H.E. NO. 2020-2

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

In the Matter of

STATE OF NEW JERSEY (CORRECTIONS),

Respondent,

-and- Docket No. CO-2016-107

NEW JERSEY LAW ENFORCEMENT
SUPERVISORS ASSOCIATION,

Charging Party.

STATE OF NEW JERSEY (CORRECTIONS)

Respondent,

-and- Docket No. CO-2016-118

NEW JERSEY SUPERIOR OFFICERS
LAW ENFORCEMENT ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner determines that the State of New Jersey (State) violated N.J.S.A. 34:13A-5.4a(5) and, derivatively, 5.4a(1) by unilaterally discontinuing the payment of salary guide step increments to employees in negotiations units represented by the New Jersey Law Enforcement Supervisors' Association (NJLESA) and the New Jersey Superior Officers Law Enforcement Association (NJSOA). The State, NJSOA and NJLESA were parties to collective negotiations agreements extending from July 1, 2011 through June 30, 2015 and those agreements provided for the payment of annual salary guide increments based on length of satisfactory work performance. The Hearing Examiner found that, under NLRB v. Katz, 369 U.S. 736 (1962) and N.J.S.A. 34:13A-5.3, the State was obligated under the unilateral change doctrine to continue to pay salary increments to unit employees after the 2011-2015 agreements expired and until the parties negotiated modifications to those increment systems.

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

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Appearances:

For the Respondent,
Montgomery, McCracken, Walker & Rhodes, LLP, attorneys
(William Kennedy, of counsel)

For the Charging Party - Supervisors Association,
Crivelli & Barbati, LLC, attorneys
(Frank Crivelli, of counsel)

For the Charging Party - Superior Officers Association,
O'Brien, Belland & Bushinsky, LLC, of counsel
(Kevin D. Jarvis, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On December 22 and 28, 2015, the New Jersey Law Enforcement Supervisors Association (NJLESA) and the New Jersey Superior

Officers Law Enforcement Association (NJSOA)(hereinafter collectively referred to as the "Unions") filed unfair practice charges against the State of New Jersey (State). The NJLESA alleges the State violated sections 5.4a(1),(2),(5) and (7)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), by unilaterally discontinuing the payment of salary guide step increments upon the expiration of the NJLESA's 2011-2015 collective negotiation agreement, which expired on June 30, 2015. The NJSOA presents the same claim against the State, but adds that the State's conduct also violated section 5.4a(3) of the Act.[2/]

In 2015, the NJLESA and its President, William Toolen, filed a lawsuit in Mercer County Superior Court against the State over

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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. (2)Dominating or interfering with the formation, existence or administration of any employee organization. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

2/ Section 5.4a(3) of the Act provides that "public employers, their representatives or agents are prohibited from: discriminating in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act." The NJSOA alleges the State's conduct violates this subsection of the Act, as well as section 5.4a(1),(2),(5) and (7).

the non-payment of increments. The NJSOA intervened as a plaintiff in the lawsuit. In the Superior Court matter, the NJSOA and NJLESA allege the State's failure to pay salary guide increments to unit employees upon expiration of the NJSOA and NJLESA's 2011-2015 collective negotiation agreements (CNA) violated several civil service statutes, including N.J.S.A. 11A:3-7, N.J.S.A. 52:14-15.27 and N.J.S.A. 52:14-15.28. The parties agreed to hold the above-referenced unfair practice charges in abeyance until the Superior Court matter and related appeals involving the Township of Bridgewater and Atlantic County concerning the viability of the dynamic status quo doctrine were litigated.[3/]

On March 28, 2017, Superior Court Assignment Judge Mary C. Jacobson ordered the transfer of NJLESA's lawsuit to the New Jersey Public Employment Relations Commission (Commission) for adjudication. On August 2, 2017, the New Jersey Supreme Court held that the subject of whether to pay salary guide step increments during the hiatus period between an expired CNA and successor CNA was a mandatorily negotiable subject. In the

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3/ The "related appeals" were County of Atlantic, P.E.R.C. No. 2014-40, 40 NJPER 285 (¶109 2013), rev'd 42 NJPER 433 (¶117 App. Div. 2016), certif. granted 227 N.J. 148, aff'd on other grounds 44 NJPER 39 (¶12 S.Ct. 2017), 230 N.J. 237 (2017); and Bridgewater Tp., P.E.R.C. No. 2015-11, 41 NJPER 107 (¶38 2014), rev'd 42 NJPER 433 (¶117 App. Div. 2016), certif. granted 227 N.J. 148, aff'd on other grounds 44 NJPER 39 (¶12 S.Ct. 2017), 230 N.J. 237 (2017).

Matter of Atlantic County, 230 N.J. 237, 253-254 (2017). The Court declined, however, to address the viability of the dynamic status quo doctrine, and instead ruled that, as a matter of contract interpretation, the County of Atlantic and the Township of Bridgewater were required to pay salary guide step increments during this hiatus period under their respective CNAs. Atlantic County, 230 N.J. at 255.

On January 25, 2018, the Commission dismissed NJLESA's lawsuit and held the above-referenced civil service statutes did not require the State to pay salary guide increments during negotiations for a successor agreement. State of New Jersey (Toolen), P.E.R.C. No. 2018-29, 44 NJPER 300 (¶83 2018). The Commission wrote:

> Viewing N.J.S.A. 11A:3-7(b) in context, and in light of the Supreme Court's *Atlantic County/Bridgewater* decision, we hold that standing alone, it does not require the payment of salary increments during the hiatus between the expiration of one contract and the consummation of a successor. Nothing in the other four statutes[4/] warrants a different conclusion, nor have they ever been so construed. [44 NJPER at 302]

In dismissing NJLESA's complaint, the Commission noted that its decision did not preclude the NJLESA and NJSOA from litigating

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4/ The four statutes the Commission is referring to are: N.J.S.A. 52:14-15.27, N.J.S.A. 52:14-15.28, N.J.S.A. 53:1-6 and N.J.S.A. 53:1-7. 44 NJPER at 304 (fn. 5). The first two statutes cover employees in NJSOA's and NJLESA's negotiations units, the latter two apply to rank-and-file and superior officer state troopers' units.

the issue of whether unit employees were entitled to salary guide increment payments under our Act. Specifically, the Commission wrote:

> [T]he plaintiffs in Toolen [Superior Court case] contend that three statutes mandate the payment of increments after contract expiration. Accepting that argument and applying the preemption test would mean that a public employer has no discretion to negotiate, but instead must pay increments in every circumstance and, in the case of state troopers, in an amount set by the Superintendent. That premise conflicts with the Supreme Court's holding in Atlantic County/Bridgewater that the issue is mandatorily negotiable and that the parties are free to negotiate language requiring or barring the payment of increments during the hiatus between agreements. See Atlantic County/Bridgewater, 230 N.J. at 256 (pointing out that a public employer, Ho-Ho-Kus Board of Education, and the majority representative of its teaching staff members had included in their collective negotiations agreement a provision stating that increments would not be paid after the contract expired). Accordingly, we will dismiss the Toolen complaint. Doing so will not prevent the Toolen plaintiffs from seeking a ruling, via their unfair practice charges or an arbitrator if the charges are deferred to grievance arbitration, that the increments should have been paid under the EERA or the CNA, as the case may be. Dismissing the Toolen complaint will only preclude the plaintiffs and intervenors from relitigating before this Agency their claims that Titles 11, 52, and 53 mandated the payment of increments and step movement during the hiatus period. [44 NJPER at 303].

On February 22, 2018, the Commission denied the plaintiffs' motion for reconsideration of its decision. State of New Jersey (Toolen), P.E.R.C. No. 2018-36, 44 NJPER 329 (¶94 2018), app. pending.

On April 9 and 11, 2018, then Acting Director of Unfair Practices issued complaints on NJSOA's and NJLESA's a(1) and a(5) allegations.[5/] The State filed Answers to both charges on or about May 3, 2018. In its Answer to NJSOA's complaint, the State admits NJSOA ". . . members' salaries are subject to a salary guide that provides for 'step' increases for eligible employees . . ." and that the guide is governed by a "State Compensation Plan." The State also admits to freezing the payment of salary increments following the expiration of NJSOA's 2011-2015 CNA, but otherwise denies NJSOA's remaining allegations and denies violating the Act by freezing the payment of increments. Similarly, the State in its Answer to the NJLESA's Complaint admits NJLESA unit members' salaries are governed by a salary guide subject to a "State Compensation Plan" and also admits to freezing payment of salary increments to unit members upon expiration of the NJLESA's 2011-2015 CNA, but denies NJLESA's remaining allegations and denies violating the Act.[6/]

5/ The a(2), (3) and (7) allegations were dismissed.

6/ On June 6, 2018, the Acting Director of Unfair Practices ordered the consolidation of NJLESA and NJSOA's charges with two other unfair practice charges (Docket Nos. CO-2016-106 and CO-2016-114) presenting identical claims that were filed by the Policemen's Benevolent Association Local 105 (PBA Local 105) and the New Jersey State PBA State Law Enforcement Unit (SLEU). During the pendency of this motion, PBA 105 and SLEU withdrew these charges as part of contract settlements with the State.

On July 6, 2018, the NJLESA filed a motion for summary judgment, accompanied by a brief and certifications from Thomas Moran, former President of the NJLESA ("Moran Cert."); William Toolen, current President of NJLESA ("Toolen Cert."); and Frank M. Crivelli, Esq., an attorney with the law firm representing NJLESA in this matter ("Crivelli Cert."). The NJSOA also filed a motion for summary judgment, accompanied by a brief with exhibits on July 6, 2018. On July 17, 2018, the NJSOA and State executed a Memorandum of Agreement (MOA) covering the period from July 1, 2015 through June 30, 2019. The MOA provided, in pertinent part, for the payment of salary guide increments to NJSOA unit employees that were the subject of its charge.

In response to NJLESA's motion, the State filed a Cross Motion for Summary Judgment on August 17, 2018, accompanied by a brief, certification from Erin Clarke, Esq. ("Clark Cert."), an attorney representing the State in this matter, and exhibits accompanying Clarke's certification. The State did not submit a certification or affidavit disputing the facts set forth in Toolen and Moran's certifications. The NJSOA and NJLESA filed reply briefs in opposition to the State's cross motion in August and September of 2018. The Commission referred the motion and cross motion to me for decision on September 26, 2018.

On November 8, 2018, the State and NJLESA executed a MOA providing, in pertinent part, for the payment of salary guide

increments to eligible NJLESA unit employees for the period July 1, 2015 through June 30, 2019.

On February 5, 2019, the parties agreed to participate in a settlement conference to resolve these charges. Unable to reach agreement, the undersigned requested the parties brief the issue of whether the charges were moot as a consequence of the MOAs entered into by the State, NJLESA and NJSOA for the period of July 1, 2015 through June 30, 2019. On March 15, 2019, the NJLESA filed a brief and certifications from Toolen and Crivelli in support of its position that its charge was not rendered moot by the 2015-2019 MOA with the State. On March 15 and 22, 2019, the NJSOA filed a brief and certification from Louis Hall, NJSOA Treasurer ("Hall Cert.") in support of its position that its charge was not rendered moot by the 2015-2019 MOA with the State.

On or about March 15, 2019, the State filed a brief and certification from Camille Warner ("Warner Cert."), an Employment Relations Specialist with the New Jersey Office of Employee Relations (OER) who was involved in negotiating the MOAs with NJLESA and NJSOA, in support of the State's position that the MOAs rendered the charges moot. The NJSOA filed a reply brief in response to the State's submission on March 29, 2019 and the State filed an additional brief in support of its position on March 29, 2019. In the summer of 2019, the State agreed to pay NJLESA and NJSOA unit employees salary guide step increments for

the 2020 fiscal year (July 1, 2019 through June 30, 2020) while the parties were negotiating a successor agreement to the 2015-2019 MOAs.[7/] Negotiations are ongoing.

On August 6, 2019, I sent a letter to the parties requesting information about when salary guide increments under the 2015-2019 MOAs were paid to unit members and how much those increments cost the State. I also requested confirmation as to whether the Unions' sought prejudgment interest on the amount of increments withheld by the State since July 1, 2015. In response, on September 6, 2019 NJSOA filed a letter and certifications from Lieutenant Lance Crenny ("Crenny Cert."), a member of the NJSOA's Executive Board, and retired Lieutenant Clifford Barnes ("Barnes Cert."), a NJSOA member. NJLESA filed a certification and letter from Crivelli on September 6, 2019 and the State filed a letter on September 6, 2019.

Summary judgment will be granted:

> if it appears from the pleadings, together with the briefs, affidavits and other documents filed, there exists no genuine issue of material fact and the movant . . . is entitled to its requested relief as a matter of law. [N.J.A.C. 19:14-4.8(d)]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995) sets forth the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The

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7/ This was confirmed in emails from the parties' attorneys to the undersigned.

fact-finder must ". . . consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the moving party." If that issue can be resolved in only one way, it is not a genuine issue of material fact. A motion for summary judgment should be granted cautiously -- the procedure may not be used as a substitute for a plenary hearing. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982).

While a party is not required to file an affidavit or certification in support of summary judgment, where a ". . . party opposing the motion [for summary judgment] does not submit any affidavits or documentation contradicting the moving party's affidavits and documents, then the moving party's facts may be considered as true, and there would necessarily be no material factual issue to adjudicate unless, per chance, it was raised in the movant's pleadings." CWA Local 1037 (Schuster), H.E. No. 86-10, 11 NJPER 621, 622 (¶16217 1985), adopted P.E.R.C. No. 86-78, 12 NJPER 91 (¶17032 1985); City of Hoboken, H.E. No. 95-17, 21 NJPER 107 (¶26065 1995), adopted P.E.R.C. No. 95-91, 21 NJPER 184 (¶26117 1995); Nutley Tp., H.E. No. 99-18, 25 NJPER 199 (¶30092 1999) (final agency decision); N.J.A.C. 1:1-12.5(b) ("When a motion for summary decision is made and supported, an

adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined by an evidentiary proceeding.") As the New Jersey Supreme Court explained in Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954):

> [I]f the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature . . . he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts and the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact. [17 N.J. at 75]

Given these standards and since the State has not provided affidavits, certifications or documents disputing the NJLESA's certifications[8/], I must accept as true the statements in Toolen's and Moran's certifications. CWA Local 1037 (Schuster), 11 NJPER at 622-623.

