

I.R. No. 2019-23

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LITTLE FERRY BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2019-256

LITTLE FERRY EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief based on an unfair practice charge alleging that a public employer refused to negotiate over proper placement of unit employees on the parties' collectively negotiated salary guides as part of their negotiations for a successor agreement. The Charging Party acknowledged that it first became aware of the Respondent's omission in the fall of 2018, alleging that it was initiated in the parties' 2010-2013 agreement and continued through the 2014-2016 and 2016-2019 agreements. The charge alleges that the Respondent's conduct violates 5.4a(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq.

The Designee denies the application because of material issues of law and fact raised by the Respondent's reply. Those issues concern the meaning of specified agreement provisions, waivers, the statute of limitations and the Commission's unfair practice jurisdiction. See State of New Jersey (Dept. of Human Services) P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

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Appearances:

For the Respondent,
Winne, Banta, Basralian & Kahn, P.C., attorneys
(Marla Wolfe Taus, of counsel)

For the Charging Party,
Zazzali, Fagella, Nowak, Kleinbaum & Friedman,
attorneys
(Colin M. Lynch, of counsel)

INTERLOCUTORY DECISION

On April 5 and 10, 2019, Little Ferry Education Association (Association) filed an unfair practice charge and amended charge against Little Ferry Board of Education (Board), together with an application for interim relief, a certification, exhibits and a brief. The charge alleges that beginning with the parties' 2010-2013 collective negotiations agreement and continuing through their current 2016-2019 agreement, the Board, ". . . through neglect, inadvertence or otherwise," failed to advance or place teachers at their appropriate step on the [contractual] salary guides." The charge alleges that the Association and its members

first became aware of the "errors/failures" on or about October 2, 2018 in an Association-conducted "workshop" among members to explain "step progression" in the agreement. The charge alleges that on March 7, 2019, in the parties' initial negotiations session for a successor agreement, the parties discussed preparation of a "scattergram" and the Board representatives, ". . . did not dispute that a substantial number of teachers are placed at the wrong step on the salary guide." The charge alleges that on March 18, 2019, Board Counsel advised the Association, ". . . that the teaches are being paid correctly."

The charge alleges that the Board, ". . . is refusing to negotiate the placement of teachers on their correct [salary guide] step, either prospectively or retroactively, in connection with the current on-going negotiations for a successor agreement," violating section 5.4a(1), (3) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1; et

^{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. (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."

seq. (Act). The Association has acknowledged on the charge form that a grievance contesting the Board's conduct has been filed.

The Association seeks an order directing the Board to place teachers on their "correct" step on the 2016-2019 salary guide. It alternatively seeks an order compelling the Board to negotiate teachers' "prospective and retroactive" placement on the correct step(s) of the 2016-2019 salary guide, together with owed back pay.

On April 18, 2019, I issued an Order to Show Cause, setting forth dates for the Board's response, the Association's reply and argument in a telephone conference call. By agreement of the parties, the Association's reply became due on May 6, 2019 and the conference call was rescheduled to May 9, 2019, when the parties argued their respective cases.

The Board asserts that the Association's charge is really a "veiled attempt to litigate" a breach of contract claim and is not an unfair practice, pursuant to State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984); denies that it has repudiated the collective negotiations agreement and that it has refused to negotiate; asserts that it has a good faith disagreement with the Association in interpreting the agreement; that the Association repeatedly affirmed the correctness of the step placements numerous times

between 2010 and 2018; that the claim is barred by equitable estoppel, waiver, laches and a statute of limitations.

The following pertinent facts appear:

The Board and Association have signed a series of successive collective negotiations agreements, relevantly beginning with the agreement extending from May 17, 2010 through May 16, 2013. The agreement includes salary guides for each covered school year (Board exhibit "B"). Article XIA "Salary" provides: "All teachers and nurses shall be compensated in accordance with the salary guides attached hereto as Schedules A-1 and A-2 . . ." Article XIC reserves to the Board a right to withhold an increment for "inefficiency or other good cause." The antecedent and signed memorandum of agreement provides that the first year includes a "wage freeze - remains the same as reflected in the 2009-2010 salary guide;" the second year (2011-2012) sets forth, ". . . an increase of 2.8% on each step of the 2010-2011 guide" and the third year (July 2, 2012 - May 16, 2013) sets forth, ". . . an increase of 2.5% on each step of the 2011-2012 guide" (Association exhibit "B").

The Association has filed copies of a multi-year series (2009-2014) of Board "annual salary notice(s) to tenured personnel" provided to six named unit members revealing their consistent step and salary progression in each school year (Association reply, exhibit "A").

