEN LEXIS 74 (Comm'r of Ed., January 28, 1994).

parties in drafting the current Article XII, interim relief is inappropriate as the understanding and intent of the parties may only be explored as part of a full hearing." Finally, the Board asserts that "the Association's contention that the Board is permitted to recoup salary overpayments under the law is an impermissible generalization and entirely inapplicable to this case" given that "any overpayment of salary would not be made due to an error by the Board" but "would be required . . . by order of PERC."

STANDARD OF REVIEW

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations[11/] and that irreparable harm will occur if the requested relief is not granted; in certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. See Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); Burlington

11/ Material facts must not be in dispute in order for the moving party to have a substantial likelihood of success before the Commission.

Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009) (citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe)); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975). In Little Egg Harbor Tp., the Commission Designee stated:

> [T]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

N.J.S.A. 34:13A-5.3, entitled "Employee organizations; right to form or join; collective negotiations; grievance procedures," provides in pertinent part:

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

Public employers are prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). "It shall be an unfair practice for an employer to engage in

activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification." State of New Jersey (Corrections), H.E. 2014-9, 40 NJPER 534 (¶173 2014) (citing New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978)). The Commission has held that a violation of another unfair practice provision derivatively violates subsection 5.4a(1). Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

Public employers are also prohibited from "[r]efusing 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. . . ." N.J.S.A. 34:13A-5.4a(5). A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and attitude of the party charged. Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010). The Commission has held that "a breach of contract may also rise to the level of a refusal to negotiate in good faith" and that it "ha[s] the authority to remedy that violation under subsection a(5)." State of New Jersey (Dep't of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

ANALYSIS

At issue in this interim relief application is whether, upon expiration of a three-year collective negotiations agreement between a local board of education and a majority representative, salary increments constitute terms and conditions of employment that may not be unilaterally changed absent negotiations.

The Supreme Court of New Jersey has held that "salary step increments [are] a mandatorily negotiable term and condition of employment because [they are] part and parcel to an employee's compensation for any particular year." In re Atlantic Cty., 230 N.J. 237, 253 (2017). With respect to "the salary increment systems provided for in . . . expired CNAs," the Supreme Court noted that although "contractual obligations will [normally] cease . . . upon termination of [a] bargaining agreement," "exceptions are determined by contract interpretation . . . [a]nd . . . if a collective-bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration, disputes as to such continuing benefits may be found to arise under the agreement." Id. at 254. Ultimately, in the context of expired CNAs between public employers and employees that were not subject to Title 18A, the Supreme Court found that it "need not look beyond the contracts themselves to conclude that the step increases continued beyond the expiration of the

contracts." Ibid. The three CNAs at issue in In re Atlantic Cty. contained the following three contractual provisions:

> [T]his agreement shall remain in full force and effect during collective negotiations between the parties beyond the date of expiration set forth herein until the parties have mutually agreed on a new agreement.
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> * * *
>
> [A]ll provisions of the Agreement will continue in effect until a successor Agreement is negotiated."
>
> * * *
>
> [A]ll 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.
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> [In re Atlantic Cty., 230 N.J. at 254-255.]

However, public employers and employees subject to Title 18A are circumscribed by N.J.S.A. 18A:29-4.1, entitled "Salary policy schedules," which provides:

> A board of education of any district may adopt a one, two, three, four, or five year salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law. The policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of one, two, three, four, or five years from the effective date of the policy but shall not prohibit the payment of salaries higher than those required by the policy or schedules nor the subsequent adoption of policies or schedules providing for higher salaries, increments or adjustments.