8/ Attorney affidavits are not the appropriate vehicle for raising a genuine issue of material fact because attorneys typically do not have personal knowledge of the material facts in a case. Clarke's certification, moreover, does not dispute Moran's and Toolen's certified facts about the practice of paying salary guide step increments to NJLESA unit employees. Instead of certifying to any facts disputing Moran's and Toolen's certifications or pertaining to the past practice concerning increment payments to NJSOA and NJLESA unit employees, the Clarke Certification attaches exhibits, including provisions of the parties' CNAs, State appropriations laws, Civil Service Commission Compensation Compendiums for fiscal years 2015 through 2018, an unpublished Appellate Division opinion, and a MOA between the NJSOA and State. None of this documentation raises a genuine issue of material fact.

Based on the parties' submissions and this standard of review, I make the following:

FINDINGS OF FACT

Material Facts in NJLESA's Charge

1. The NJLESA is the exclusive majority representative of primary level supervisory law enforcement employees of the State. NJLESA's unit includes, but is not limited to, employees holding the following titles: (1) Correction Sergeant, (2) Correction Sergeant, Juvenile Justice Commission, (3) Assistant District Parole Supervisor, (4) Assistant District Parole Supervisor, Juvenile Justice Commission, (5) State Park Police Sergeant, (6) Conservation Officer 2, (7)Police Sergeant Health Care Facility, (8) Police Sergeant PIP, (9) Sergeant Campus Police, (10) Special Agent I, and (11) Supervising Interstate Escort Officer. (Toolen Cert., Paragraphs 3 and 4; Crivelli Cert., Exhibit D and Appendix I to the 2011-2015 CNA)[9/].

2. The State and NJLESA are parties to a collective negotiations agreement (NJLESA CNA) extending from July 1, 2011 through June 30, 2015. (Crivelli Cert., Exhibit D).

3. Article III of the NJLESA CNA, entitled "Civil Service Regulations", provides:

9/ The complete CNA, along with other CNAs referenced in this decision, may be found on the Commission's website at the following link:

https://www.perc.state.nj.us/publicsectorcontracts.nsf

> The administrative and procedural provisions and controls of the Civil Service law and Rules and Regulations promulgated there under are to be observed in the administration of this Agreement. [Crivelli Cert., Exhibit D]

4. Article XIII, entitled "Salary Compensation Plan and Program", and Appendix II of the NJLESA CNA sets forth a salary guide structure for NJLESA unit employees. It provides, in pertinent part:

> The parties acknowledge the existence and continuation during the term of this Agreement of the State Compensation Plan which incorporates in particular, but without specific limit, the following basic concepts . . .
>
> > (b) A salary range with specific minimum and maximum rates and intermediate incremental steps therein for each position.
> >
> > c) The authority, method and procedures to effect modifications as such are required. However, within any classification the annual salary rate of employees shall not be reduced as a result of the exercise of this authority. [Article XIII(A)(1)(b) and c)

5. Article XIII and Appendix II of the NJLESA CNA also provides for the payment of annual salary guide step increments to eligible unit employees whose job performance is not unsatisfactory. In this regard, Article XIII(B)(2) of the NJLESA CNA provides:

> Salary Increments: Normal increments shall be paid to all employees eligible for such increments within the policies of the State

> Compensation Plan during the term of this Agreement:
>
> > a. Where the normal increment has been denied due to an unsatisfactory performance rating, and if subsequent performance of the employee is determined by the supervisor to have improved to the point which then warrants granting a merit increment, such increment may be granted effective on any of the three (3) quarterly action dates which follow the anniversary date of the employee, and subsequent to the improved performance and rating which justifies such action. The normal anniversary date of such employee shall not be affected by this action.
> >
> > b. Employees who have been at the eighth step of the same range for 18 months or longer shall be eligible for movement to the ninth step providing their performance warrants this salary adjustment.
> >
> > c. Employees who have been at the ninth step of the same range for 24 months or longer shall be eligible for movement to the tenth step providing their performance warrants this salary adjustment.

6. By letter dated June 29, 2015, Michael J. Dee., then Director of the Governor’s Office of Employee Relations (OER), notified Toolen that certain economic provisions in the NJLESA’s CNA would no longer be implemented as of July 1, 2015. (Crivelli

Cert., Exhibit F; Toolen Cert., Paragraphs 11 and 12).[10/] Dee wrote:

We are writing in connection with the upcoming collective negotiations between the State and the New Jersey Law Enforcement Supervisors Association (NJLESA). As you are aware, the contract awarded by Arbitrator Mastriani in PERC Docket No. IA-2014-003 expired on June 30, 2015.

If a new agreement is not in place by July 1, 2015, based on the express language in the collective negotiations agreement and governing case law, the following economic provisions will expire with the agreement on June 30, 2015, and will not be continued pending negotiations:

1. Article XIII(B) Compensation Adjustment, including increments under Paragraph (B)(2) effective the first full pay period after July 1, 2015;

2. Article XIII(D) Eye Care Program; and

3. Article XXXVI Uniform Allowance.

This letter addresses only certain economic items which do not continue beyond June 30, 2015, pending the completion of negotiations. In the interim, the State will maintain all current terms and conditions of employment in accordance with our

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10/ As of the time of the letter, the parties were subject to an Interest Arbitration Award issued by Arbitrator James Mastrianni (Commission Docket No. IA-2014-003) that covered the period July 1, 2011 through June 30, 2015. The parties later executed a 2011-2015 CNA implementing that award.

contract and governing law. [Crivelli Cert., Exhibit F; Toolen Cert., Paragraph 13]

7. Toolen, who received Dee's letter, has been the President of NJLESA since 2014. (Toolen Cert., Paragraph 1). Toolen has also been a member of NJLESA since 2008 and has been employed by the New Jersey Department of Corrections (DOC) for twenty (20) years. (Toolen Cert., Paragraphs 16 and 26).

8. During his time as a NJLESA member, Toolen certifies that NJLESA members ". . . continued to progress on their respective step guides and received their step increments as anticipated during the hiatus period when a successor CNA was being negotiated" and that the ". . . State had never before suspended the step movement or discontinued the payment of step increments to NJLESA members following the expiration of a CNA." (Toolen Cert., Paragraphs 26 and 27). During his twenty years as a DOC employee, the ". . . State had never taken the position that it was going to suspend NJLESA members' movement on their respective salary guides or discontinue the payment of the step increments until a new CNA was negotiated" and that the State never negotiated with NJLESA prior to discontinuing the payment of increments to NJLESA members on July 1, 2015. (Toolen Cert., Paragraphs 16 and 17).

9. Thomas Moran served as President of the NJLESA from 2003 through 2007. (Moran Cert., Paragraph 7). Prior to his

tenure as NJLESA President, Moran was a member of NJLESA and served as Executive Vice President on NJLESA's Executive Board. (Moran Cert., Paragraph 7). He began working for DOC in 1985 as a Correction Officer Recruit and throughout the course of his career was promoted through the ranks as a Senior Correction Officer, Correction Sergeant, and a Correction Lieutenant. (Moran Cert., Paragraphs 3 and 4). In achieving these ranks, Moran also became a member of various State law enforcement negotiations units, including but not limited to NJLESA. (Moran Cert., Paragraph 4). In 2005, Moran was promoted to work as DOC's Chief of Staff, where he was ". . . responsible for the overall operations of the DOC, to include administering the various policies and procedures promulgated by the Department." (Moran Cert., Paragraph 5).

10. For the entirety of Moran's employment with the DOC since 1985, he does ". . . not recall the State ever suspending employees' movement on their respective salary guides or discontinuing the payment of step increments during the hiatus period when a prior CNA expired and a successor CNA was being negotiated, irrespective of the collective negotiations unit I was a member of." (Moran Cert., Paragraph 13).

11. On or about November 8, 2018, the NJLESA and State executed an MOA covering the period from July 1, 2015 through June 30, 2019. (3/10/19 Toolen Cert., Paragraphs 3 and 4). The

MOA provided for the payment of salary guide increments to NJLESA unit members for the period July 1, 2015 through June 30, 2019. (Warner Cert., Exhibit B; 3/10/19 Toolen Cert., Exhibit A). During negotiations for the 2015-2019 MOA, the NJLESA proposed contract language requiring salary guide increment payments during the hiatus period between the 2015-2019 MOA and a successor contract. (3/10/19 Toolen Cert., Paragraph 6). The State declined to make a counterproposal setting forth contract language addressing this subject. (Toolen Cert., Paragraph 7).

12. In August or September of 2019, the State paid NJLESA unit employees their salary guide increments pursuant to the 2015-2019 MOA. (9/6/19 Crivelli Cert.; 9/6/19 Letter from State)[11/] Thus, since July 1, 2015, the State withheld payment of increments for a period of 4 years and 2 or 3 months.[12/] (9/6/19 Crivelli Cert.; 9/6/19 Letter from State). NJLESA seeks prejudgment interest on the amount withheld. (9/6/19 Crivelli Cert.).

11/ The NJLESA and State dispute whether full increments have been paid. The State asserts they were paid on August 30, 2019, while NJLESA contends in its September 6 submission that they were scheduled to be paid "on or about September 13, 2019." (9/6/19 Crivelli). This factual dispute is immaterial to the outcome of this case. The undisputed fact is that increments were withheld for over four years.

12/ The parties did not provide information about the total cost of increments paid pursuant to the 2015-2019 MOAs.

Material Facts in NJSOA's Charge

13. NJSOA is the exclusive majority representative of the following full-time permanent and provisional state superior law enforcement officers: Conservation Officer 1; Correction Lieutenant; Correction Lieutenant, Juvenile Justice Commission; District Parole Supervisor; Lieutenant Campus Police; Police Lieutenant Health Care Facility; Police Lieutenant PIP; State Park Police Lieutenant; Supervising Inspector ABC; Supervising Special Agent; Supervisor of Enforcement Weights and Measures; Supervisor of Licensing Weights and Measures; Supervisor of Lumber Inspections Weights and Measures; and Supervisor of Technical Services Weights and Measures. (Exhibit A to 7/6/18 NJSOA Brief).

14. The State and NJSOA are parties to a collective negotiations agreement (CNA) extending from July 1, 2011 through June 30, 2015. (Exhibit A to 7/6/18 NJSOA Brief; Exhibit D to Clark Cert.).

15. Article III of the CNA provides: "The administrative and procedural provisions and controls of the Civil Service law and Rules and Regulations promulgated there under are to be observed in the administration of this Agreement." (Exhibit A to 7/6/18 NJSOA Brief).

16. The NJSOA CNA includes provisions that are identical to the NJLESA 2011-2015 CNA's provisions concerning the payment

of annual salary guide step increments based on length of satisfactory service. (See Findings of Fact Nos. 4 and 5). (Articles V, XIII, and XL of the NJSOA CNA in Exhibit A to the 7/6/18 NJSOA Brief).

17. Upon expiration of the 2011-2015 NJSOA CNA and effective July 1, 2015, the State unilaterally “froze” or discontinued the payment of salary guide increments to eligible NJSOA unit employees. (State’s Answer to NJSOA’s Complaint; Page 1 of State’s August 2018 Brief in Support of a Cross Motion for Summary Judgment).

18. On or about July 17, 2018, the State and NJSOA executed a MOA extending from July 1, 2015 through June 30, 2019. The MOA provided for the payment of salary guide increments to NJSOA unit employees retroactive to July 1, 2015. (3/28/19 Hall Cert., Paragraphs 1 and 2; Exhibit A to the 9/7/18 Hall Cert. and Exhibit B to the Warner Cert.).

19. During negotiations of the 2015-2019 MOA, the NJSOA proposed language be included in the MOA that would require the State to continue the payment of salary guide increments upon the expiration of the 2015-2019 MOA. (9/7/18 Hall Cert., Paragraph 4). The State declined to include this language in the MOA. (9/17/18 Hall Cert., Paragraph 4). In lieu of making a counterproposal to address the issue of salary guide increments during the hiatus period between an expired and successor CNA,

the State acknowledged the following in a footnote to the 2015-2019 MOA. (Warner Cert., Exhibit B):

> Though no change is required to the collective negotiations agreement, the parties agree that increments will be paid to all employees eligible for such increments, consistent with the State Compensation Plan, for each year during the term of this Agreement.
>
> Though no such language will be included in the collective negotiations agreement, the parties acknowledge that salary increases will be effective and any retroactive salary or increment payments due to an employee pursuant to this Agreement will be implemented as soon as reasonably practicable.

20. On December 7, 2018, the State paid NJSOA unit employees salary guide increments, retroactive to July 1, 2015, pursuant to the 2015-2019 MOA. (Crenny Cert., Paragraph 5; 9/6/19 Letter from State). Since July 1, 2015, payment of the NJSOA's salary guide increments were withheld for a period of three years and eleven months.[13/] The NJSOA does not seek pre-judgment interest on the amount of increments withheld, but does seek a cease and desist order and posting of notice that the State violated the Act by unilaterally discontinuing increment payments effective July 1, 2015.

13/ The NJSOA and State did not provide information about the total cost of increments to the State.

ANALYSIS

The State violated N.J.S.A. 34:13A-5.4(a)(5) and, derivatively, N.J.S.A. 34:13A-5.4(a)(1) by unilaterally discontinuing the payment of salary guide step increments to NJLESA and NJSOA unit employees upon the expiration of their 2011-2015 CNAs. I find this violation for the following reasons:

> (1) The 2015-2019 MOAs between the State and Unions did not render the Unions' charges moot because the State illegally withheld payment of salary guide increments to NJSOA and NJLESA unit employees for over three years.
>
> (2) The State and Unions incorporated by reference in their 2011-2015 CNAs the terms and conditions of employment set forth in the civil service laws concerning automatic salary guide movement based on length of service and satisfactory work performance;
>
> (3) Under NLRB v. Katz, 362 U.S. 736 (1962) and fifty-seven years of National Labor Relations Board (NLRB), Commission and judicial precedent applying Katz's unilateral change doctrine, the State breached its statutory duty to negotiate in good faith with the Unions by unilaterally discontinuing salary guide increment payments during the hiatus period between the 2011-2015 CNAs and successor agreements;
>
> (4) Under the New Jersey Supreme Court's opinion in Atlantic County, 230 N.J. 237 (2017) and the holdings in Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000), the State breached its statutory duty to negotiate in good faith with the Unions by unilaterally discontinuing salary guide increment payments

> to NJSOA and NJLESA unit employees upon expiration of their 2011-2015 CNAs.
>
> (5) Under New Jersey Supreme Court precedent, fiscal distress and budgetary constraints do not justify the State's unilateral change to the mandatorily negotiable subject of salary guide increment payments.
>
> (6) Based on precedent about precedent, the Commission is bound by the Appellate Division's opinion in Atlantic County until the Appellate Division and/or Supreme Court directs otherwise.

