

P.E.R.C. NO. 91-114

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SCOTCH PLAINS-FANWOOD BOARD
OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-90-123

SCOTCH PLAINS-FANWOOD ASSOCIATION
OF EDUCATIONAL SECRETARIES,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Scotch Plains-Fanwood Board of Education violated the New Jersey Employer-Employee Relations Act when it failed to pay salary increments to employees represented by the Scotch Plains-Fanwood Association of Educational Secretaries upon the expiration of the 1986-1989 contract. It orders that employees be paid interest on increments withheld.

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OF EDUCATIONAL SECRETARIES,

Charging Party.

Appearances:

For the Respondent, Casper P. Boehm, Jr., attorney

For the Charging Party, Balk, Oxfeld, Mandell & Cohen,
attorneys (Sanford R. Oxfeld, of counsel)

DECISION AND ORDER

On October 30, 1989, the Scotch Plains-Fanwood Association of Educational Secretaries filed an unfair practice charge against the Scotch Plains-Fanwood Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, specifically subsections 5.4(a)(1), (3) and (5),^{1/} by failing

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment 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

to pay salary increments after the expiration of the parties' 1986-89 collective negotiations agreement.

On February 7, 1990, a Complaint and Notice of Hearing issued. On February 23, the Board filed an Answer admitting that the collective agreement had expired, but denying that it was obligated to pay the increments.

On March 29, 1990, Hearing Examiner Richard C. Gwin conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by May 29. On June 6, the Board submitted a letter stating that the contract had been resolved through factfinding and that therefore the increment withholding dispute was moot.

On March 15, 1991, the Hearing Examiner issued his report and recommendations. H.E. No. 91-30, 17 NJPER 193 (¶22082 1991). He rejected the Board's mootness claim because the contract was not settled until after the record closed and because interest on the withheld increments is not insubstantial.

On April 5, 1991, after an extension of time, the Board filed exceptions. It claims that the Hearing Examiner erred by not properly weighing the history of raises that were less than those employees would have received had they advanced one step

1/ Footnote Continued From Previous Page

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."

on the previous year's salary guide, and by not finding that increments were not paid before the signing of the 1986-89 contract. It argues that the Board had a right to rely on a practice of not paying increments after contract expirations and that therefore the request for interest should be denied and the Complaint dismissed.^{2/}

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-4) are accurate. The Hearing Examiner found several instances where employees ultimately received less than they would have by advancing one step on the previous salary guide. He also found that although salary guides for the 1986-89 agreement were not finalized until October 1986, increments were not paid after the expiration of the the predecessor agreement and the Association did not request that they be paid.

Automatic increment systems must be continued during successor contract negotiations. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978). The Association's failure to protest the Board's failure to pay increments in the past is not a waiver of its right to seek relief now. See City of Vineland, I.R. No. 81-1, 7 NJPER 324 (¶12142 1981), enf'd Dkt No. M-3982-80 (7/15/81). Likewise, that negotiated increases might be less than payments of status quo incremental increases does not obviate the obligation to maintain the status quo during

^{2/} The Board has requested oral argument. The issues having been fully briefed, we deny that request. N.J.A.C. 19:14-8.2.

negotiations. See, e.g., Bayonne Bd. of Ed., I.R. No. 85-6, 10 NJPER 611 (¶15287 1984). Finally, settlement of the contract after the record closed does not render the dispute moot. Contrast Bayonne Bd. of Ed., P.E.R.C. No. 89-118, 15 NJPER 287 (¶20127 1989), aff'd App. Div. Dkt. No. A-4871-88T1 (3/5/90)(Board complied with interim relief order); Belleville Bd. of Ed., P.E.R.C. No. 88-66, 14 NJPER 128 (¶19049 1988), aff'd App. Div. Dkt. No. A-3021-87T7 (11/23/88)(agreement reached the day unfair practice charge filed). The yearly cost of the increments for 1988-89 was \$47,877. The interest accrued between July 1, 1989 and the time the contract settled is not insubstantial. Contrast Bayonne; Belleville. We therefore find that the failure to pay increments violated subsections 5.4(a)(1) and (5), and order the posting of a notice and the payment of interest.^{3/}

ORDER

The Scotch Plains-Fanwood Board of Education is ordered to:

A. Cease and desist from:

1. Interfering, restraining or coercing employees in the exercise of the rights guaranteed by the Act, particularly by withholding salary increments while negotiating for a successor agreement with the Scotch Plains-Fanwood Association of Educational Secretaries.