> Every school budget adopted, certified or approved by the board, the voters of the district, the board of school estimate, the governing body of the municipality or municipalities, or the commissioner, as the case may be, shall contain such amounts as may be necessary to fully implement the policy and schedules for that budget year.[12/]

The Supreme Court of New Jersey has held that the version of N.J.S.A. 18A:29-4.1 promulgated under P.L. 1987, c. 123 "prohibits [a local board of education] from paying increments on [an] expired [three-year] contract because that would make the contract binding for a fourth year, beyond the statutory term." Bd. of Educ. v. Neptune Twp. Educ. Ass'n, 144 N.J. 16, 33 (1996); accord Middletown Tp. Bd. of Ed., H.E. No. 98-30, 24 NJPER 330 (¶29155 1998), adopted P.E.R.C. No. 99-72, 25 NJPER 122 (¶30053 1999). However, the Supreme Court also found that "the prohibition against increments in N.J.S.A. 18A:29-4.1 does not apply" to employees outside the definition of "teaching staff member" such that "[c]ontracts with those employees should be governed by labor law only since no education law preempts that general rule." Id. at 34. In 2000, the Appellate Division affirmed the Commission's determination "that where the

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12/ N.J.S.A. 18A:29-4.1, as originally enacted, required two-year salary policies. In 1987, the statute was amended to allow for one, two, or three year salary polices. P.L. 1987, c. 123. Effective January 17, 2014, the statute was amended again to also allow for four or five year salary policies. P.L. 2013, c. 199.

collective negotiations unit includes both teachers and non-teachers, the 'dynamic status quo' concept should not apply to mandate continuation of salary increments to non-teachers under an expired contract." East Hanover Bd. of Ed. and East Hanover Ed. Ass'n, P.E.R.C. No. 99-71, 25 NJPER 119 (¶30052 1999), aff'd 26 NJPER 200 (¶31081 App. Div. 2000), certif. den. 165 N.J. 489 (2000).

In 2003, the "School Employees Contract Resolution and Equity Act" was enacted under P.L. 2003, c. 126 and added N.J.S.A. 34:13A-31 thru -39 to the Act. N.J.S.A. 34:13A-33, entitled "Terms, conditions of employment under expired agreements," provides:

> Notwithstanding the expiration of a collective negotiations agreement, an impasse in negotiations, an exhaustion of the commission's impasse procedures, or the utilization or completion of the procedures required by this act, and notwithstanding any law or regulation to the contrary, no public employer, its representatives, or its agents shall unilaterally impose, modify, amend, delete or alter any terms and conditions of employment as set forth in the expired or expiring collective negotiations agreement, or unilaterally impose, modify, amend, delete, or alter any other negotiable terms and conditions of employment, without specific agreement of the majority representative.

Accord N.J.S.A. 34:13A-5.3.

Given these legal precepts, I find that the Association has demonstrated a substantial likelihood of prevailing in a final

Commission decision on its legal and factual allegations. I find that Article XXXV[13/] of the CNA clearly expresses the parties' intent to maintain all terms and conditions of employment – including the continued payment of salary increments – after the CNA's expiration until a successor agreement is reached. See In re Atlantic Cty., 230 N.J. at 254-255; accord Cliffside Park Bd. of Ed., I.R. No. 2019-8, __ NJPER __ (¶__ 2019).

Contrary to the Board's assertions, Articles VIII and XII - read in conjunction with each other - unambiguously establish the parties' agreement with respect to salary guides, vertical/ horizontal movement on the salary guides, and increment withholding. In re Atlantic Cty., 230 N.J. at 254-255 (noting that "courts enforce contracts based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract"; indicating that a reviewing court "must consider contractual language in the context of the circumstances' at the time of drafting and apply a rational meaning in keeping with the

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13/ Article XXXV provides:

> This Agreement shall be effective as of July 1, 2015, and continue in effect until June 30, 201 [sic]. If this Agreement expires, it is expressly understood that all provisions and benefits contained herein shall remain in force until a new agreement is agreed upon and signed by the parties.

expressed general purpose"; specifying that "if the contract into which the parties have entered is clear, then it must be enforced as written" but if it is "ambiguous, courts will consider the parties' practical construction of the contract as evidence of their intention and as controlling weight in determining a contract's interpretation"). Specifically, I find that:

> -the parties' agreed to salary schedules with vertical movement (e.g., "Step 1," "Step 2-3," "Step 4-6," etc. based upon an employee's initial placement and subsequent years of service) and horizontal movement (e.g., "BA," "MA," "MA+30" and "DOCT" based upon an employee's level of education); provided that salary increases are not automatic and may be withheld for inefficiency or other just cause; defined "employment increment" to mean "the next step on the salary guide at which step the teacher would be placed"; specified that teachers who begin work on/before December 1 receive full credit on the salary guide for the next school year (i.e., vertical movement); and specified that advanced degrees and/or college credits must be directly related to current approved jobs in order to qualify for salary guide advancement (i.e., horizontal movement);
>
> -the parties' also agreed that tenured teachers would only be considered for salary guide advancement once per year (i.e., horizontal movement); specified that applications for salary guide advancement (i.e., horizontal movement) had to be submitted by September 1 or March 1 each year and that if approved, payments for advancement would begin on October 1 or April 1 of the same year; and provided that there would be no retroactive salary guide advancement (e.g., if an employee achieved an advanced degree and/or college credits in one school year but failed to apply for

> horizontal movement until the following school year, the employee would not receive a retroactive horizontal movement or attendant payment).

See 2015-2018 CNA, Art. VIII, XII; see also, e.g., Middletown Tp. Bd. of Ed., H.E. No. 98-30, 24 NJPER 330 (¶29155 1998), adopted P.E.R.C. No. 99-72, 25 NJPER 122 (¶30053 1999) (the hearing examiner explained that "[e]mployment increments are the increases awarded after the successful completion of each year of employment" and that "[l]ongevity payments are construed by the Commissioner of Education to constitute employment increments"; noting that "[a]dvancement to the master's degree level on the guide is not an employment increment based on another year of satisfactory service with a school board nor is it an adjustment increment based on an increase in the cost of living or other economic considerations"); Harrison Tp. Bd. of Ed., P.E.R.C. No. 96-84, 22 NJPER 242 (¶27126 1996); Englewood Bd. of Ed., P.E.R.C. No. 98-75, 24 NJPER 21 (¶29014 1997).

Articles VIII and XII - read in pari materia with Article XXXV - do not contradict the parties' express agreement to continue the payment of salary increments after the CNA's expiration until a successor agreement is reached. Moreover, the Board's assertion that existing contractual language prohibits the payment of salary increments after the CNA's expiration is undermined by the fact that – in conjunction with other proposals

– it proposed the following language in negotiations for a successor agreement:

> No salary increments shall be paid at the conclusion of the negotiated Agreement unless specifically negotiated and agreed to by the parties.
>
> [Vignola Supplemental Certification at ¶¶ 13-16, Ex. SA.]

If nothing else, the Board's proposal demonstrates that the parties are fully capable of negotiating "clear contractual language [that] leaves no room for confusion and could have easily been incorporated into the CNA[] at issue here" with respect to the payment (or non-payment) of salary increments upon contract expiration. In re Atlantic Cty., 230 N.J. at 255-256.

I disagree with the Board's assertion that local boards of education are exempt from paying increments upon expiration of a collective negotiations agreement. Before N.J.S.A. 18A:29-4.1 was amended to permit four or five year salary policies, the Commission and its designees held that "N.J.S.A. 18A:29-4.1 [did] not bar the payment of salary increments . . . following the expiration of a two-year agreement." New Horizons Community Charter School Bd. of Trustees, I.R. No. 2006-10, 31 NJPER 380 (¶149 2005) (concluding that N.J.S.A. 34:13A-33 "supplements and reinforces the Act's proscription against unilateral changes in terms and conditions of employment during the course of collective negotiations"); accord Waldwick Bd. of Ed., I.R. No.