For these reasons, I grant the NJSOA and NJLESA's Motions for Summary Judgment and deny the State's Cross Motion for Summary Judgment.

Mootness

The State argues the Unions' charges are moot because the State entered into MOAs with the Unions providing for the payment of increments that were the subject of these charges. The Unions' disagree. I find this dispute is not moot because the withholding of increments for over three years is itself an injury that has been repeatedly remedied by New Jersey courts and the Commission.[14/]

14/ Since I find the Unions' charges are not moot because of the State's withholding of increments for over three years, I do not need to address the Unions' argument that the charges are not moot because the State's unilateral discontinuance of salary increments may recur when the next CNA expires. Such argument calls for an advisory opinion, which the Commission is loathe to provide.

One party's withholding and use of money another party is legally entitled to is a cognizable injury. Decker v. Elizabeth Bd. of Ed., 153 N.J.Super. 470, 475 (App. Div. 1977), cert. den. 75 N.J. 612 (1978); Penpac, Inc. v. Passaic Cty. Utilities Authority, 367 N.J.Super. 487, 503-504 (App. Div. 2004). New Jersey courts and the Commission have remedied this type of injury by awarding pre-judgment interest on the amount wrongfully withheld. Potente v. County of Hudson, 187 N.J. 103, 114 (2006) (Supreme Court articulates the general rule that ". . . pre-judgment interest shall be awarded against all defendants *unless* it is prohibited by applicable law" or statute); Decker, 153 N.J.Super. at 475 (Appellate Division upholds award of prejudgment interest on back pay for the period an employee was wrongfully discriminated against because "during the period of discrimination, the board [of education] had the use of money to which complainant was entitled and hence it was unjustly enriched" and "equity and justice requires payment by way of interest for its use."); Willingboro Bd. of Ed., P.E.R.C. No. 85-58, 11 NJPER 19 (¶16009 1984) (Commission holds that it has the remedial authority under the Act to award interest on salary and benefits illegally withheld from unit employees).

Pre-judgment interest is not punitive. Passaic Cty. Utilities Authority, 367 N.J.Super. at 504. It is instead intended ". . . to compensate a party for lost earnings on a sum

of money to which it was entitled, but which has been retained by another." Id. One hundred dollars in 2015 is not worth the same as one hundred dollars in 2019.[15/] That loss in value, and the injured party's inability to use that money for a period of time, are legal harms.

In that vein, the Commission and Appellate Division have repeatedly awarded pre-judgment interest on wrongfully withheld salary increments and compensation to negotiations unit members. Salem Cty. Bd. of Vocational Education, P.E.R.C. No. 79-99, 5 NJPER 239 (¶10135 1979), aff'd in pt., rev'd in pt., rem'd, NJPER Supp.2d 82 (¶63 App. Div. 1980) (Appellate Division orders Commission to include pre-judgment interest on a back pay award); Bergen Pines Hospital, P.E.R.C. No. 82-117, 8 NJPER 360 (¶13165 1982); Logan Tp. Bd. of Ed., P.E.R.C. No. 83-23, 8 NJPER 546 (¶13251 1982), aff'd NJPER Supp.2d 138 (¶119 App. Div. 1983); Willingboro Bd. of Ed., 11 NJPER at 20 (Commission holds that it has "remedial authority" under the Act ". . . to make employees whole for actual losses attributable to unfair practices" and that "that authority encompasses the power to award interest on

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15/ To reinforce the point, CBS News reported on June 15, 2019 that the last time Congress increased the federal minimum wage to $7.25 an hour was on July 24, 2009. Since that time, the cost of living has increased by 18% and that increase has "eroded the buying power of that $7.25 an hour to $6" an hour. See "The Federal Minimum Wage Sets a Record–For Not Rising", at https://www.cbsnews.com/news federal-minimum-wage-sets-record-for-length-with-no-increase /(last visited on September 5, 2019).

salaries and benefits illegally denied employees."); Howell Tp. Bd. of Ed., P.E.R.C. No. 86-44, 11 NJPER 634 (¶16223 1985) (Commission orders employer to pay interest for the two week period the employer withheld payment of salary guide increments to unit employees); Scotch Plains-Fanwood Bd. of Ed., P.E.R.C. No. 91-114, 17 NJPER 336 (¶22149 1991) (Commission orders board of education to pay pre-judgment interest on the salary increments that were withheld from unit members from July 1, 1989 until "when they were paid in 1990"); Borough of West Paterson, P.E.R.C. No. 92-18, 17 NJPER 413 (¶22198 1991) (On August 15, 1991, the Commission ordered a borough to pay pre-judgment interest on salary increments that were withheld since February 1, 1991); Camden County Prosecutor, P.E.R.C. No. 2006-24, 31 NJPER 323 (¶128 2005) (Commission orders employer to pay pre-judgment interest on $500 bonuses that were withheld in repudiation of an agreement between employer and union). The Commission will order pre-judgment interest regardless of whether it was requested in an unfair practice charge. Camden County Prosecutor, 31 NJPER at 324.

Sometimes, however, when an employer has withheld salary increments for a brief period of time and has promptly agreed to pay increments to a charging party, the Commission has found no case or controversy worth adjudicating. Belleville Bd. of Ed., P.E.R.C. No. 88-66, 14 NJPER 128 (¶19049 1988), aff'd NJPER

Supp.2d 196 (¶174 App. Div. 1988) (Commission dismisses complaint as moot where parties reached agreement on payment of increments on the same day the majority representative filed an unfair practice charge); Bayonne Bd. of Ed., P.E.R.C. No. 89-118, 15 NJPER 287 (¶20127 1989), aff'd NJPER Supp.2d 238 (¶197 App. Div. 1990) (Commission dismisses complaint where employer agreed to pay and did pay increments soon after majority representative filed an application for interim relief). In other words, the Commission has found this type of case "moot." Id.

However, the Commission has also found that where increments were withheld and interest accrued over a substantial period of time, the case is not moot and an award of pre-judgment interest is appropriate. Scotch Plains, 17 NJPER at 337 (Commission ordered payment of pre-judgment interest and found that withholding of increments for a period of one year justified a finding that the case was not moot since a "not insubstantial" amount of interest accrued); West Paterson, 17 NJPER at 414 (Commission ordered borough to pay pre-judgment interest on increments withheld by the borough for six months and found the case was not moot). In that instance, the case is not moot even where the parties have agreed to the payment of increments prior to disposition of a charge. Id.[16/]

16/ In a recent opinion issued by the United States' Supreme Court on May 20, 2019, the Court noted that a case is not (continued...)

Here, unlike the employers in Belleville and Bayonne, the State did not pay salary increments to NJSOA unit employees for three years and five months (July 1, 2015 to December 7, 2018) and for four years and two months to NJLESA unit employees (July 1, 2015 through August 30, 2019). Both instances are lengthy periods that exceed by two to three years the time period the employers in Scotch Plains, West Paterson, and Howell withheld increments. And in each of those cases the Commission found the charges were not moot and awarded pre-judgment interest. While the parties have not provided a figure representing the cost of increments withheld, I find that withholding increments for a period of approximately four years is a legally cognizable injury that should be remedied.

The State argues prior Commission decisions awarding pre-judgment interest are distinguishable from the present case because here, the State was acting in accordance with "existing law" under the Commission decisions in Atlantic County and Bridgewater; whereas in prior Commission decisions the law was "well-settled" as to the payment of increments after a CNA

16/ (...continued)
moot if there is any chance of money "changing hands" between a defendant and plaintiff and "as long as a claim for monetary relief survives." Mission Prod. Holdings v. Tempnology, LLC, 139 S.Ct. 1652, 1660 (2019). Pre-judgment interest on withheld increments is a claim for monetary relief that "survives" an agreement to pay increments. West Paterson, Howell Tp., Scotch Plains.

expires. (Pages 6-7 of State's 3/29/19 Brief; Page 3 of State's 9/6/19 Letter Brief). The State also contends that any delay in the payment of increments was attributable to the Unions' conduct since it was the Union that requested its charges be held in abeyance pending the outcome of the litigation in Toolen, Atlantic County, and Bridgewater. (Page 7 of 3/29/19 of State's Brief). Since the Union requested these matters be held in abeyance, the State should not be held responsible for pre-judgment interest for the period of delay. I disagree with each contention.

The Unions' litigation strategies did not prevent the State from paying increments to unit employees. The State chose to litigate over increments instead of pay them. Like any appeal of an outcome favorable to one party, the risk of not settling for the prevailing party is an adverse outcome that reverses what was a "victory."

That is precisely what happened here. On March 13, 2016, the Appellate Division reversed the Commission in Atlantic County and the Supreme Court affirmed the Appellate Division's judgment on August 2, 2017.[17/] Yet, notwithstanding the State's contention that it was only complying with existing law at the time it froze

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17/ In a separate section of this decision, I will address why the Supreme Court's decision to not address the dynamic status quo doctrine does not justify abandonment of the Appellate Division's opinion in Atlantic County, as the State contends.

increments in 2015, the State did not pay increments covering 2015, 2016, 2017 and for almost all of 2018 when "existing law" changed under the Appellate Division and Supreme Court opinions in Atlantic County. Instead, the State chose not to pay increments covering this period until December 7, 2018 and August 30, 2019.[18/] "Existing law" changed, but the State's position remained the same.

For these reasons, this case is not moot.

The Incorporation Doctrine

A majority representative and public employer can agree to include a provision in a CNA that expressly incorporates by reference statutory terms and conditions of employment. Stafford Tp., P.E.R.C. No. 2005-51, 31 NJPER 84, 85 (¶40 2005) (Majority representative proposes including a Fair Labor Standards Act provision in a CNA regarding compensation for on-call work). However, when a CNA does not expressly incorporate a statutory or regulatory term and condition of employment, the statutory or regulatory term and condition of employment is nonetheless

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18/ The State also contends that awarding pre-judgment interest on withheld salary increments might circumvent the 2% base salary cap for interest arbitration under N.J.S.A 34:13A-16.7. To begin with, the base salary cap applies to interest arbitration awards. The State does not cite and the undersigned is not aware of any statute, regulation or case that applies the 2% cap to unfair practice remedies. Indeed, the parties can negotiate a salary increase through collective negotiations or mediation that exceeds the 2% cap.

". . . effectively incorporated by reference as terms of any collective agreement. . . " covering a negotiations unit, provided that statute or regulation "speaks in the imperative" on specific terms and conditions of employment and leaves nothing to the employer's discretion. State v. State Supervisory Employees' Ass'n, 78 N.J. 54, 80 (1978). A CNA cannot contravene ". . . specific statutes or regulations which expressly set particular terms and conditions of employment." Id.; Englewood Bd. of Ed. v. Englewood Teachers Union, 64 N.J. 1, 6-7 (1973).

The Commission has applied the incorporation doctrine to a variety of statutes and regulations for decades. Hudson County, P.E.R.C. No. 80-103, 6 NJPER 101 (¶11052 1980) (Incorporation of a statutory residency requirement for county employees); Ewing Tp., P.E.R.C. No. 83-165, 9 NJPER 400, 401 (¶14182 1983) (Commission held a statute setting a cap on consecutive work days for police was effectively incorporated into the parties' CNA and that "statutes and regulations which are applicable to the employees who comprise a particular unit are effectively incorporated by reference as terms of any collective agreement covering that unit."); Village of Ridgewood, P.E.R.C. No. 92-110, 18 NJPER 267 (¶23113 1992), aff'd NJPER Supp.2d 302 (¶236 App. Div. 1993); Borough of Paramus, P.E.R.C. No. 94-98, 20 NJPER 196 (¶25092 1994)(Statutory tenure provision governing construction and sub-code officials was effectively incorporated as part of

CNA); State of New Jersey (Dept. of Transportation); P.E.R.C. No. 98-52, 23 NJPER 608, 609-610 (¶28299 1997) (Commission finds a civil service regulation governing overtime compensation was effectively incorporated as part of a CNA and explains that "a statute or regulation setting a term and condition of employment is incorporated by reference as a term of the collective agreement. . . "); Atlantic County Sheriff's Office, P.E.R.C. No. 2005-28, 30 NJPER 444 (¶147 2004) (Civil services regulations on disciplinary procedures regarding fitness for duty examinations were effectively incorporated as part of CNA); Borough of Longport, P.E.R.C. No. 2006-53, 32 NJPER 16, 18 (¶8 2006) (Commission explains that ". . . because statutes are effectively incorporated by reference into collective negotiations agreements, parties may negotiate to resolve disputes over their application through the negotiated grievance procedure"); City of Orange Tp., P.E.R.C. No. 2019-37, 45 NJPER 325 (¶86 2019) (Statutory provisions governing payments for health insurance waivers effectively incorporated as part of parties' CNA). And in the specific context of State Compensation Plans and the payment of salary increments to employees under Civil Service laws, the Commission has held that employees' receipt of increments under a State Compensation Plan is an "established term and condition of employment" that cannot be unilaterally

changed during collective negotiations. State of New Jersey, P.E.R.C. No. 87-21, 12 NJPER 744, 745 (¶17279 1986) (fn. 2).

In, State of New Jersey, the Commission denied the State's motion for reconsideration and a stay of a Commission designee's order requiring the State to pay unit members salary increments that were withheld during collective negotiations for a successor agreement with the Council of New Jersey State College Locals, NJSFT-AFT, AFL-CIO (Council). 12 NJPER at 745. The State, while acknowledging that the ". . . increment concept . . . " has been a ". . . traditional part of the Civil Service salary structure . . . " for the unit employees the Council represented (which included academic, administrative, and teaching staff at the State's colleges); the State contended that the Civil Service salary increment system no longer applied to the Council's unit employees because a statute enacted by the New Jersey Legislature in 1986 removed the State college positions from coverage under the Civil Service laws. Id.[19/] The Commission disagreed and explained:

> This statute removes the positions of unit employees from the operation of Civil Service statutes, but does not expressly or impliedly preclude them from coverage under the policies of the State Compensation Plan. **It is the employees' receipt of increments, not their coverage under Civil Service laws,**

19/ The citation provided by the Commission for this statute was P.L. 1986, c. 42. 12 NJPER at 744.

> **that is the established term and condition of employment.** [12 NJPER at 745 (fn.2)] [emphasis added].

Consequently, the Commission held the State violated the Act by unilaterally discontinuing the payment of salary guide increments to the Council's unit employees during collective negotiations for a successor agreement. 12 NJPER at 745.