2. Refusing to negotiate in good faith with the Association concerning terms and conditions of employment of unit

^{3/} In the absence of any allegations of anti-union animus, we dismiss the subsection 5.4(a)(3) allegation.

employees, particularly by withholding salary increments while negotiating for a successor agreement.

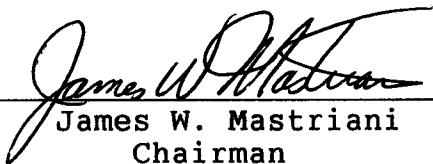
B. Take this action:

1. Pay employees represented by the Association, at the rate set forth in R. 4:42-11, interest on increments withheld between July 1, 1989 and the time they were paid in 1990.

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 shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Regan abstained from consideration.

DATED: June 20, 1991
Trenton, New Jersey
ISSUED: June 21, 1991



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, restraining or coercing employees in the exercise of the rights guaranteed by the Act, particularly by withholding salary increments while negotiating for a successor agreement with the Scotch Plains-Fanwood Association of Educational Secretaries.

WE WILL cease and desist from refusing to negotiate in good faith with the Association concerning terms and conditions of employment of unit employees, particularly by withholding salary increments while negotiating for a successor agreement.

WE WILL pay employees represented by the Association, at the rate set forth in B. 4:42-11, interest on increments withheld between July 1, 1989 and the time they were paid in 1990.

Docket No. CO-H-90-123

SCOTCH PLAINS-FANWOOD BOARD OF EDUCATION

(Public Employer)

Dated: _____

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, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

H.E. NO. 91-30

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

In the Matter of

SCOTCH PLAINS-FANWOOD BOARD
OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-90-123

SCOTCH PLAINS-FANWOOD ASSOCIATION
OF EDUCATIONAL SECRETARIES,

Charging Party.

SYNOPSIS

The Hearing Examiner recommends that the Board violated subsection 5.4(a)(1) and (5) by failing to pay salary increments contained in an expired contract. The Hearing Examiner rejects the Board's assertion that the matter was mooted by the parties' eventual negotiation of a successor agreement. The new agreement was not negotiated until after the record closed and the amount of interest involved was not insubstantial.

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

In the Matter of

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Charging Party.

Appearances:

For the Respondent, Casper P. Boehm, Jr., Attorney

For the Charging Party, Balk, Oxfeld, Mandell & Cohen,
Attorneys (Sanford R. Oxfeld, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On October 30, 1989, the Scotch Plains-Fanwood Association of Educational Secretaries ("Association") filed an unfair practice charge alleging that the Scotch Plains-Fanwood Board of Education ("Board") violated subsections 5.4(a)(1), (3) and (5)^{1/} of the New

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment 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."

Jersey Employer-Employee Relations Act 34:13A-1 et seq. ("Act"), by failing to pay salary increments contained in a collective negotiations agreement that expired on July 1, 1989.

On February 7, 1990, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On February 23, 1990, the Board filed an answer admitting that the collective agreement had expired, but denying that it was obligated to pay the increments.

On March 29, 1990, I conducted a hearing at which the parties were given the opportunity to examine witnesses, introduce documents and argue. The parties waived closing argument and filed letter briefs by May 29, 1990. On June 6, 1990, the Board sought to supplement the record with a letter indicating that the parties had resolved their collective negotiations impasse and agreed to salary guides in fact-finding.

