I.R. NO. 99-6

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WALDWICK BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-99-79

WALDWICK EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

Following Mahwah Board of Education, I.R. No. 98-8, 23 NJPER 593 (¶28290 1997), a Commission Designee enters an interim order directing the Waldwick Board of Education to pay unit employees, consisting of both teaching and non-teaching staff members, increments after the expiration of a two-year collective agreement with the Waldwick Education Association.

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Appearances:

For the Respondent,
Fogarty & Hara, attorneys
(Rodney T. Hara and Ellen Marie Walsh, of counsel)

For the Charging Party,
Bucceri & Pincus, attorneys
(Gregory T. Syrek, of counsel)

INTERLOCUTORY DECISION

On September 16, 1998, the Waldwick Education Association ("Association") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the Waldwick Board of Education ("Board") violated provisions 5.4a(1) and (5)[1/] of the New Jersey Employer-Employee Relations Act

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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. (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."

("Act"), N.J.S.A. 34:13A-1 et seq., by failing after the expiration of the collective agreement to pay salary increments to unit employees for the 1998-1999 school year commencing July 1, 1998.

The charge was accompanied by an application for interim relief with supporting documents. An order to show cause was executed on September 18, 1998 and a return date was scheduled for October 8, 1998. The parties submitted briefs, affidavits and exhibits in accordance with Commission rules; the parties argued orally on the established return date.

It appears that the Association represents a negotiations unit consisting of classroom teachers and other teaching staff members, office personnel and custodial, maintenance and ground employees. Custodial, maintenance and ground employees and some office personnel are employed on a 12-month basis. The remaining office personnel, as well as the teaching staff members are employed in 10-month positions.

The parties appear to have entered into a collective agreement covering the period July 1, 1996 through June 30, 1998. It appears that the parties have engaged, and continue to engage in collective negotiations in an effort to arrive at a successor agreement commencing July 1, 1998. The Association claims, and the Board does not dispute, that since the expiration of the 1996-1998 agreement, no increments have been paid to any unit employees. The union claims that employees working a 12-month calendar were entitled to receive increments effective July 15, 1998. The

Association further claims that unit employees working on a 10-month basis were entitled to receive increments on September 15, 1998.

The Board asserts that the status quo does not require the automatic payment of salary increments to unit employees once the 1996-1998 collective agreement expired. The Board argues that when the expired collective agreement is for less than three years, the New Jersey Supreme Court decision in Board of Education, Township of Neptune v. Neptune Township Education Association, 144 N.J. 16 (1996) requires that salary schedules be limited to the term of the agreement, even if the duration of the agreement is less than three years.

The Board also argues that there are circumstances where it is appropriate to withhold the increment, regardless of the term of the collective agreement. The Board states that if the payment of the increment does not represent the "status quo" then payment is neither mandatory nor automatic. The Board contends that the collective agreement contains express language which establishes that increments are not automatic for teachers. Article XVII(A) of the expired collective agreement provides as follows:

> Teachers who do satisfactory work will be recommended to the Board of Education by the Superintendent for a salary increment in accordance with the approved teachers' salary guide. This recommendation must be acted upon by the Board of Education.
>
> However, the Board may withhold such increment for inefficiency or other just cause, provided the inefficiency is established in keeping with the following principle:

> Teacher efficiency shall be determined on the basis of periodic, written reports of observations by the teachers' superior(s). Such reports shall be discussed with the teacher following such observation and shall state whatever changes are deemed desirable.

The Board argues that the above quoted contract language is supported by practice. The Board states that teachers were not paid their increment for the 1996-1998 collective agreement until June 23, 1997, the date on which the terms of the 1996-1998 agreement was ratified. Thus, the Board concludes that clear contract language and past practice indicate that the "status quo" is not represented by the automatic payment of increments after the expiration of the agreement. In support of its position, the Board cites Hawthorne Bd. of Ed. and Hawthorne Ed'l Secretaries Assn., 23 NJPER 638 (¶28312 1997).

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 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 Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer 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).

This case is not the first where a board of education, relying upon Neptune, has refused to pay increments to employees included in a mixed unit of teaching and non-teaching staff after the expiration of a two-year collective agreement. In Mahwah Bd. of Ed., I.R. No. 98-8, 23 NJPER 593 (¶28290 1997), a case decided subsequent to Neptune, the Commission Designee ordered the payment of increments to a mixed unit of teaching and non-teaching staff members after the expiration of a two-year collective agreement. The Commission Designee stated:

> The refusal to pay increments is a unilateral alteration of the status quo and a per se illegal refusal to negotiate in good faith. 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. [Citations omitted. 23 NJPER at 593-594.]