The collective negotiations agreement in State of New Jersey also contained language identical to the contract language in the NJSOA and NJLESA CNAs concerning increment payments (See Findings of Fact 4,5 and 16). In State of New Jersey, the CNA with the Council provided, in pertinent part:

> Normal increments shall be paid to all employees eligible for such increments within the policies of the State Compensation Plan during the term of this Agreement. [12 NJPER at 745]

In construing this language, the Commission concluded that the State remained obligated after the CNA expired to continue paying increments to Council unit employees during successor contract negotiations. Id. Quoting from State and CWA, I.R. No. 82-2, 7 NJPER 532 (¶12235 1981), in which a Commission designee construed identical language in a collective agreement between the State and Communications Workers of America, the Commission explained why the language "during the term of this agreement" did not preclude a finding that the State was obligated to pay salary increments after its CNA expired under the Act:

> It must be emphasized that it is not the contracts per se which are being extended. Rather, it is the terms and conditions of employment which were in effect at the time that the contracts expired which are being maintained. Those terms included a salary structure which provided for the payment of increments...measured by assigned anniversary dates. Proper placement on the salary guide which remains in effect requires that qualified employees...move up one step and receive the appropriate increment. [12 NJPER at 745; quoting State and CWA, 7 NJPER at 536]

Here, the parties expressly agreed to incorporate by reference the "administrative and procedural provisions and controls of the Civil Service Law and Rules and Regulations promulgated thereunder" and to "administer" the 2011-2015 CNAs in accordance with those requirements. (Article III of NJSOA and NJLESA 2011-2015 CNAs). The civil service requirements incorporated as part of the CNA and pertinent to this dispute include:

> (1) A prohibition that a "State employee compensation plan shall not be amended, changed, or modified except pursuant to a written agreement entered into between the State and the majority representative following negotiations." N.J.S.A. 11A:3-7(b);
>
> (2) The legislative mandate that "...the Civil Service Commission shall establish automatic increases in such salary, based upon length of service, within the salary ranges established from time to time therefor, and such salary shall thereafter automatically be increased accordingly, unless the head of the [employer] department and the Civil Service Commission shall agree that the service record of the holder of such

> office, position or employment does not warrant any such increase in salary." N.J.S.A. 52:14-15.28; and
>
> (3) Defining an anniversary date of employment for unit employees as "...the biweekly pay period in which an employee is eligible, if warranted by performance and place in the salary range for a salary increase." N.J.A.C. 4A:3-4.5.

The State committed an unfair practice by unilaterally changing these expressly incorporated statutory and regulatory terms and conditions of employment under Article III of the NJSOA and NJLESA's 2011-2015 CNAs. It did so in several respects.

First, it "amended, changed and modified" the State Compensation Plan applicable to NJSOA and NJLESA unit employees by discontinuing increment payments based on length of service and work performance. Under N.J.S.A. 11A:3-7, the State could not amend or change the State Compensation plan without a negotiated written agreement with the NJSOA and NJLESA (which was never obtained). The State admits in its Answer that NJSOA and NJLESA were paid salary increments in accordance with the State Compensation Plan and discontinued increment payments under that plan effective July 1, 2015. That unilateral change in the payment of increments was not based on an employee's work performance or length of service, as prescribed in N.J.S.A 11A:3-7(b) and N.J.A.C. 4A:3-4.5(a). The State and Unions could have negotiated language in Article III of their CNA that restricted or precluded the operation of these civil service requirements

upon expiration of their 2011-2015 CNAs (e.g., "Civil service law and rules shall be observed in administering this agreement except for those rules governing salary guide increments or state compensation plans" or "except the requirements under N.J.S.A. 11A:3-7 and N.J.S.A 52:14-15.28"). They did not. In unilaterally changing these incorporated terms, the State violated section 5.4a(5) of the Act.[20/] Ewing Tp.; Hudson Cty.; Ridgewood; Paramus; State (Dept. of Transportation).

Setting aside Article III and the civil service laws incorporated therein, NJSOA and NJLESA unit employees' receipt of increments was an "established term and condition of employment" that could not be unilaterally changed by the State. State of New Jersey, 12 NJPER 744; State and CWA, 7 NJPER 532. For decades, NJLESA unit employees received salary guide increments based on length of service and satisfactory work performance

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20/ Even if the NJSOA and NJLESA CNAs did not expressly incorporate civil service law, N.J.S.A. 52:14-15.28 and N.J.S.A. 11A:3-7 were effectively incorporated as terms and conditions of the parties' CNAs. Each statute "speaks in the imperative" and sets specific terms and conditions of employment while leaving no room for discretion by the employer in maintaining the status quo for salary guide increment payments based on length of service and work performance State Supervisory Employees' Ass'n, 78 N.J. at 80; Englewood Bd. of Ed. 64 N.J. at 6-7 (Noting that a CNA cannot contravene ". . . specific statutes or regulations which expressly set particular terms and conditions of employment"). Whatever modifications to the salary guide structures the parties negotiate, the parties are required under these civil service laws to maintain those structures during collective negotiations. That includes salary guide movement and the payment of increments.

regardless of whether those employees were subject to a current or expired CNA. (Moran Cert., Paragraph 13; Toolen Cert., Paragraphs 16, 17, 26 and 27). And from at least July 1, 2011 through June 30, 2015, NJSOA unit employees received salary guide increments based on length of service and satisfactory work performance. As the Commission held in State of New Jersey, even if NJSOA and NJLESA unit employees were not subject to civil service laws, their receipt of increments was an established term and condition of employment that could not be unilaterally changed during negotiations for a successor agreement. By freezing increments effective July 1, 2015, the State violated the Act by unilaterally altering established, incorporated terms and conditions of employment without negotiations with the NJSOA and NJLESA.

The State argues the Commission in Toolen rejected these arguments. (Page 24 of State's 8/17/18 Brief). I disagree. The Commission did not discuss or apply the incorporation doctrine in Toolen. It also did not discuss whether the parties agreed in their CNA to comply with these civil service statutes governing salary increment payments. On the contrary, the Commission noted that its decision in Toolen did not preclude the Unions from litigating the question of whether increments should have been paid to unit employees under the Act or their CNAs. 44 NJPER at 303. Instead, the Commission held in Toolen that N.J.S.A. 11A:3-

7 and N.J.S.A. 52:14-15.28 should not be interpreted as precluding the parties from negotiating modifications to their salary guide increment payments during the hiatus period between an expired and successor CNA. Id. Nor should the statutes be interpreted as mandating increment payments *regardless* of whether the parties agreed to freeze or modify increment payments during the hiatus period. However, under Article III and the incorporation doctrine, the Unions and State agreed to payment of increments during this period. As indicated previously and consistent with Toolen, the State and Unions could have negotiated and agreed to contract language that modified or froze increments upon expiration of the 2011-2015 CNAs. They did not. Contrary to the State's contention, there is nothing inconsistent between the holding in Toolen and the arguments based on the incorporation doctrine.

Katz and the Duty to Negotiate

Apart from liability under the incorporation doctrine, the State breached its statutory duty to negotiate by unilaterally changing a mandatorily negotiable term and condition of employment: the payment of salary guide increments. Atlantic County, 230 N.J. at 253-254. The two primary sources for this duty are NLRB v. Katz, 369 U.S. 736 (1962) (hereinafter referred to as "Katz") and N.J.S.A. 34:13A-5.3 (hereinafter referred to as "Section 5.3").

Section 5.3 contains a "rule similar to that of Katz." Galloway Tp. Bd. of Ed. v. Galloway Tp. Educ. Ass'n, 78 N.J. 25, 48 (1978). The rule is as follows: "Proposed new rules or modification of existing rules governing working conditions shall be negotiated with the majority representative before they are established." N.J.S.A. 34:13a-5.3; 78 N.J. at 48. This rule in Section 5.3 has been interpreted by the Supreme Court as "more expansive than the *Katz* rule" in that "it applies at all times" and not just during the period of negotiations for a new CNA. 78 N.J. at 48-49 (fn. 9).

The State argues that the Commission should adopt the Commission's decision in Atlantic County[21/] and reject the dynamic status quo doctrine. (page 17 of State's 8/17/18 Brief). I disagree. This section, and the next two sections of analysis are intended to support three conclusions:

> (1) The Commission decision in Atlantic County conflicts with Katz and Section 5.3;
>
> (2) Under Katz and the courts', NLRB's and Commission's application of Katz, there is only one "status quo" doctrine, and it is neither "dynamic" or "static";

21/ See Atlantic County, P.E.R.C. No. 2014-40, 40 NJPER 285 (¶109 2013). The State also argues the Commission is not bound by the Appellate Division's decision in Atlantic County because our Supreme Court declined to address whether the Appellate Division's analysis of the dynamic status quo doctrine was correct. (Pages 19-20 of State's 8/17/18 Brief). This argument will be addressed in a separate section.

> (3) The State is required under Katz and Section 5.3 to pay salary guide increments to NJSOA and NJLESA unit employees after their CNAs expire.

To arrive at these conclusions, it is necessary to discuss the historical underpinnings of the "status quo" doctrine.[22/] That analysis begins with Katz.

The "experience and adjudications" under the National Labor Relations Act (NLRA) [23/] are an appropriate guide for interpreting our Act. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Educational Secretaries, 78 N.J. 1, 9 (1978). This is particularly true with respect to the Act's unfair practice provisions, since these provisions ". . . parallel the unfair labor practice provisions of the [NLRA] in many respects." Id.; In Re Bridgewater Tp., 95 N.J. 235, 240 (1984) (Supreme Court explained that the ". . . language and intent of the Act and the

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22/ In this section, we will analyze Katz, the unilateral change doctrine, and the cases discussing Katz. The next section will provide a comparative analysis of the principles derived from Katz versus those principles articulated by the Commission in the Atlantic County decision. Finally, in the section after this comparative analysis, I will apply Katz and the unilateral change doctrine to the facts in this case to determine whether the State violated the Act in unilaterally discontinuing salary guide increment payments upon expiration of the 2011-2015 CNAs with the NJSOA and NJLESA.

23/ Sometimes the NLRA is referred to as the Labor Management Relations Act (LMRA). The LMRA, also known as the "Taft-Hartley Act", was a series of amendments to the NLRA enacted in 1947. The NLRA was enacted in 1935. When referring to the NLRA in this decision, I mean the NLRA, as amended (which includes the LMRA amendments).

[NLRA] are substantially the same")[24/]. And our Supreme Court has noted the ". . . settled principle of private sector labor law under the NLRA" that an "employer's unilateral alteration of the prevailing terms and conditions of employment during the course of collective bargaining concerning the affected conditions constitutes an unlawful refusal to bargain, since such unilateral action is a circumvention of the statutory duty to bargain." 78 N.J. at 48. That principle began with Katz and is known as the "unilateral change doctrine." Honeywell International Inc. v. NLRB, 253 F.3d 125,131 (D.C. Cir. 2001).

The unilateral change doctrine is "premised on a statutory right" and is ". . . an inviolate principle of collective bargaining."[25/] Honeywell, 253 F.3d at 131. The doctrine

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24/ However, ". . . federal precedents concerning the scope of collective bargaining in the private sector are of little value in determining the permissible scope of collective bargaining in public employment labor relations in New Jersey." 95 N.J. at 241 (fn. 2). Here, however, there is no dispute that the payment of salary guide increments during the hiatus period between an expired and successor CNA is mandatorily negotiable. Atlantic County, 230 N.J. at 253-254.

25/ The NLRB has recognized certain "categorical exceptions" to the doctrine based on federal statutes governing certain subjects. Litton, 501 U.S. at 199; Southwestern Steel & Supply v. NLRB, 806 F.2d 1111, 1113-1114. These subjects include union dues check off and agency shop contractual provisions which, by federal statute, are only permitted if specified by the express terms of a CNA. Id. Moreover, in recognition of private sector employees' statutory right to strike under the NLRA, a "no strike" provision does not survive expiration of a CNA under the doctrine. Id.

(continued...)

enforces the statutory right of a majority representative, on behalf of unit employees, to negotiate working conditions with an employer before an employer establishes or changes those working conditions. Id.; accord Middletown Tp. and Middletown PBA Local 124, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997), aff'd 334

25/ (...continued)
However, the payment of annual salary guide increments or wage increases after a CNA expires *is* subject to the doctrine. Daily News of L.A. v. NLRB, 73 F.3d 406, 412-13 (D.C. Cir. 1993)(Employer required under *Katz* and unilateral change doctrine to continue to maintain merit-based salary increases even though the increases were discretionary as to the precise amount); Wilkes-Barre Hospital Co. v. NLRB, 857 F.3d 364, 374 (D.C. Cir. 2017) (Employer hospital required under unilateral change doctrine to continue paying salary increases to nurses in bargaining unit after their CBA expired and until the parties reached impasse or a new agreement); Prime Healthcare Services v. NLRB, 890 F.3d 286, 294 (D.C. Cir. 2018) ("In the absence of language in the collective bargaining agreement providing otherwise, anniversary step [salary] increases are part of the status quo and continue post-expiration"). And, the categorical exceptions to the doctrine reinforce a general principle that I will elaborate on later in this decision: i.e., the Legislature, not the Commission, can decide whether terms and conditions of employment do not survive CNA expiration and are not subject to the unilateral change doctrine. The Legislature could have enacted a statute prohibiting the payment of salary guide increments following the expiration of a CNA and preempted negotiations on that subject. See, e.g. Neptune Bd. of Ed. v. Neptune Education Ass'n, 144 N.J. 16 (1996) (Supreme Court holds that an education statute preempts negotiations over the payment of salary increments upon expiration of a three year CNA with a teachers' union). It did not. Salary increments, like other mandatorily negotiable terms and conditions of employment, are subject to the unilateral change doctrine until the Legislature directs otherwise. That principle also advances the statutory policy behind requiring negotiations over working conditions before they are established or changed by an employer. N.J.S.A. 34:13A-5.3.

N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000).[26/] An employer is prohibited under the doctrine from changing mandatorily negotiable working conditions unless the union waives the statutory right to negotiate, the employer and union have reached agreement on the subject, or the union and employer reach impasse in negotiations.[27/] Id., Local Joint Executive Bd. of Las Vegas v. NLRB, 540 F.3d 1072, 1078-1079 (9th Cir. 2008). In the 57 years since Katz, these principles have been applied to wage and salary structures established by contract and/or past practice.[28/]

26/ The NLRB, D.C. Circuit, and U.S. Supreme Court have also noted that the "Board [NLRB] has taken the position that it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations." Wilkes-Barre Hospital v. NLRB, 857 F.3d 364, 373 (D.C. Cir. 2017); quoting Litton, 501 U.S. at 198.