Board Superintendent Frank Scarafile certifies that the negotiated agreement for that period (May 17, 2010 through May 16, 2013) was that, ". . . employees would not advance in steps between 2010-11 and 2012-2013 but instead would move horizontally and the salaries in the second and third years of the agreement would include the increases" (Scarafile certification, para. 20).

On July 1, 2014, representatives of the parties signed a memorandum of agreement specifying that items not addressed in it are "deemed withdrawn" and that, "all other language in the contract that expired on May 16, 2013 not in conflict with this memorandum of agreement shall continue in the new contract and will remain status quo." The memorandum identifies the "contract duration" extending from July 1, 2013 through June 30, 2016."

The memorandum provides in a pertinent part:

Salary Increases:

- Effective 7/1/13: The 2013-14 salary guide will be constructed to reflect the following: \$500 will be added to Steps 2-3, 4-5, and 6-7. Teachers will advance one step on the salary guide. Teachers who were at the maximum step in 2012-13 will advance to a new step in 2013-14 and will receive a \$1,000 increase. Increases will be paid retroactive to 7/1/13.
- Effective 7/1/14: Teachers will advance one step on the salary guide. Teachers who were at the maximum step in 2013-14 will receive a \$900 increase in 2014-15. No additional steps will be added to the guide.

- Effective 7/1/15: Teachers will advance one step on the salary guide. Teachers who were at the maximum step in 2014-15 will receive an \$850 increase in 2015-16. No additional steps will be added to the guide.

Salary Guides: Agreed-upon guides are attached.
[Association exhibit "D"]

On May 5, 2016, a three-page scattergram showing the names, salaries and respective experience/education steps of all unit employees, together with longevity payments and their individual "total compensation" amounts was duly signed by Board and Association representatives (Board exhibit "D"; Board Superintendent Frank Scarafile certification, para. 4-6).

In a supplemental certification, NJEA representative Loccke writes that the Association's "sign-off" on the scattergram merely verified, ". . . what was in fact being paid to the teachers, not whether the salaries were at the level they should be" (para.10).

On July 7, 2016, representatives of both parties signed a memorandum of agreement extending from July 1, 2016 through June 30, 2019 (Board exhibit "F"). The memorandum provides in a pertinent part:

2. Salary:

- a) Effective July 1, 2016, the base salaries of the Association shall be increased by 2.35%.

b) Effective July 1, 2017, the base salaries of the Association and 'Schedule B' shall be increased by 2.40%.

c) Effective July 1, 2018, the base salaries of the Association and 'Schedule B' shall be increased by 2.40%.

d) All increases are inclusive of increment and retroactive to the date(s) referenced above, when applicable.

e) Salary guides to be mutually developed by both parties. [Board exhibit "F"].

On August 4, 2016, Karen Kaner, an Association representative, emailed a "proposed salary guide" to the Superintendent and Board Counsel, with the notation, "Please let me know when this is accepted so that I can present it at the ratification meeting." Attached is an eight-page "Little Ferry teachers salary guide" for 2015-2016, 2016-2017, 2017-2018 and 2018-2019, setting forth enumerated (and occasionally compressed) experiential "steps," educational achievement categories and respective increment dollar amounts (Board exhibit "G").

On an unspecified date in September, 2016, the Association ratified the memorandum of agreement signed on July 7, 2016 and the salary guides it forwarded to the Board on August 4, 2016. On an unspecified later date, the Board also ratified the memorandum and salary guides (Scarafile certification, para. 9-11).

Negotiations unit members are individually issued an "annual salary notice" or a contract (if non-tenured) apprising them of

their annual salaries for each respective school year in the current agreement. Superintendent Scarafile certifies: "Without incident, each of the teachers potentially affected by the Association's allegations signed and returned their contracts/annual notice which confirmed their step and salary" (Board exhibit "H"; Scarafile certification para. 12).

On an unspecified date in early September, 2018, Board interim Business Administrator Dennis Frohnapfel spoke with (now former) Association chief negotiator Karen Kaner for the purpose of confirming the implementation of "the salary guide and advancement, which was already in place." Scarafile certifies that Kaner, ". . . advised and confirmed that it was being applied correctly . . . Each teacher would advance numerically along the guide (1, 2, 3, 4, 5, 6, 7, etc.) and would fall accordingly on the corresponding line of the guide." On December 11, 2018, she emailed Frohnapfel:

I owe you an apology. I misspoke when I told you about the movement on the guide. It had been that way for many, many years but changed with the 2013-2015 contract. We have documentation that shows the change . . .
[Board exhibit "J"]

In December, 2018, Frohnapfel, ". . . recognized errors" [i.e., "failure to properly advance teacher to [her] appropriate step on the applicable guide"] and corrected the step placement of teacher Emily Nicholson and "partially corrected" those of teachers Danielle Carletto and Cheryl Migale (Association

certification of NJEA representative Richard E. Loccke, para. 16-21).