The Commission Designee, applying Neptune, ordered the Board to pay increments to all unit employees. In denying Mahwah Board of Education's motion for reconsideration, P.E.R.C. No. 98-105, 24 NJPER 133 (¶29067 1998), the Commission noted that the Designee issued a decision consistent with Commission precedent. I find Mahwah to be particularly instructive since the alleged factual elements of a two-year agreement covering a mixed unit which includes both teaching and non-teaching staff members appear in both cases. Also, the Commission has had some opportunity to provide

limited guidance in its decision by denying the Mahwah Board of Education's motion for reconsideration.2/

I note that prior to Neptune, the Commission, following Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978), consistently held that good faith negotiations requires the maintenance of established terms and conditions of employment, i.e., the "dynamic status quo", and the payment of increments as part of that status quo. 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. Evesham Tp. Bd. of Ed, I.R. No. 95-10, 21 NJPER 3, 4 (¶26001 1994); Hudson Cty and Hudson Cty PBA Local 51, P.E.R.C. No. 78-48, 4 NJPER 87 (¶4041 1978), aff'd NJPER Supp.2d 62 (¶44 App. Div. 1979); Rutgers, the State University and Rutgers University College Teachers Association, et al., P.E.R.C. No. 80-66, 5 NJPER 539 (¶10278 1979),

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2/ Essex Cty. Voc. and Tech Bd. of Ed., I.R. No. 97-4, 22 NJPER 343 (¶27178 1996) also concerns a situation involving a two-year agreement covering a mixed unit of teaching and non-teaching staff members. The Commission Designee in Essex Cty. Vo. Tech. refused to grant the charging party's application for interim relief. However, the Commission Designee in East Hanover Tp. Bd. of., I.R. No. 98-4, 23 NJPER 537 (¶28264 1997), notice of app. dism. App. Div. Dkt. No. A-000345-97T2 (12/15/97), enf. action w/d Law Div. Dkt. No. MER-L-000029-98 (6/11/98), declined to follow Essex Cty Vo. Tech. Mahwah, having gotten some Commission review, provides better guidance than Essex Cty. Voc. Tech.

aff'd as mod. NJPER Supp.2d 96 (¶79 App. Div. 1981); City of Vineland and Vineland PBA 266, I.R. No. 81-1, 7 NJPER 324 (¶12142 1981); Belleville Bd. of Ed., I.R. No. 87-5, 12 NJPER 692 (¶17262 1986); Hunterdon Cty Bd. of Social Services, I.R. No. 87-17, 13 NJPER 215 (¶18091 1987); Township of Marlboro, I.R. No. 88-2, 13 NJPER 662 (¶18250 1987); Borough of Palisades Park, I.R. No. 87-21, 13 NJPER 260 (¶18107 1987); Middlesex Cty. Sheriff, I.R. No. 87-19, 13 NJPER 251 (¶18101 1987); County of Bergen, I.R. No. 91-20, 17 NJPER 275 (¶22124 1991); County of Sussex, I.R. No. 91-15, 17 NJPER 234 (¶22101 1991); Burlington County, I.R. No. 93-2, 18 NJPER 406 (¶23185 1992); Somerset County, I.R. No. 93-15, 19 NJPER 259 (¶24129 1993).

I am not persuaded that the Board's claim that the express language of the collective agreement defeats the automatic nature of increment payments in this case. The language cited by the Board appears to be in the nature of language which typically allows the Board to withhold increments based on teaching performance or inefficiency. While the Board cites Hawthorne in support of its argument, the language contained in the Hawthorne collective agreement differs significantly from that contained in the Waldwick contract. The language in the Hawthorne agreement provides:

> Individual secretarial personnel are not entitled to an automatic salary increment. Said increment shall be paid subject to the recommendation of the Superintendent of Schools and approved by the Board of Education.

The language in the Hawthorne agreement appears to expressly and explicitly eliminate the secretarial employees' entitlement to an automatic salary increment. It does not appear that the language contained in the Waldwick agreement contains similar explicit language. The Board's claim that increments were not paid until the 1996-1998 collective agreement was ratified, standing alone, is insufficient to establish that automatic payment of increments does not constitute the current condition of employment. Consequently, for the reasons set forth above, consistent with long-standing Commission precedent, I find that the Association has established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations.

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. The Court in Galloway stated:

> Indisputedly, the amount of an employee's compensation is an important condition of ...employment. If a scheduled annual step increment in an employee's salary is an 'existing rul[e] 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. [78 N.J. at 49.]

Accordingly, in accordance with the traditional application of Galloway to the circumstances in this case, I find that the Association has established that it will suffer irreparable harm as the result of the Board's failure to pay increments.

In balancing the parties relative hardship, I find that the chilling effect which results from the Board's failure to pay increments and the irreparable harm which is suffered by the employee organization as the result of the Board's unilateral change in conditions of employment during the course of negotiations outweighs any harm suffered by the Board as the result of maintaining the status quo by granting increments to unit employees. Accordingly, absent Commission direction to the contrary, I am constrained by precedent to order the Board to immediately pay increments to unit employees.

ORDER

It is **ORDERED** that the Waldwick Board of Education pay all unit employees increments retroactive to the first pay period as appropriate for 10 or 12-month employees for school year 1998-1999. This interim order will remain in effect pending a final Commission order in this matter. This case will proceed through the normal unfair practice processing procedure.

Stuart Reichman
Commission Designee

DATED: October 15, 1998
Trenton, New Jersey