Based on the entire record, I make the following:

FINDINGS OF FACT

1. The Board is a public employer within the meaning of the Act and subject to its provisions.
2. The Association is an employee organization within the meaning of the Act and subject to its provisions. It represents a collective negotiations unit consisting of ten, eleven and twelve-month secretaries employed by the Board.
3. The Board and the Association are parties to a collective negotiations agreement that expired on June 30, 1989. That agreement contained salary guides which provided automatic annual step increases. (T8; CP-1).

4. The parties began negotiating for a successor to CP-1 in January 1989. Mildred McClosky was the negotiations chairperson for the Association and has been a member of Association negotiations teams since the early 1970's.

5. The parties had not negotiated a successor agreement by the time CP-1 expired. The Board did not pay the salary increments contained in CP-1 after it expired. McClosky recalled only one previous occasion that the Board did pay salary increments when a contract expired without a successor in place. That occurred in the early 1970's, around 1973 or '74. When a successor to that contract was finally negotiated, at least two secretaries actually received a smaller salary increase than was provided by the increment in the expiring contract. Those secretaries repaid the difference to the Board by salary deduction. (T9-T14, T17-T18).

6. McClosky indicated that the 1989-90 negotiations was not the first time that the Board did not pay an increment when a contract expired without a successor in place. For example, negotiations for CP-1 were not concluded until September 1986 and the guides were not finished until October 1986. The Board had not paid the increments contained in the contract preceding CP-1. The

Association had not asked that those increments be paid.^{2/}
(T21-T22).

7. The cost of the increment in the expiring CP-1 was \$47,877. The Board did not obtain an agreement from the Association not to pay the increment. (T49-T50; CP-2).

8. A comparison of the 1985-86 salary guide (R-2) with the 1986-87 guide in CP-1 shows several instances where movement from a step on the 1985-86 guide to the next step on the 1986-87 guide resulted in a lower increase than movement between the same steps on the 1985-86 guide. There was no evidence about how many secretaries actually occupied steps where this occurred. (T35-T42).

ANALYSIS

An employer's refusal to pay automatic salary increments contained in a recently expired contract (before exhausting the Commission's impasse resolution procedures) is a unilateral change of the status quo and an unfair practice. In Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978), the Court held that the employer violated subsection 5.4(a)(1) and (5) of the Act when, prior to fact-finding, it refused to pay teachers the salary step increment they would have received normally at the start of a new school year to reflect an additional year of teaching

^{2/} McClosky admitted that her recollection of the timing of the conclusion of negotiations for CP-1 was not very accurate. I base my findings of when the negotiations concluded on the testimony of Gary Whalen who was the Board's chief negotiator for that contract and whose recollection was clear and testimony credible. (T34-T35, T42).

experience. The Court also concluded that the parties' eventual agreement to a successor contract requiring the retroactive payment of increments based on a new salary guide did not warrant the dismissal of the Association's unfair practice charge as moot. Finally, the Court held that the Commission acted within its statutory authority by adjudicating the unfair practice charge after the parties negotiated a successor agreement, and seeking to enforce a cease and desist order requiring the Board to notify employees that it would abide by the Act and comply with the Commission's decision in the future.

The Commission has applied Galloway in several cases. It is settled that, where an expiring contract provides for the automatic payment of increments based on years of experience, the refusal to do so, due to its chilling effect on negotiations, is an unfair practice. Hudson Cty., P.E.R.C. No. 78-48, 4 NJPER 87 (¶14041 1978); aff'd App. Div. Dkt. No. A-2444-77 (4/10/79); Belleville Bd. of Ed., I.R. No. 87-5, 12 NJPER 692 (¶17262 1986); Carteret Bd. of Ed., I.R. No. 85-2, 10 NJPER 492 (¶15223 1984); Alexandria Tp. Bd. of Ed., I.R. No. 84-5, 10 NJPER 1 (¶15000 1983); Jersey City Bd. of Ed., I.R. No. 83-6, 8 NJPER 593 (¶13277 1982); State of New Jersey, I.R. No. 82-2, 7 NJPER 532 (¶12235 1981); and City of Vineland, I.R. No. 81-1, 7 NJPER 324 (¶12142 1981).