99-6, 24 NJPER 498 (¶29231 1998); see also Mahwah Bd. of Ed., I.R. No. 98-8, 23 NJPER 593 (¶28290 1997), recon. den. P.E.R.C. No. 98-105, 24 NJPER 133 (¶29067 1998) (denying reconsideration of a designee's order that the board pay salary increments to teachers after the expiration of a two-year CNA; holding that "[n]othing in Neptune suggests that N.J.S.A. 18A:29-4.1 applies to two-year agreements entered into before the expiration of a predecessor agreement"). Applying the same rationale in this case, N.J.S.A. 18A:29-4.1 does not bar the payment of salary increments following the expiration of a three-year agreement given that the statute now permits salary policies of up to five years in duration. However, N.J.S.A. 18A:29-4.1 does bar the payment of salary increments following the expiration of a five-year agreement or, if a successor agreement has not been reached, after a five-year period has elapsed from the inception of a CNA that was less than five years in duration. See Cliffside Bd. of Ed.; accord New Horizons Community Charter School Bd. of Trustees; Waldwick Bd. of Ed.; Mahwah Bd. of Ed.

Notably, despite specifically discussing the evolution of the "dynamic status quo doctrine" (including with respect to public employers and employees subject to Title 18A) in a published opinion, the Appellate Division did not overrule, question, or express any dissatisfaction with the Commission or its designees' understanding of Neptune and/or their application

of N.J.S.A. 18A:29-4.1 as set forth above (i.e., N.J.S.A. 18A:29-4.1 does not bar the payment of salary increments following the expiration of a two-year agreement). In re Atlantic Cty., 445 N.J. Super. 1, 9-11, 17-18 (App. Div. 2016). Rather, the Appellate Division specifically stated that "PERC cannot abandon the adjudicative doctrine it long ago adopted, rooted in parallel law" and "[t]o the extent the dynamic status quo doctrine must be changed, it is the Legislature's prerogative to do so." In re Atlantic Cty., 445 N.J. Super. at 22. "The decision of an intermediate appellate court is the law of the State until reversed or overruled by the court of last resort." State v. Rembert, 156 N.J. Super. 203, 206 (App. Div. 1978); accord Kosmin v. N.J. State Parole Bd., 363 N.J. Super. 28, 40 (App. Div. 2003) (holding that "state administrative agencies are free to disagree with [the Appellate Division's] decisions" but "are not . . . free to disregard them"; a state administrative agency cannot "challenge the legitimacy of the judicial system by ignoring the appellate court's order and going its own way despite that order"); State v. Breitweiser, 373 N.J. Super. 271, 282-283 (App. Div. 2004) (noting that there is "little analytical value in attempting to draw meaningful distinctions between a Supreme Court's holding and expressions of well-reasoned dictum" because "[b]oth are legal pronouncements by the State's highest judicial body and are therefore worthy of and entitled to the utmost

respect"; "as an intermediate appellate court, we consider ourselves bound by carefully considered dictum from the Supreme Court"); In re Atlantic Cty., 445 N.J. Super. at 17-18 (noting that "an expression of opinion on a point involved in a case, argued by counsel and deliberately mentioned by the court, although not essential to the disposition of a case[,] becomes authoritative when it is expressly declared by the court as a guide for future conduct").

While I acknowledge the Board's argument with respect to N.J.S.A. 18A:28-5[14/] (i.e., local boards are prohibited from recouping salary increments), I find that it is of no moment given that the Commission precedent and the courts' discussion/determination in In re Atlantic Cty. set forth above developed after the same concerns were discussed in Neptune. See Neptune, 144 N.J. at 25-26. I also acknowledge the Board's argument with respect to the legislative history of N.J.S.A.

14/ N.J.S.A. 18A:28-5, entitled "Requirements for tenure," provides in pertinent part:

> The services of all teaching staff members . . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity or conduct unbecoming such a teaching staff member or other just cause . . . .