27/ "Impasse" is defined as the ". . . point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless. . . " Laborers Health, 484 U.S. at 543 (fn. 5). After impasse, a private sector employer can unilaterally change a term and condition of employment. However, in the case of New Jersey police and firefighters, "impasse" does not justify an employer's unilateral change to terms and conditions of employment. N.J.S.A. 34:13A-21. Instead, the parties proceed to interest arbitration, where an employer is under a statutory obligation to maintain terms and conditions of employment until the interest arbitration process is resolved. Id.

28/ See NLRB v. Dothan Eagle, Inc., 434 F.2d 93 (5th Cir. 1970) (Employer's unilateral decision to discontinue bi-annual wage increases during collective bargaining violated *Katz* and Section 8(a)(5) of the NLRA); NLRB v. United Aircraft

(continued...)

A waiver of a statutory right under the NLRA or Act must be "clear and unmistakable." Metro Edison Co. v. NLRB, 460 U.S. 693, 707-708 (1983) (Supreme Court rejects argument that a union contractually waived its right to strike under NLRA and articulated the general proposition that the Court ". . . will not infer from a general contractual provision that the parties

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28/ (...continued)
Corp., 490 F.2d 1105 (2nd Cir. 1973) (Employer's unilateral decision to withhold promised wage increase during collective bargaining violated *Katz* and Section 8(a)(5) of NLRA); NLRB v. Hendel Manufacturing Co., 523 F.2d 133 (2nd Cir. 1975) (Employer's unilateral decision to suspend established patterns and practices for compensating unit employees violated the unilateral change doctrine in *Katz*); NLRB v. Allied Products Corp., 548 F.2d 644, 652-53 (6th Cir. 1977) (Court explains that the NLRA is violated by . . . a unilateral change in the existing wage structure whether that change be an increase or the denial of a scheduled wage increase" and that an employer violated *Katz* and Section 8(a)(5) by unilaterally discontinuing the payment of merit-based pay increases ". . . even though it offered to discuss with the union the re-institution of the merit increases" after discontinuance); Eastern Maine Medical Center v. NLRB, 658 F.2d 1 (1st Cir. 1981)(Employer violated *Katz* and section 8(a)(5) by unilaterally discontinuing practice of granting wage increases following periodic evaluations); Daily News of L.A. v. NLRB, 73 F.3d 406, 412-13 (D.C. Cir. 1993) (Employer required under *Katz* and unilateral change doctrine to continue to maintain merit-based salary increases upon expiration of a CBA even though the increases were discretionary as to the precise amount); Wilkes-Barre Hospital Co. v. NLRB, 857 F.3d 364, 374 (D.C. Cir. 2017) (Employer hospital required under unilateral change doctrine to continue paying salary increases to nurses in bargaining unit after their CBA expired and until the parties reached impasse or a new agreement); Prime Healthcare Services v. NLRB, 890 F.3d 286, 294 (D.C. Cir. 2018) ("In the absence of language in the collective bargaining agreement providing otherwise, anniversary step [salary] increases are part of the status quo and continue post-expiration").

intended to waive a statutorily protected right unless the undertaking is explicitly stated" or, in other words, the waiver is "clear and unmistakable."); Local Joint Executive Board of Las Vegas v. NLRB, 540 F.3d 1072, 1079 (9th Cir. 2008) (Court explains that the "standard for waiving statutory rights is high" and that a contractual waiver of a statutory right must be "explicitly stated, clear and unmistakable"); Wilkes-Barre Hospital v. NLRB, 857 F.3d 364, 377 (D.C. Cir. 2017) (Union did not waive the statutory right under NLRA to negotiate and receive salary increases based on years of service upon expiration of a CBA even though CBA stated increases would be paid "during the term" of the CBA); accord Red Bank Regional Educ. Ass'n v. Red Bank Regional Bd. of Ed., 78 N.J. 122, 140 (1978) (A contractual waiver of a statutory right ". . . must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively.")

For over a half century, the NLRB and courts applied the "clear and unmistakable" waiver standard ". . . to all cases arising under Section 8(a)(5)[29/] where an employer has asserted that a contractual provision authorizes it to act unilaterally with respect to a term and condition of employment . . ." Joint

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29/ Section 8(a)(5) refers to 29 U.S.C. §158(a)(5) of the NLRA, which provides that an employer commits an unfair labor practice when it refuses to bargain collectively with a majority representative over wages, hours and other terms and conditions of employment.

Executive Board, 540 F.3d at 1079; quoting Provena Hospitals, 350 NLRB 808, 810-812 (2007); Honeywell; Wilkes-Barre. This waiver standard ". . . requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the *statutory* duty to bargain that would otherwise apply." 540 F.3d at 1079-1080. Under the NLRA, this waiver standard requires explicit language in an agreement terminating a majority representative's statutory right to negotiate salary increments or increases before an employer can unilaterally discontinue payment of scheduled salary increments and/or increases. Daily News, Honeywell, Wilkes-Barre, Prime Healthcare. In other words, "only where the [contractual] provision states that the benefit [salary increments] will 'terminate' has the Board [NLRB] found a clear and unmistakable waiver." 540 F.3d at 1080.

The unilateral change doctrine protects the integrity of the collective bargaining process. NLRB v. C&C Plywood Corp., 385 U.S. 421, 430 (1967) (Supreme Court notes the NLRA's ". . . clear emphasis upon the protection of free collective bargaining" and finding the employer's unilateral implementation of a premium payment plan to unit employees was an unfair labor practice); Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 544 (1988) (fn. 6); Honeywell

International, 253 F.3d at 131. It's purpose is to prevent unions and employers from interfering with the "give and take" process that is essential to collective bargaining. Id., Metro Edison Co. v. NLRB, 460 U.S. 693, 704 (1983) (Supreme Court explains that the "entire process of collective bargaining is structured and regulated on the assumption that the parties proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest" and that "Congress has sought to ensure the integrity of this process by preventing both management and labor's representatives from being coerced in the performance of their official duties"); Katz, 369 U.S. 736, 744-746. In describing the rationale for the unilateral change doctrine in Katz, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) wrote:

> The rationale for the *Katz* rule is simple:
>
> > A unilateral change not only violates the plain requirement that the parties bargain over "wages, hours, and other terms and conditions", but also **injures the process of collective bargaining itself**. Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent. [253 F.3d at 131, quoting NLRB v. McClatchy Newspapers, 964 F.2d 1153, 1162 (D.C. Cir. 1992) (emphasis added)]

The "give and take" process essential to collective negotiations allows management and labor to voice their concerns

about working conditions and managerial policies in a way that is more conducive to labor peace and harmony than unilateral action without dialogue. In Re Local 195, IFPTE v. State of New Jersey, 88 N.J. 393, 409 (1982) (Noting that discussion between employer and union instead of unilateral action "would undoubtedly promote labor peace and harmony, a major goal of the New Jersey Employer-Employee Relations Act"). And the New Jersey Legislature has chosen collective negotiations as the method for achieving labor peace. N.J.S.A. 34:13A-5.3; N.J.S.A. 34:13A-5.12 ("The Legislature finds and declares that collective negotiations promotes labor stability in the public sector and enhances the delivery and avoids the disruption of public services."); Robbinsville Tp. Bd. of Ed. v. Washington Tp. Educ. Ass'n, 227 N.J. 192, 204 (2016) (Supreme Court explained that "the Legislature and this Court have, time and again, emphasized the value of collective negotiated agreements in our society" and that the "Legislature enacted the EERA [Employer-Employee Relations Act] to serve the interests of New Jersey citizens by preventing labor disputes through such agreements" and noting the "wisdom of pursuing discussion between public employers and employees which promotes labor peace and harmony"). These general principles inform a discussion as to whether an employer can unilaterally freeze salary guide increment payments upon expiration of a CNA.

In Katz, the United States Supreme Court held that an employer violated the duty to negotiate under the NLRA by unilaterally changing three conditions of employment even though the employer acted "earnestly and in all good faith" in bargaining for a first contract. Katz, 369 U.S. at 742-743. A group of technical employees at a steel fabrication plant wanted to organize. A union filed a representation petition with the NLRB on their behalf and the NLRB certified the union as their majority representative on July 5, 1956. 369 U.S. at 739. Between August, 1956 and May, 1957, the union and employer engaged in collective bargaining for a first contract during ten separate negotiations sessions and four mediation sessions. 369 U.S. at 739-740. During this period, the NLRB and the United States' Court of Appeals for the Second Circuit found that the employer's conduct during negotiations and mediation did not manifest bad faith bargaining. 369 U.S. at 737. However, the employer implemented three unilateral changes to mandatorily negotiable terms and conditions of employment prior to reaching an impasse in bargaining with the union. Those changes included: (1) granting unit employees merit pay increases in October 1956 and January 1957; (2) a change in sick-leave policy in March 1957; and (3) the unilateral implementation of a system of automatic wage increases during April 1957. 369 U.S. at 740-741.

The NLRB found these unilateral changes violated section 8(a)(5) of the NLRA.[30/] 369 U.S. at 737. The Second Circuit disagreed and wrote:

> We are of the opinion that the unilateral acts here complained of, occurring as they did during the negotiating of a collective bargaining agreement, do not *per se* constitute a refusal to bargain collectively and *per se* are not violative of [section] 8(a)(5). While the subject is not generally free from doubt, it is our conclusion that in the posture of this case a necessary requisite of a Section 8(a)(5) violation is a finding that the employer failed to bargain in good faith. [369 U.S. at 738; quoting 289 F.2d at 702-703].

The U.S. Supreme Court rejected this rationale and reversed the Second Circuit's decision. 369 U.S. at 738-739.

In the Supreme Court's view, a unilateral change to a mandatorily negotiable term and condition of employment *is*, *per se*, a violation of the NLRA. 369 U.S. at 742-743. The Court explained that the statutory duty to negotiate under the NLRA necessarily prohibits unilateral changes to conditions of employment. In analyzing the duty to negotiate under the NLRA, the Supreme Court delineated bedrock principles of labor relations that would serve as a guidepost for the NLRB, the courts and the Commission for more than a half-century:

30/ Section 8(a)(5) is the federal private sector analogue to N.J.S.A. 34:13A-5.4(a)(5).

> The duty to 'bargain collectively' enjoined by [Section] 8(a)(5) is defined by [Section] 8(d) as the duty to 'meet...and confer in good faith with respect to wages, hours and other terms and conditions of employment. Clearly, the duty thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate *in fact* – 'to meet and confer'–about any of the mandatory subjects. A refusal to negotiate *in fact* as to any subject which is within [Section] 8(d), and about which the union seeks to negotiate, violates [Section] 8(a)(5) though the employer has every desire to reach agreement with the union upon an overall collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of [Section] 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of [Section] 8(a)(5) much as does a flat refusal. [369 U.S. at 742-744.]

The Supreme Court thus found that the Second Circuit erred in concluding that a finding of subjective bad faith bargaining was a pre-requisite for finding an employer refused to bargain under Section 8(a)(5) of the NLRA. 369 U.S. at 747-748. In other words, unilateral action, by itself, can violate Section 8(a)(5).

The Court in Katz went on to explain "the policy and practical considerations" supporting the unilateral change doctrine. 369 U.S. at 744. It did so by analyzing the unilateral changes implemented by the employer. 369 U.S. at 744-746. On the sick leave change, the Court wrote:

> A sick leave plan had been in effect since May 1956, under which employees were allowed ten paid sick leave days annually and could

> accumulate half the unused days, or up to five days each year. Changes in the plan were sought and proposals and counterproposals had come up at three bargaining conferences. In March 1957, the company, without first notifying or consulting the union, announced changes in the plan, which reduced from ten to five the number of paid sick-leave days per year, but allowed accumulation of twice the unused days, thus increasing to ten the number of days which might be carried over. This action plainly frustrated the statutory objective of establishing working conditions through bargaining. Some employees might view the change to be a diminution of benefits. Others, more interested in accumulating sick leave days, might regard the change as an improvement. If one view or the other clearly prevailed among the employees, the unilateral action might well mean that the employer had either uselessly dissipated trading material or aggravated the sick leave issue. On the other hand, if the employees were more evenly divided on the merits of the company's changes, the union negotiators, beset by conflicting factions, might be led to adopt a protective vagueness on the issue of sick leave, which also would inhibit the useful discussion contemplated by Congress in imposing the specific obligation to bargain collectively. [369 U.S. at 744]

The Court here is describing how unilateral action by the employer concerning a mandatorily negotiable subject has a destabilizing and disruptive impact on the collective bargaining process that harms *both* the union and employer. See also Middletown Tp., 24 NJPER at 30, aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000) (hereinafter referred to as "Middletown") (Supreme Court and Appellate Division affirm

Commission decision in which Commission held that "changes in employment conditions must be addressed through the collective negotiations process" and that "unilateral action is destabilizing and contrary to the express requirements of the Act"). The union's ability to advocate for negotiations positions or proposals that the unit, as a collective body, seeks to achieve is hampered when the status quo is unilaterally changed by the employer. From the employer's perspective, a unilateral change may create unnecessary dissension among unit members and/or needlessly give up to the union more consideration in a bargain than was necessary to achieve labor peace. Either way, the statutory objective memorialized in the Act to achieve labor peace through a collective negotiations process is thwarted.

A second policy consideration undergirding the unilateral change doctrine concerns the negative impact unilateral changes can have on the union's status as an effective bargaining agent for its members. 369 U.S. at 745. Again, the Court illustrates this point by analyzing one of the three unilateral changes at issue in the case. At an April 4, 1957 bargaining session, the employer offered and the union rejected a salary increase proposal. 369 U.S. at 744-745. Soon after that session, the employer unilaterally implemented a system of automatic wage increases to union members that was ". . . considerably more

generous than that which had shortly theretofore been offered to and rejected by the union." 369 U.S. at 745. Such action, the Court concluded, ". . . conclusively manifested bad faith in negotiations." Id. The Court went on to explain:

> An employer is not required to lead with his best offer; he is free to bargain. But even after an impasse is reached he has no license to grant wage increases greater than any he has ever offered the union at the bargaining table, for such action is necessarily inconsistent with a sincere desire to conclude an agreement with the union. [369 U.S. at 745]

That type of unilateral action creates, among union members, the perception that the union is ineffectual because the union cannot secure in collective bargaining what the employer decided unilaterally to bestow on its members. This impedes the ability of the union to be an effective advocate for its members and conflicts with the statutory objective of achieving labor peace through collective bargaining.

The Court's analysis of the third unilateral change introduces the concept of the "status quo." To determine whether an employer unilaterally changed conditions of employment, one must first answer the question: changed from what? What were the conditions of employment before the change, and how do we define "conditions of employment" in deciding whether there was a change? Defining the status quo would become the central inquiry in applying the unilateral change doctrine.