The Commission has also occasionally refused to consider whether an employer's failure to pay salary increments was unlawful. In Belleville Bd. of Ed., P.E.R.C. No. 88-66, 14 NJPER 128 (¶19049 1988), aff'd App. Div. Dkt. No. A-3021-87T7, the

Commission dismissed as moot a complaint seeking interest on increments withheld during negotiations. Noting that the Board had complied with an interim relief order to repay withheld increments and that the parties had signed a memorandum for a successor agreement the day the unfair practice charge was filed and before a Complaint issued, the Commission concluded:

It would not serve the Act's purposes to decide the only issue that remains in dispute: the payment of interest. The underlying dispute is resolved. The contract is settled and all increments have been paid. Whether the Board violated the Act by refusing to pay increments is academic at this point. Id. at 129.

[See also State of New Jersey, P.E.R.C. No. 88-2, 13 NJPER 634 (¶18236 1987).

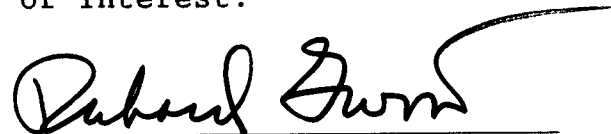
The Commission reached a similar result in Bayonne Bd. of Ed., P.E.R.C. No. 89-118 (15 NJPER 287 (¶20127 1989), aff'd per curiam App. Div. Dkt. No. A-4871-88T1 (3/5/90). The Bayonne Board had failed to pay salary increments when a contract expired during successor negotiations. The Bayonne Teachers Association filed an application for interim relief and the Board informed the Commission that it would immediately repay the increments it had withheld for two pay periods. Dismissing related unfair practice charges, the Commission concluded:

Galloway requires that increment systems be continued during successor contract negotiations. If a school board flouts that obligation, immediate interim relief can be obtained. As in Belleville, however, it would not serve the Act's purposes here to decide this past dispute where the only issue outstanding is the payment of minute amounts of interest. The underlying dispute is moot.

Belleville, Bayonne and State of New Jersey demonstrate the Commission's reluctance to consider increment disputes where the parties have already resolved the underlying problem by negotiating successor contracts.^{3/} In each case formal unfair practice proceedings had not begun before the increments were repaid and the dispute involved minute amounts of interest. (See e.g. Bayonne, 15 NJPER at 288).

Here, however, the underlying dispute was not resolved until the record had closed in the unfair practice proceeding. In addition, the cost of the increment was \$47,877 and it was withheld from July 1, 1989 until late May or June 1990. While the interest on \$47,877 for 10 or 11 months may not be enormous in the context of a school budget, I do not consider it "minute."

I recommend, therefore, that the Commission find that the Board violated subsections 5.4(a)(5) and (1) when it withheld payment of the increments and that the matter is not mooted by the consummation of an agreement in fact-finding months after the record closed in the unfair practice proceeding. I recommend posting of the attached notice and the payment of interest.



Richard C. Gwin
Hearing Examiner

Dated: March 15, 1991
Trenton, New Jersey

^{3/} The Commission also emphasized the readily available remedy of interim relief.

NOTICE TO ALL 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 NOT, now or in the future, interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, by withholding salary increments while negotiating with the Scotch Plains-Fanwood Association of Educational Secretaries for a successor agreement.

WE WILL NOT, now or in the future, unilaterally change terms and conditions of employment and alter the status quo by refusing to pay salary increments while negotiating with the Association for a successor agreement.

WE WILL pay employees represented by the Bayonne Education Association interest at the rate set forth at R. 4:42-11 on increments withheld from July 1, 1989 until they were paid in 1990.

Docket No. CO-H-90-123

SCOTCH PLAINS-FANWOOD BOARD OF EDUCATION
(Public Employer)

Dated _____

By _____
(Title)

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