18A:29-4.1[15/] (i.e., one of the bills that proposed the 2014 amendment included language – which was deleted before the bill was passed - requiring local boards to pay all increments due under an expired salary policy until a new salary policy was agreed to through collective bargaining) but again find that it is of no moment given that "a court may not rewrite a statute or add language that the Legislature omitted" and can only "turn to extrinsic evidence for guidance, including a law's legislative history," "[i]f the language is unclear." State v. Munafo, 222 N.J. 480, 488 (2015).

Accordingly, I find that the Association has demonstrated a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations.

I also find that the Association has established that it will suffer irreparable harm as a result of the Board's failure to pay salary increments. New Jersey courts and the Commission have held that "employers are barred from 'unilaterally altering

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15/ Senate No. 1127 (introduced January 23, 2012) and Assembly No. 3791 (introduced February 7, 2013) both included the following language which was deleted before final passage and enactment of the bill:

> Upon expiration of any salary policy adopted pursuant to this section, a board of education shall be obligated to pay all increments due under the expired salary policy until a salary policy for a subsequent time period is agreed upon through collective bargaining negotiations.

mandatory bargaining topics, whether established by expired contract or by past practice, without first bargaining to impasse.'" In re Atlantic Cty., 230 N.J. at 252 (citing Neptune, 144 N.J. at 22); accord Closter Bor., P.E.R.C. No. 2001-75, 27 NJPER 289 (¶32104 2001) (holding that "[u]nilateral changes in [mandatorily negotiable terms and conditions of employment] violate the obligation to negotiate in good faith" and "can shift the balance of power in the collective negotiations process"; holding that "[i]f a change occurs during contract negotiations, the harm is exacerbated"); Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass'n, 78 N.J. 25, 48 (1978) (finding that the Legislature, through enactment of the Act, "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").

In Galloway, a decision recently cited with approval by the Appellate Division for the same proposition set forth below, the Supreme Court of New Jersey stated:

> 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-5.4a(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.
>
> [Galloway, 78 N.J. at 49.]

Accord In re Atlantic Cty., 445 N.J. Super. at 17-18 (noting that "even if the Court's analysis in Galloway was no more than dictum unnecessary to the ultimate ruling applying N.J.S.A. 18A:29-4.1, we must follow it").

Similarly in Waldwick Bd. of Ed., the Commission Designee stated:

> The refusal to pay increments has been found under Galloway to constitute a unilateral alteration of the status quo and a refusal to negotiate in good faith. Historically, it has been found that such conduct so interferes with the negotiations process that a traditional remedy at the conclusion of the hearing process would not effectively remedy the violations of the Act. . . .In accordance with Galloway, the Commission has consistently held that irreparable harm exists when an employer refuses to apply automatic increments because such action changes the established terms and conditions of employment.
>
> [Waldwick Bd. of Ed., 24 NJPER at 499.]

Accord Cliffside Bd. of Ed.; State of New Jersey, I.R. No. 82-2, 7 NJPER 532 (¶12235 1981) (noting that "the unilateral withholding of the increments by the employer introduced illegal economic coercion into the negotiations process" and "[t]he

implication of such action [was] that if the employees agree to the employer's position, they get their increments immediately" but "if they continue to negotiate, they must wait for the increments, if they get them at all"); Union Cty. Reg. High School Bd. of Ed., P.E.R.C. No. 78-27, 4 NJPER 11 (¶4007 1978) (noting that "[p]articular types of unilateral action relating to terms and conditions of employment, such as the non-payment of salary increments, may so undercut the negotiations process and adversely affect the ability of a majority representative to effectively represent its particular constituency that traditional monetary awards that would be ordered at the conclusion of a case would not effectively remedy a violation of the Act").

Accordingly, I find that the Association has demonstrated irreparable harm.