The third unilateral change in Katz involved merit pay increases. 369 U.S. at 745. The union and employer discussed merit pay increases at three meetings in 1956, but no final agreement was reached on the subject. Id. At 745-746. Then, in January 1957, the employer unilaterally granted merit pay increases to 20 of the approximately 50 employees in the union's bargaining unit. Id. at 746. The Court held this unilateral change violated the NLRA and explained:

> This [unilateral] action too must be viewed as tantamount to an outright refusal to negotiate on that subject, and therefore as a violation of [Section] 8(a)(5), unless the fact that the January raises were in line with the company's long-standing practice of granting quarterly or semiannual merit reviews – in effect, were a mere continuation of the status quo – differentiates them from the wage increases and the changes in the sick-leave plan. We do not think it does. Whatever might be the case as to so-called "merit raises" which are in fact simply automatic increases to which the employer has already committed himself, the raises here in question were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases. [369 U.S. at 746-747]

The Court here is making an important analytical distinction between two types of compensation increases. One type of increase is in some sense "automatic" and consistent with a

pattern, procedure or practice set by the parties' CNA or through the parties' past practice. The second type of increase is largely discretionary and not consistent with any discernible procedure or past practice. In the decades following Katz, this analytical distinction would be applied by the courts and the Commission in deciding whether salary increases were or were not required under the unilateral change doctrine. As explained in further detail, *infra*, if the increases were "automatic" they could not be altered under the unilateral change doctrine, whereas if they were largely discretionary, increases were not required. Ocean County, P.E.R.C. No. 86-107, 12 NJPER 341, 347 (¶17130 1986) (Commission, citing Katz and Galloway, explains that to determine whether a refusal to pay a salary increment is a violation of the statutory duty to negotiate ". . . depends upon whether the payment of the increment is automatic, scheduled and required to preserve the status quo or whether such payment is discretionary and a matter to be resolved in negotiations.")

In summary, the Court in Katz adopted the following conclusion and rationale in support of its interpretation of Section 8(a)(5) of the NLRA:

> Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be

> justified by any reason of substance. It follows that the Board may hold such unilateral action to be an unfair labor practice in violation of [Section] 8(a)(5), without also finding the employer guilty of over-all subjective bad faith. [369 U.S. at 747-748]

In Katz, the parties were without a contract and the Court applied the unilateral change doctrine to then-existing practices governing terms and conditions of employment. Litton Financial, 501 U.S. at 198. How would the unilateral change doctrine apply to terms and conditions of employment set by an expired collective negotiations agreement (CNA)? An employer is obligated to honor the terms and conditions of an expired CNA during collective negotiations for a successor CNA. Laborers Health and Welfare Trust, 484 U.S. at 544 (fn. 6) (The U.S. Supreme Court, citing Katz, holds that "an employer's failure to honor the terms and conditions of an expired collective bargaining agreement pending negotiations on a new agreement constitutes bad faith bargaining in breach of sections 8(a)(1), 8(a)(5) and 8(d) of the National Labor Relations Act); Litton Financial, 501 U.S. 190, 198, 203 (U.S. Supreme Court explains that the unilateral change doctrine under Katz ". . . has been extended as well to cases where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed" and the duty not to change terms and conditions of employment after a CNA expired derives from the statutory duty to

bargain in good faith); Wilkes-Barre, 857 F.3d at 374 ("[T]he unilateral change doctrine requires employers to honor the terms and conditions of an expired collective bargaining agreement"); accord Atlantic County, 230 N.J. at 252 (New Jersey Supreme Court notes that "employers are barred from unilaterally altering . . . mandatory bargaining topics, whether established by expired contract or by past practice, without first bargaining to impasse."). The status quo under an expired CNA is defined by the terms of that CNA. Wilkes-Barre, 857 F.3d at 374; Intermountain Rural Elec. Ass'n v. NLRB, 984 F.2d 1562, 1567-69 (10th Cir. 1993) (Contract language of an expired CNA defines the status quo); Prime Healthcare, 890 F.3d at 294 (Terms of an expired CNA defines status quo under unilateral change doctrine); Finley Hospital v. NLRB, 827 F.3d 720, 724 (8th Cir. 2016), quoting Litton, 501 U.S. at 206 and Derrico v. Sheehan Emergency Hospital, 844 F.2d 22, 25-27 (2nd Cir. 1988) (The Eighth Circuit explains that "terms and conditions [of an expired CNA] that continue as part of the status quo under the unilateral change doctrine are no longer agreed-upon terms, they are terms imposed by law" and that while "an expired contract has by its own terms released all parties from their respective contractual obligations", the "rights and duties under the expired agreement retain legal significance because they define the status quo for purposes of the prohibition on unilateral changes.")

An expired CNA's salary or wage provisions continue in effect during collective negotiations if they are "automatic" in the sense they are paid to unit employees based on length of service and/or merit based criteria in a regular, periodic manner. Wilkes-Barre, Prime Healthcare; see also Daily News of L.A. v. NLRB, 73 F.3d 406 (D.C. Cir. 1996) (Court held that three year practice of awarding annual, merit-based salary increases must be preserved during collective negotiations for a first contract). If the increases, however, are not based on any criteria linked to an employee's length of service or periodic evaluations, but are instead largely discretionary and not consistent with any pattern, practice or procedure, then the increases are not required under the doctrine. Advanced Life Systems v. NLRB, 898 F.3d 38 (D.C. Cir. 2018); Finley Hospital v. NLRB, 827 F.3d 720 (8th Cir. 2016). However, salary guide payments or structures that permit some degree of discretion by the employer as to the amount or eligibility for a salary increase are subject to the doctrine and must be preserved during collective negotiations. Daily News; Eastern Maine Medical Center v. NLRB, 658 F.2d 1 (1st Cir. 1981) (The Court notes that "indefiniteness" and a "flavor of discretion" as to the amount of a wage increase does not prevent the practice of periodic evaluations of employees for wage increases from becoming a

condition of employment subject to the unilateral change doctrine).

Regardless of whether or not the doctrine requires an increase in salary after a CNA expires, its purpose is to prohibit changes to existing salary and wage structures until the parties have negotiated in good faith over these changes. As the D.C. Circuit and NLRB have explained:

> [I]t makes absolutely no difference under *Katz* whether the change at issue adds to or subtracts from employees' wages, or whether it institutes a new employment policy or withdraws one that already exists. Thus, 'in some circumstances it will be an unfair labor practice to grant unilaterally a wage increase, and in other circumstances it will be an unfair labor practice to deny unilaterally a wage increase.' The Act [NLRA] is violated by a unilateral change in the existing wage structures whether that change be an increase or the denial of a scheduled increase. [73 F.3d at 411; quoting NLRB v. Allied Products Corp., 548 F.2d 644, 652-53 (6th Cir. 1977).

The best way to illustrate these points is to analyze cases where salary increases were and were not required under the unilateral change doctrine. The NLRB and Courts have developed workable standards in this area. And, moreover, the Commission applied these standards for decades until it reversed course in Atlantic County.

In Prime Healthcare, the D.C. Circuit held that an employer violated Section 8(a)(5) of the NLRA by unilaterally discontinuing the payment of annual step increases in wages after

a collective bargaining agreement (CBA) between the employer and a union expired. Prime Healthcare; 890 F.3d at 295. The union represented a bargaining unit of nurses who worked at hospitals owned by the employer. 890 F.3d at 290. The union and employer were parties to a collective bargaining agreement (CBA) extending from January 1, 2007 through March 31, 2011. Id. Under the CBA, the employer agreed to move employees to higher steps of a wage scale annually on the anniversary date of a unit employee's hire, subject to 9.25% cap on wage increases in any twelve month period. 890 F.3d at 291. The employer unilaterally discontinued anniversary step increases after the CBA expired and contended the step increases terminated with the expiration of the CBA. 890 F.3d at 293. The D.C. Circuit disagreed and held that "in the absence of language in the collective bargaining agreement providing otherwise, anniversary step increases are part of the status quo and continue post-expiration [of the CBA]." 890 F.3d at 294. The Court explained the parties would need to negotiate explicit language terminating unit employees' right to anniversary step increases upon CBA expiration to justify the employer's discontinuance of step increases. Id. As the Court elaborated:

> Where one of two wage increase provisions in a collective bargaining agreement includes explicit language making clear that it will not continue as part of the *status quo* post-expiration [of the CBA], and the other increase provision in the contract does not

> include such explicit language, the second [or latter] increase provision remains part of the *status quo* and is subject to the unilateral change doctrine. [890 F.3d at 294].

Similar to Prime Healthcare, the D.C. Circuit in Wilkes-Barre held that an employer violated Section 8(a)(5) of the NLRA by unilaterally discontinuing longevity-based wage increases after a CBA between the union and employer expired. Wilkes-Barre, 857 F.3d at 379. The union and employer were parties to a CBA extending from April 30, 2011 through April 30, 2013 ("2011 CBA"). 857 F.3d at 368. The CBA provided a wage schedule whereby unit employees would receive wage increases based on length of service on the January 27 after the unit employee's anniversary date. Id. According to the agreed-upon wage schedule, unit employees received wage increases at different experience levels, including after two, 3-4, 5-9, 10-14, 15-19, 20-24 and 25 plus years of experience with the employer. Id. The CBA also provided that these longevity-based wage increases would be paid "during the term of this agreement". Id. at 369.

The Court held, based on the CBA's terms, that the employer was obligated under the unilateral change doctrine to continue paying longevity-based wage increases to unit employees after the CBA's expiration and until the union and employer reached a lawful impasse in bargaining or reached a new agreement on longevity pay increases. 857 F.3d at 374. The Court also

rejected the employer's argument that the language "during the term of this agreement" was a contractual waiver of the statutory right of unit employees to continue to receive longevity-based increases during negotiations for a successor agreement. Id. at 378[31/]. The Court held that the duration clause did not constitute a "clear and unmistakable waiver." It explained:

> The Hospital [employer] fails to identify any express language in the 2011 CBA to support its waiver defense, arguing instead that the agreement's language does not affirmatively "point to an ongoing statutory obligation" to pay longevity-based increases. The Hospital's argument fails to consider that, pursuant to the unilateral change doctrine, wages rates established in a collective bargaining agreement continue in effect "even after an employer is released from any contractual obligations." Moreover...the 2011 CBA's silence on the Hospital's statutory obligation to continue paying longevity-based increases after the agreement's expiration as part of the status quo is insufficient to establish waiver. While a contract duration clause that expressly authorizes the employer to terminate statutory obligations upon expiration is sufficient to establish waiver, the 2011 CBA does not contain such language. The durational clause in Appendix A [of the agreement] "makes it clear that the Union's *contractual* right to longevity

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31/ The Appellate Division and Commission have also rejected this argument. State of New Jersey, 12 NJPER at 745; Botany Mills Inc. v. Textile Workers Union, 50 N.J.Super. 18, 29 (App. Div. 1958)(Appellate Division explained that it is ". . . commonplace that rights to which employees are entitled under a collective bargaining agreement may not actually fructify in enjoyment until after the expiration of a given contract period with reference to which they may be regarded as having been earned.")

> based increases ended on April 30, 2013, but it is "silent on the Union's post-expiration *statutory* rights. Accordingly, the durational clause "in no way evinces a clear and unmistakable waiver by the Union." [857 F.3d at 378, internal citations omitted; see also Atlantic County, 230 N.J. at 256[32/]]

The Court further explained that a standard duration clause in a CBA, without more ". . . does not vitiate the Union's *statutory* claim to continued longevity-based increases", in that the "unilateral change doctrine presupposes the end of a collective bargaining agreement." 857 F.3d at 377; Honeywell, 253 F.3d at 128[33/]. It is precisely when a CNA *expires* or is *silent* on a

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32/ The Supreme Court in Atlantic County noted that the employer and union in that case could have agreed to "clear contract language" that provided increments would not be automatic and would not be paid after a CNA expires. To illustrate this point, the Court discussed a 2012-2015 CNA between Ho-Ho-Kus Board of Education and the Ho-Ho-Kus Education Association that expressly provided that "increments shall not be paid unless and until the parties agree to a successor contract." 230 N.J. at 256. That suggestion is consistent with the waiver principles discussed in Middletown, Wilkes-Barre and Honeywell, i.e., explicit language in a CNA terminating a union's statutory right to negotiate a particular term and condition of employment (such as salary increments) is what is required under the unilateral change doctrine.

33/ In Honeywell, the D.C. Circuit reinforced this point and explained these principles derive from Katz and wrote:

> Under *Katz*, an expiration date in a standard contract duration clause cannot defeat the unilateral change doctrine. Indeed, as the Court made clear in *Litton*, the *Katz* rule often presupposes the end of a collective bargaining agreement and guarantees the continuation of existing benefits *as a matter of law*. To hold that a general contract duration clause "covers" and vitiates

(continued...)

subject that the statutory duty to negotiate that subject and abide by the unilateral change doctrine during negotiations is essential. Honeywell; Middletown.

The Court in Wilkes-Barre also rejected the employer's argument that the post-expiration status quo mandated the cessation of longevity-based wage increases until a new agreement is reached. 857 F.3d at 374. In other words, the employer argued that the status quo was static and required freezing employees' salaries on the date the CBA expired. Id. The Court rejected this notion of a static status quo and wrote:

> In essence, the Hospital [employer] seeks to define the status quo by taking a snapshot of each individual nurse's [unit employee's] pay rate at the moment the 2011 CBA expired. **But the terms of the expired agreement define the post-expiration status quo**, see e.g. Litton, 501 U.S. at 206; Sw. Steel, 806 F.2d at 1113, **not each individual employee's circumstance at the time of expiration...**[857 F.3d at 374, emphasis added]

The Court here is providing a critical insight about the concept of the status quo as it relates to an expired CNA that provides for wage or salary guide movement. And that insight is this: under the unilateral change doctrine, there is only one "status quo" under an expired CNA; it is neither "dynamic" or

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33/ (...continued)
a Union's statutory claim to continued status quo benefits, would be to drain the unilateral change doctrine of any coherent meaning. [253 F.3d at 128]

"static," but instead defined by the terms of the expired CNA. (See Page 18 of State's 8/17/18 Brief). The terms, "dynamic" and "static" are misleading if they are understood to mean there can be "two status quos" under an expired CNA and the choice of which one applies is simply a matter of labor relations "policy." See Atlantic County, 40 NJPER at 288-289[34/]. Instead, the adjectives "dynamic" and "static" are descriptions of different salary terms in a CNA that define the status quo post-contract expiration. The status quo is "dynamic" if the terms of the CNA provide for salary guide movement based on length of service or some other fixed criteria. The status quo is "static" if the terms of the CNA freeze salary guide movement. See, e.g., the contract example given in Atlantic County, 230 N.J. at 256 of an agreement

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34/ There, the Commission characterized the "dynamic" and "static" status quo as separate doctrines it could choose, as a matter of labor relations policy, to adopt or reject. Specifically, the Commission wrote:

> Thus, after thirty years of experience, we find that the dynamic *status quo* no longer fulfills the needs of the parties in that it serves as a disincentive to the prompt settlement of labor disputes, and disserves rather than promotes prompt resolution of labor disputes. While public employers will continue to be bound by the strictures of maintenance of the *status quo*, that will be defined as "static" rather than a dynamic *status quo*. [40 NJPER at 288-289].