On an unspecified date in or after October, 2018, interim Business Administrator Frohnapfel prepared "worksheets" for thirteen named unit employees (including Nicholson) setting forth their respective salaries, guide and step placements at the start of each school year from September, 2015 through the 2018-2019 school years, inclusive. These worksheets reveal escalating compensation with graduated step increases and educational attainment.

NJEA representative Loccke and Association representative Karen Lavery separately certify that the worksheets, ". . . constitute an acknowledgment of the [salary guide placement] errors" (Loccke certification, para. 25; Lavery certification, para. 7). Superintendent Scarafile certifies:

. . . Simply put, the worksheets were prepared solely to illustrate how the Association's asserted interpretation of the salary guides would affect step placement and the monetary ramifications of such placement. The worksheets in no way expressed the opinion of Dr. Frohnapfel, my opinion or that of the Board that an error had been made or that the Association's new interpretation of the salary guides were correct. Rather, those worksheets represented a good faith effort on the part of the Board and administration to review the Association's position [Scarafile certification, para. 19]

The Association estimates that 22 of about 80 unit employees are

". . . presently on the wrong step" (Association exhibit "E"; Loccke certification, para. 28).

On March 7, 2019, representatives of the parties met, including the Board Superintendent, Interim Business Administrator Frohnapfel, Board Counsel, NJEA representative Loccke and Association negotiator Karen Lavery (Scarafile certification para. 21; Loccke certification, para. 32). Scarafile certifies that the Board's negotiations committee, ". . . was not in attendance."

The Association representatives informed the Board representatives, ". . . of the scope of the issue of improper step placement" and that "a scattergram placing teachers at their proper and correct step must be utilized for purposes of negotiating salary increases and other economic issues." (Loccke certification, para. 33,34). Board representatives, ". . . were not there to dispute or confirm the Association's position. The sole purpose was, at [the Association's] request, for the Association to explain and clarify their position so that we could discuss their request and demand with the Board" (Scarafile certification, para. 21).

On March 18, 2019, Board Counsel issued an email to NJEA representative Loccke, advising that, ". . . the teachers have been paid in accordance [with] the negotiated salary guides as specifically set forth in the current collective bargaining

agreement." She wrote that guide movement was confirmed "through the approved scattergram" and "reconfirmed by the Association with Dr. Frohnapfel early on in the contract term" (Association exhibit "I").

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain 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 and that irreparable harm will occur if the requested relief is not granted. 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. Crowe v. De Giora, 90 N.J. 126, 132-134 (1982); Whitmeyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); 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).

Material issues of fact and law preclude the Association's request for interim relief.

Placement on a salary guide is mandatorily negotiable. Belleville Ed. Ass'n v. Belleville Bd of Ed. 209 N.J. Super 93, 98 (App. Div. 1986). The Board and the Association negotiated three consecutive teacher salary guides over the past nine years that frame the context of their dispute. In 2016, they also

signed a scattergram memorializing each unit employee's compensation and step placement for the 2016-2019 term.

The Commission is reluctant to set aside an agreement that is clear on its face. A party seeking such relief must establish by ". . . clear, satisfactory, specific and convincing evidence that the written agreement does not accurately reflect what that parties intended." Paterson Bd. of Ed., P.E.R.C. No. 90-42, 15 NJPER 688, 691 (¶20279 1989); Hillside Bd. of Ed., P.E.R.C. No. 89-57, 15 NJPER 13 (¶20004 1988). "While the Commission has recognized that harmonious labor relations would not be served by enforcing contract language that conflicts with both parties' intent, it has warned that a party may not be excused from the unintended consequences of a negotiated agreement. A party cannot expect relief merely because it did not realize the consequences of its assent." Paterson Bd. of Ed. at 15 NJPER 691.

The parties' disagreement over the meaning of their negotiated salary schedules begins with the 2010-2013 agreement. The Board asserts that the Association agreed to a step advancement "freeze" for that agreement's duration and the Association has provided six examples of teacher step movement on that disputed schedule. Such a dispute cannot be resolved in this matter's premature posture. That dispute, like subsequent and equally contentious ones revealed in the facts arising from the 2013-2016 and 2016-2019 agreements, also implicate the

Commission's statute of limitations and unfair practice jurisdiction. N.J.S.A. 34:13A-5.4c; State of New Jersey (Dept. of Human Services)).

For these reasons, I find that the Association has not demonstrated that it has a substantial likelihood of succeeding in a final Commission decision on its factual and legal allegations.

ORDER

The request for interim relief is denied. The charge shall be processed in the normal course.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: May 13, 2019
Trenton, New Jersey