I also find that the Association has demonstrated relative hardship and that the public interest will not be injured by an interim relief order. "In balancing the parties' relative hardship, . . . the chilling effect that results from the Board's failure to pay the increments and the irreparable harm that is suffered by the [Association] as a result of the Board's unilateral change in conditions of employment during the course of negotiations outweighs any harm suffered by the Board as [a] result of [being required to] maintain[] the status quo by

granting increments to unit employees." Cliffside Bd. of Ed.; accord New Horizons Community Charter School Bd. of Trustees; Waldwick Bd. of Ed.; Mahwah Bd. of Ed.; State of New Jersey; Union Cty. Reg. High School Bd. of Ed. The Appellate Division has held that "the fiscal health of municipalities and tax rates are not within PERC's charge." In re Atlantic Cty., 445 N.J. Super. at 22; see also Robbinsville Twp. Bd. of Educ. v. Washington Twp. Educ. Ass'n, 227 N.J. 192, 204 (2016) (rejecting the holding that "the economic crisis present in [a] school district permitted the [b]oard to forego negotiations" because "[a]llowing a claimed need for management prerorgative to prevail in tight budgetary times in order for municipal governmental policy to be properly determined would eviscerate the durability of collective negotiated agreements").

Moreover, the cases cited by the Board are distinguishable from the instant matter. In Bloomfield Bd. of Ed., I.R. No. 2011-12, 36 NJPER 330 (¶129 2010), recon. granted P.E.R.C. No. 2011-55, 37 NJPER 2 (¶2 2011), the board was seeking a wage freeze based upon a $4.4 million reduction in state aid, or approximately 7% of its budget. In State Operated School District of the City of Paterson, I.R. No. 2011-17, 36 NJPER 376 (¶147 2010), recon. granted P.E.R.C. No. 2012-3, 38 NJPER 132 (¶33 2011), the board was facing an $81 million budget gap, 432 tenured teachers and 482 non-tenured teachers had received RIF

notices, and the assistant superintendent certified that there was "no money budgeted for a salary increase to association members." Here, the Board's assertion that paying salary increments under the expired CNA's 2017-2018 salary guide – an amount which the Board concedes is "1.17% of the total salary cost" – "would [create] an irretrievable financial burden . . . and severely impact its ability to negotiate effectively and best represent the taxpayers of [Englewood]" is undermined by the fact that – in conjunction with other proposals – it proposed salary increases of 2.40%, 2.60%, and 3.00% in negotiations for a successor agreement. See Vignola Supplemental Certification at ¶¶ 13-16, Ex. SA; contrast Balletto Certification at ¶¶ 19-38, Exhs. 3-6.

While I acknowledge that the Board's salary proposal may require other economic concessions from the Association, it appears that paying salary increments under the expired CNA's 2017-2018 salary guide may in fact be less onerous than what the Board contends. Notwithstanding same, the parties are fully capable of accounting for the payment of salary increments due under the expired CNA, modifying their respective proposals where appropriate, and negotiating a successor agreement thereafter. See In re Atlantic Cty., 230 N.J. at 256 (noting that "[i]t is important to recognize that the process of negotiation serves an important role in effectuating the promotion of permanent, public

and private employer-employee peace and the health, welfare, comfort and safety of the people of the State" (citations omitted)).

Accordingly, I find that the Association has demonstrated relative hardship and that the public interest will not be injured by an interim relief order.

Under these circumstances, I find that the Association has sustained the heavy burden required for interim relief under the Crowe factors and grant the application for interim relief pursuant to N.J.A.C. 19:14-9.5(a). This case will be transferred to the Director of Unfair Practices for further processing.

ORDER

The Englewood Teachers' Association's application for interim relief is granted. The Englewood Board of Education shall immediately pay all eligible unit employees, retroactive to the first pay period of the 2018-2019 school year, the salary increments due to them (i.e., under the 2017-2018 salary guide) consistent with the parties' expired 2015-2018 collective negotiations agreement.

/s/Joseph P. Blaney
Joseph P. Blaney
Commission Designee

DATED: October 29, 2018
Trenton, New Jersey