However, the Commission, under Katz, the unilateral change doctrine, and Section 5.3, is obligated to define the status quo based on the terms of the expired CNA.

that would freeze increments). The point is that the terms of the expired CNA, and not an abstract doctrine or labor relations policy, defines the status quo.

The dynamic status quo is not a labor relations policy or doctrine. The word "dynamic" does not appear anywhere in the Commission's or Supreme Court's decisions in Galloway. P.E.R.C. No. 76-32, 2 NJPER 186 (1976), rev'd 149 N.J. Super. 352 (App. Div. 1977), rev'd 78 N.J. 25 (1978). In Galloway, the Commission merely applied the unilateral change doctrine set forth in Katz. 78 N.J. at 50 (Supreme Court explains that the Commission's reasoning in Galloway "is consistent with *Katz*"). And, as explained in Katz, the unilateral change doctrine is grounded in the statutory duty to negotiate. They are two sides of the same coin.

Not all salary terms established by past practice or a CNA define the status quo under the unilateral change doctrine. Advanced Life; Finley Hospital. When a union and employer are negotiating a CNA for the first time without an existing contract, the general rule is that an employer ". . . may not make pay increases or award bonuses to represented employees without first negotiating their terms with the union." Advanced Life, 898 F.3d at 46. Unilateral implementation of a wage or salary structure before negotiating that structure with the union violates the duty to negotiate under Section 8(a)(5) and Section

5.3. Id., citing Katz, 369 U.S. at 743; N.J.S.A. 34:13A-5.3 (Statute provides that ***"Proposed new rules*** or modifications of existing rules governing working conditions ***shall be negotiated with the majority representative before they are established***.") (emphasis added). The exception to this rule exists where an employer has a "long standing practice" of awarding automatic pay increases at "fixed" and "regular intervals." Advanced Life, 898 F.3d at 46, quoting Katz, 369 U.S. at 746. If that salary practice exists, the employer is obligated under the NLRA and Act to continue implementing that wage or salary structure during negotiations for a first contract. Id.; Middletown. If, however, the salary or wage practices are irregular, discretionary and otherwise do not ". . . present a recognizable pattern establishing who will receive a raise, when it will occur, and how much the raise will be", then the employer is obligated to freeze unit employees' salaries or wages until it has negotiated a salary and wage structure with the union. Advanced Life, 898 F.3d at 46; citing Katz, 369 U.S. at 746-747

Some salary and wage terms in a CNA do not define the status quo under the unilateral change doctrine. If a salary or wage provision allows an employer to retain "total discretion" over how much of a pay increase a unit employee would receive, that provision would not define the status quo under an expired CNA. Advanced Life. Moreover, a CNA that provided for a one-

time bonus or salary increase does not create a new status quo under the unilateral change doctrine. Finley Hospital, 827 F.3d at 725 (Court held that a one-time 3% salary increase in a one year CNA did not define the status quo for negotiations of a successor CNA). However, "an employer with a past history of a merit [pay] increase program neither may discontinue that program nor continue to unilaterally exercise his discretion with respect to such increases." Finley Hospital, 827 F.3d at 725, quoting Litton Microwave Cooking Products v. NLRB, 949 F.2d 249, 252 (8th Cir. 1991). The employer is instead obligated to maintain the merit-based salary program during negotiations for a successor agreement. Id.

Beginning in 1975, the Commission adopted and applied the unilateral change doctrine in defining the status quo. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975), app. dismissed as moot App. Div. Dkt. No. A-8-75 (6/24/76), certif. denied 70 N.J. 150 (1976). In Piscataway, the first Commission decision to apply the doctrine, the Commission found that a board of education (board) violated the Act by unilaterally discontinuing hospitalization and medical insurance coverage for employees represented by the education association. 1 NJPER at 50. In 1973, the association and board entered into a CNA that, by its terms, expired on June 30, 1975. The CNA contained a contract clause which provided, at the Board's

expense, major medical and hospitalization insurance coverage to association unit employees. 1 NJPER at 49. By letter dated June 16, 1975, the board's business administrator notified unit employees that payments for insurance coverage would be discontinued upon expiration of the parties' CNA. Id.

The association filed a charge alleging the board's unilateral discontinuance of insurance coverage was ". . . a unilateral alteration of a term or condition of employment in violation of the statutory duty to negotiate in good faith. . . " under N.J.S.A. 34:13A-5.4(a)(5). 1 NJPER at 49. The board countered that the insurance coverage was a contractual provision that expired on June 30, 1975 and that ". . . although the Commission can require the parties to negotiate in good faith with respect to a successor agreement, it cannot require the continuation of an expired contractual obligation or require that the parties agree to the continuation of such obligation in the successor agreement." 1 NJPER at 49-50.

The Commission decided this dispute the same way the federal courts and NLRB did and would: apply Katz and the unilateral change doctrine by defining the status quo for negotiations according to the terms of the parties' expired CNA. Laborers Health Fund; Litton, Honeywell; Wilkes-Barre; Prime Healthcare. The Commission's analysis of this issue mirrored

that of any number of NLRB and judicial decisions applying Katz and the unilateral change doctrine:

> It is the generally accepted view in the both the public and private sectors that an employer is normally precluded from altering the status quo while engaging in collective negotiations, and that such an alteration constitutes an unlawful refusal to negotiate. We hereby adopt that view.[35/] The Respondent [board] misconstrues this approach as Commission enforcement (or imposition) of an expired contractual obligation. Such is not the case. Rather, the Commission is simply requiring the maintenance of those terms and conditions of employment in effect as of the commencement of the obligation to negotiate, which in this case relates to negotiations with respect to a successor agreement. [1 NJPER at 50.]

In 1976, soon after Piscataway was decided, the Commission in Galloway applied Piscataway and the unilateral change doctrine to a CNA clause providing for annual salary guide step increments based on years of service.[36/] Galloway Tp. Bd. of Ed., P.E.R.C.

35/ The Commission also noted in footnote 6 of its decision that this view ". . . is particularly compelling in New Jersey where, under the common-law and unaffected by the New Jersey Employer-Employee Relations Act, public employees may not engage in a strike." 1 NJPER at 50. I understand this to mean that in exchange for abdicating the right to strike (a right enjoyed by private sector employees), the Act should be interpreted to ensure even greater protections against changes to the status quo than afforded under the NLRA.

36/ At this time, the State of New Jersey was facing a "serious fiscal crisis" and the economy was "plagued by double-digit inflation." State of New Jersey and Council; E.D. No. 79, 1 NJPER 39, 40 (1975), aff'd, 141 N.J. Super. 470 (App. Div. 1976); Atlantic City v. Laezza, 80 N.J. 255, 270 (1979).

No. 76-32, 2 NJPER 186 (1976). There, a board of education and education association were parties to a CNA extending from July 1, 1974 through June 30, 1975. 2 NJPER at 186. The CNA expired on June 30, 2015. The expired CNA ". . . contained a salary schedule which included annual increments determined by teachers' years of service and degree status." Id. After the CNA expired, the board advised unit employees in September 1975 that they would not receive their increments for additional years of service during the pendency of negotiations for a successor agreement. Id.

The Commission held the board's discontinuance of salary guide increments during negotiations violated the statutory duty to negotiate under Section 5.3 and 5.4a (5). 2 NJPER at 187. The Commission reached this holding by applying the unilateral change doctrine and defining the status quo, just as it did in Piscataway, by the terms of the expired CNA. 2 NJPER at 186. Like Piscataway, the Commission in Galloway adopted the Katz rule that the unilateral alteration of terms and conditions of employment during the course of collective negotiations is an "illegal refusal to negotiate." Id.

The Commission went on to address the board's argument that by not paying increments, the board ". . . was maintaining the status quo exactly as it was in 1974-75 until negotiations resulted in a new agreement." 2 NJPER at 186. It would address

this contention in the same way the NLRB and federal courts addressed similar arguments by employers: by analyzing what terms and conditions of the CNA were in effect at the time the CNA expired, and *not* on the particular salary an individual employee earned at the time the CNA expired. Wilkes-Barre; 857 F.3d at 374. The Commission wrote:

> The salary schedule in effect in 1974-75 specified a particular salary step for each year of a teacher's service. It cannot be disputed that a teacher who worked in 1974-75 would have an additional year of service in September 1975 and would be entitled, pursuant to the salary schedule in effect at the expiration of the agreement, to an increment of one step from his or her 1974-75 salary. The unilateral determination of the Board not to pay any increments was a negation of that additional service and was thus an alteration of the status quo. Teachers were no longer being paid pursuant to that schedule. [2 NJPER at 186]

The Commission in Galloway would also identify similar "policy and practical considerations" to those discussed in Katz in support of the unilateral change doctrine and maintaining the status quo. See Katz, 369 U.S. at 744-746.[37/] In explaining the application of the unilateral change doctrine, the Commission wrote:

> The Commission is attempting to maintain 'those terms and conditions of employment in effect' regardless of whether those terms are derived from a contract or some other

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37/ See also the discussion of the holdings and rationale in Katz in this decision.

> sources [e.g., past practice, statutes, or regulations]. The status quo represents that situation which affords the least likelihood of disruption during the course of negotiations for the new contract. Because the status quo is predictable and constitutes the terms and conditions under which the parties have been operating, it presents an environment least likely to favor either party. [2 NJPER at 186-187]

The Commission here is restating the rationale in Katz and Honeywell in support of the unilateral change doctrine as a mechanism for "preserving the integrity of the collective bargaining process" and preventing coercive interference by either labor or management representatives in that process. Katz, 369 U.S. at 744-747; Honeywell, 253 F.3d at 131.

The Supreme Court in Galloway affirmed the Commission's decision in Galloway on the ground that N.J.S.A. 18A:29-4.1 compelled the payment of increments for the 1975-76 school year. 78 N.J. at 51. Significantly, however, the Court would emphasize the rules and principles derived from Katz in its discussion of the unilateral change doctrine and the "status quo", citing and referring to Katz six times in its decision. 78 N.J. at 48-51. Nowhere in its decision did the Court discuss or even suggest that there were "two status quos", one "static" and the other "dynamic", applicable to salary guide increments. Rather, the Court would emphasize the holdings in Katz in drawing the distinction between "automatic" and "discretionary" salary

increases for the purpose of defining the status quo after a CNA expires:

> In *Katz*, the Supreme Court distinguished between automatic and discretionary wage increases and held that discretionary increases during contract negotiations violated the employer's duty to bargain in good faith. Automatic increases are sanctioned because they do not represent actual changes in conditions of employment but continue the status quo in the sense that they perpetuate existing terms and conditions of employment. Because the employees expect these benefits and readily recognize them as established practice, the increases do not tend to subvert employee's support for their bargaining agent or disrupt the bargaining relationship. [78 N.J. at 50; quoting NLRB v. John Zink Co., 551 F.2d 799, 801 (10th Cir. 1977)][38/]

Guided by this analytical distinction between "automatic" versus "discretionary" salary increases, the Commission and courts would apply Katz and the unilateral change doctrine to expired CNAs and their salary structures. If the salary increases were "automatic" , they had to be paid during successor contract negotiations. Union Cty. Regional Bd. of Ed., P.E.R.C. No. 78-27, 4 NJPER 11 (¶4007 1978); Hudson County, P.E.R.C. No. 78-48, 4 NJPER 87 (¶4041 1978), aff'd NJPER Supp.2d 62 (¶44 App.

38/ Even if the Supreme Court's discussion of Katz and the unilateral change doctrine was dicta (a debatable point); the analysis is illustrative of the Court's understanding of what section 5.3 and the "status quo" meant. Surely, if the Court believed there could be "two status quos", one "dynamic" and the other "static" under Katz and section 5.3, they would have addressed that distinction in its decision. They did not.

Div. 1979); Camden Housing Authority, P.E.R.C. No. 88-5, 13 NJPER 639 (¶18239 1987); Ocean Cty., P.E.R.C. No. 2011-6, 36 NJPER 303, 305 (¶115 2010) (The Commission ". . . has long held that the payment of automatic increments after the expiration of a collective negotiations agreement and during the pendency of successor contract negotiations is required by the Act"). If the increases were discretionary, they did not have to be paid. Ocean Cty., P.E.R.C. No. 86-107, 12 NJPER 341, 347 (¶17130 1986); Hudson Cty. Sheriff, P.E.R.C. No. 93-56, 19 NJPER 64 (¶24029 1992); Bergen Cty., P.E.R.C. No. 97-124, 23 NJPER 297 (¶28136 1997). And the Supreme Court and Appellate Division in Middletown would affirm the Commission's application of the unilateral change doctrine to existing terms and conditions of employment not covered by a CNA. Middletown Tp. and Middletown PBA Local 124, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000).

This was well-settled law for over thirty years until the Commission's decision in Atlantic County.

Analysis of Commission Decision in Atlantic County

The Commission in 2013 declined to apply the unilateral change doctrine to a mandatorily negotiable working condition: salary increments. Atlantic County, 40 NJPER 285. Salary increments, like other forms of compensation, are mandatorily

negotiable. Englewood Bd. of Ed. v. Englewood Teachers' Ass'n, 64 N.J. 1, 6-7 (1973); Woodstown-Pilesgrove Bd. of Ed v. Woodstown-Pilesgrove Educ. Ass'n, 81 N.J. 582, 591 (1980); Atlantic County, 230 N.J. at 253-254. The Commission in Atlantic County held that an employer can unilaterally discontinue the payment of salary increments when a CNA expires.[39/] The Commission in Atlantic County offered these reasons for exempting salary increments – a mandatorily negotiable subject - from the legislative mandate in Section 5.3 to negotiate before changing them:

> (1) The Commission in Galloway "created" the dynamic status quo doctrine and can therefore modify or stop applying a Commission-created doctrine when circumstances warrant;
>
> (2) A "...post expiration requirement that employers continue to pay and fund a prior increment system creates myriad instabilities in the negotiations process";[40/]
>
> (3) Changes in economic conditions since Galloway and recent legislative changes

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39/ The Commission decision in Atlantic County was issued on December 19, 2013. Eight months later, on August 14, 2014, the Commission decided Bridgewater and held that the payment of salary guide increments after a CNA expires was not negotiable. P.E.R.C. No. 2015-11, 41 NJPER 107 (¶38 2014), rev'd 42 NJPER 433 (¶117 App. Div. 2016), certif. granted 227 N.J. 148, aff'd on other grounds 44 NJPER 39 (¶12 S.Ct. 2017), 230 N.J. 237 (2017). The Supreme Court in Atlantic County would reverse this determination. Thus, the Commission could not have relied on Bridgewater in deciding Atlantic County.

40/ 40 NJPER at 288.

> imposing a 2% tax levy cap and a cap on base salaries in interest arbitration awards justify overruling the Commission decision in Galloway; and
>
> (4) Galloway's definition of the status quo (characterized as the "dynamic status quo") with respect to increments "...no longer fulfills the needs of the parties in that it serves as a disincentive to the prompt settlement of labor disputes, and disserves rather than promotes the prompt resolution of labor disputes."[41/]

For these reasons, the Commission held that "while public employers will continue to be bound by the strictures of maintenance of the *status quo*, that will be defined as "static" rather than a dynamic *status quo*." 40 NJPER at 289.

I recommend the Commission reject the decision and rationale offered in Atlantic County for not applying the unilateral change doctrine to salary guide increments for these primary reasons:

(1) The Commission in Atlantic County did not apply the "time-honored test"[42/] in Local 195, 88 N.J. 393 (1982) in reaching the conclusion that the payment of salary guide increments after a CNA expires is not mandatorily negotiable;

(2) The Commission in Galloway did not "create" the dynamic status quo, it defined the status quo in accordance with Katz, Section 5.3 and the unilateral change doctrine.

(3) The decision in Atlantic County conflicts with the plain language of Section 5.3;

41/ 40 NJPER at 289.

42/ See Robbinsville, 227 N.J. at 199.

(4) The decision in Atlantic County conflicts with the interpretation and application of Section 5.3 as expressed in Middletown;

(5) The Supreme Court has repeatedly held that tax levy laws, budgetary constraints, and fiscal distress do not justify an employer's violation of the unilateral change doctrine under Section 5.3[43/];

(6) The Commission offers no empirical evidence to support its claim that the payment of salary increments after a CNA expires serves as a "disincentive" and "impediment" to the negotiations process. In fact, parties can and *have* negotiated modifications of salary increment systems during challenging economic and fiscal times; and

(7) The Commission's sanction of unilateral changes to salary increment systems under an expired CNA creates instability in the negotiations process in conflict with the labor relations principles set forth in Katz and Middletown.

Local 195 Test

The Commission in Atlantic County did not apply the test for negotiability under IFPTE Local 195 v. State, 88 N.J. 393 (1982) ("Local 195") in reaching its determination that salary increments after a CNA expired were not negotiable. The three-pronged Local 195 test for determining whether a term and condition of employment is mandatorily negotiable is as follows:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulations; and (3) a negotiated agreement would not significantly interfere with the determination of governmental

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43/ See Atlantic City v. Laezza, 80 N.J. 255 (1979); State PBA v. Irvington; 80 N.J. 271 (1979); Robbinsville; 227 N.J. 192 (2016).

> policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
> [88 N.J. at 404-405].

In Atlantic County, it was undisputed that the employer unilaterally changed a term and condition of employment by discontinuing the payment of salary guide increments upon expiration of the parties' CNAs. Thus, in order to find that the employer did not violate Section 5.3 and 5.4a(5) of the Act, the Commission must conclude that salary guide increment payments are not mandatorily negotiable. While the Commission held that the payment of salary guide increments after a CNA expires was not mandatorily negotiable, it did not apply the Local 195 test in reaching this conclusion. Indeed, there is no mention of the Local 195 test in the decision.

Applying the Local 195 test to salary guide increments, the subject matter of salary increments, like other forms of compensation, intimately and directly affects the work and welfare of unit employees and is not preempted by a statute or regulation. Moreover, the payment of increments under prong three of the Local 195 test does not significantly interfere with the determination of governmental policy, as the subject concerns

compensation only and does not interfere with the ability of an employer to implement governmental policies. Woodestown-Pilesgrove, 81 N.J. at 591. Without analytical support anchored in the Local 195 test, the Commission's decision in Atlantic County must be rejected.

Conflict with Plain Language of Section 5.3

N.J.S.A. 34:13A-5.3 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." N.J.S.A. 34:13A-5.3 (emphasis added). Under the plain meaning of Section 5.3, a mandatorily negotiable working condition cannot be unilaterally changed by an employer *until* the employer negotiates with a majority representative over that change. Yet that is precisely what the Commission decision in Atlantic County permits: i.e., an employer can unilaterally discontinue salary guide movement upon expiration of a CNA *before* negotiating with the majority representative over changes to a salary increment system. Since the Commission decision is in direct conflict with the plain language of Section 5.3, it cannot stand.

Conflict with Middletown

The Commission's decision in Atlantic County also conflicts with the holdings and principles in Middletown.[44/]

In Middletown, the Commission held an employer violated the statutory duty to negotiate under Section 5.3 and 5.4a(5) by unilaterally changing a practice concerning salary guide placement for newly hired police officers. 24 NJPER at 30. The union filed an unfair practice charge alleging the township unilaterally changed a multi-year practice of placing new police officers with police academy training and at least one year's experience at a municipal police department at Step 3 of a salary guide. 24 NJPER at 29. A new officer, Anthony Gonzalez, was placed at Step 2 of the parties' salary guide (a lower salary than Step 3) despite having police academy training and nine years municipal police department experience at the time of hiring. Id. The CNA between the union and township did not address what step on the salary guide new officers should be placed on: the union did not have a contractual right to placement at Step 3 of the guide, but the township did not have a contractual right to change the practice of placing officers at Step 3. Id. In short, the CNA was silent on the subject of initial salary guide placement.

44/ Middletown Tp. and Middletown PBA Local 124, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000).

The township argued that ". . . any practice not found in the contract can be changed when conditions change" and that ". . . police salaries have escalated in the past several years and there is an increasing fiscal squeeze on taxpayers." 24 NJPER at 30. The Commission rejected this argument and held that changes in employment conditions under Section 5.3 must be addressed through the collective negotiations process. Id. After concluding that initial salary guide placement for new hires was mandatorily negotiable, the Commission defined the statutory duty to negotiate over non-contractual employment conditions as follows:

> An employer violates its duty to negotiate when it unilaterally alters an existing practice or rule governing a term and condition of employment...even though that practice or rule is not specifically set forth in a contract....Thus even if the contract did not bar the instant changes, it does not provide a defense for the [employer] since it does not expressly and specifically authorize such changes. [24 NJPER at 30, quoting Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138, 140 (¶14066 1983)]

The Commission went on to explain that "for purposes of ascertaining whether negotiations must precede a change, an employment condition need only exist and need not arise by an agreement of the parties, expressed or implied." 24 NJPER at 31 (fn. 3). The Commission also emphasized that the township ". . . is not bound to maintain its practice" concerning salary guide

placement of new hires, "it is simply required to negotiate before changing it." 24 NJPER at 31.

The Appellate Division and Supreme Court affirmed the Commission's decision. Middletown Tp. and Middletown PBA Local 124, 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000). The Appellate Division agreed with the union that the township was required under Section 5.3 to negotiate with the union before changing its past practice concerning salary guide placement of new hires. Middletown, 334 N.J.Super. at 515. Moreover, the Appellate Division rejected the township's argument that changing economic conditions justified the township's unilateral change to the salary guide practice. Id. As the Appellate Division explained:

> The Township argues that economic conditions have changed and its salary scale is very high so there is no need to start a new police officer at Step Three [of the salary guide] in order to be competitive with other municipalities. The PERC decision encompasses this consideration by directing negotiations to make starting salary a condition of the contract, but pending negotiations, the established practice remained in effect. That is a reasonable decision, well footed in the facts demonstrated in the record, and is neither arbitrary or capricious. [334 N.J.Super. At 515].

The holdings and rationale in Middletown are consistent with Katz and the unilateral change doctrine. Unlike Middletown, however, the Commission in Atlantic County held that changes in economic

conditions justifies an employer's unilateral change to a mandatorily negotiable employment condition: i.e., the payment of salary guide increments after a CNA expires. 40 NJPER at 288. That holding contradicts the labor relations principles articulated in Katz and Middletown and should be rejected because it disregards the legislative mandate under Section 5.3 to negotiate working conditions before they are changed, irrespective of economic conditions.

The Duty to Negotiate, Fiscal Distress and Budgetary Constraints

The Commission in Atlantic County held that the payment of salary increments after a CNA expires was no longer appropriate given the change in economic conditions since Galloway, the recent passage of laws imposing a 2% tax levy cap on municipal budgetary appropriations and a legislative cap on base salary increases awarded through interest arbitration. 40 NJPER at 287-288. In the Commission's view, these changes in the law and economy justified a departure from Galloway and from the application of Section 5.3 to salary increments. I disagree. The Legislature has the authority to decide that Section 5.3's duty to negotiate does not apply to an otherwise mandatorily negotiable subject because of fiscal, economic or other policy reasons. See, e.g. Atlantic City v. Laezza, 80 N.J. 255 (1979); Camden v. Byrne, 82 N.J. 133, 158 (1980) (Supreme Court explains that "fiscal constraints to be imposed upon local governments are

matters of legislative, not judicial prerogative"); compare Neptune Bd. of Ed. v. Neptune Education Ass'n, 144 N.J. 16 (1996) (Supreme Court held that an education statute preempted negotiations over the payment of salary increments upon expiration of a three year CNA with a teachers' union). Until the Legislature enacts a statute declaring salary increments non-negotiable once a CNA expires, the Commission must enforce the statutory duty to negotiate salary increments in accordance with the Act. N.J.S.A. 34:13A-5.3; Robbinsville; 227 N.J. 192 (2016). The Commission in Atlantic County declined to do so.

First, the economic and fiscal challenges public employers confronted in 1976 when Galloway was decided were not much different than they were in 2013 when Atlantic County was decided. In the 1970s, the State of New Jersey was facing a severe fiscal crisis and the economy was "plagued by double-digit inflation." State of New Jersey and Council; E.D. No. 79, 1 NJPER 39, 40 (1975), aff'd, 141 N.J. Super. 470 (App. Div. 1976); Atlantic City v. Laezza, 80 N.J. 255, 270 (1979). And the Supreme Court has analyzed the interplay between the Act and tax levy laws constraining local government budgets. See generally Laezza, 80 N.J. 55; New Jersey State PBA Local 29 v. Town of Irvington, 80 N.J. 271 (1979).

In Laezza, the Supreme Court held that the City of Atlantic City (City) was required by statute to comply with the then

existing 5% cap on tax levies for municipal appropriations when implementing an interest arbitration award pursuant to the Act. 80 N.J. at 269-270. The City sought permission from the Director of the Division of Local Finance to appropriate funds exceeding the 5% cap in order to implement an interest arbitration award for its police officers. 80 N.J. at 261-262. The Director denied the City's request. The City then appealed the denial and asked the Supreme Court to treat the cost of the interest arbitration award as exempt from the 5% cap. The City asserted that, if forced to pay for the award, the cost of that award ". . . would cause the 1978 budget to exceed by $1,702,114.34 the maximum final appropriations figure allowable under the Cap Law" and that ". . . were expenditures reduced in other areas in order that the overall budget remain within the Cap Law's 5% ceiling, the City's residents would suffer extreme hardship." 80 N.J. at 261.

While acknowledging the hardship the tax levy cap might impose on the City's residents, the Court held the City was required to comply with the 5% cap restriction and implement the interest arbitration award pursuant to the Act. In explaining the limitations the Court faced in addressing the interplay between statutory budgetary constraints and the cost of compliance with the Act, the Court explained this was not an issue the judiciary could address:

> As we noted in Irvington PBA [80 N.J. 271], the manner in which Atlantic City will comply with the arbitral awards without exceeding Cap Law limits is a matter which we have no authority to decree. Municipal officials must determine whether, and to what extent, personnel should be laid off, or whether budgetary appropriations for non-payroll costs should be reduced. Alternatively, they can seek Director or [Local Finance] Board approval of an emergency appropriation to defray the costs of the awards. [80 N.J. at 269-270]

The Court went on to discuss similar fiscal policy concerns that the Commission in Atlantic County considered, but the Court concluded that the judiciary lacked the authority to address those concerns. 80 N.J. at 270. Unlike the Commission in Atlantic County, the Court would defer to the policy-making authority of the Legislature to address the impact of fiscal legislation on labor relations:

> We also note that municipalities have been placed in a fiscal trilemma. Local governments have been simultaneously directed to provide basic municipal services, limit increases in the property tax and respect the rights of public employees. Under existing circumstances, the attainment of each of these goals is, at best, difficult.

As we emphasized in *Irvington PBA*, 'in a world plagued by double-digit inflation, some group will likely suffer if municipal appropriations can increase each year by at most 5%. Irvington PBA, 80 N.J. at 297. We must presume the Legislature was aware of this consequence when it enacted the Cap Law. It is for that body to determine whether the Cap Law requires

modification. We, however, must rule in accordance with existing law. [80 N.J. at 270].

Whereas the Court viewed this "fiscal trilemma" as an issue that fell exclusively within the Legislature's domain and felt compelled to enforce existing law irrespective of fiscal or other policy concerns, the Commission in Atlantic County viewed these fiscal concerns and tax levy cap legislation as a justification for not enforcing existing labor law, i.e. the statutory duty to negotiate a mandatorily working condition (salary increments) before changing that condition. N.J.S.A. 34:13A-5.3; Middletown. Unless and until the Legislature declares that public employers are not subject to the unilateral change doctrine under Section 5.3 with respect to salary increments, the Commission must enforce Section 5.3 with respect to all mandatorily negotiable working conditions, including salary increments.

In Robbinsville, the Supreme Court would reinforce the principle that economic crises or fiscal distress does not justify a public employer's unilateral change to a mandatorily negotiable condition of employment. 227 N.J. 192. There, a board of education (board), in the wake of the 2008 financial crisis, was notified by the State of New Jersey (State) in March 2010 that education funding to the district would be reduced by fifty-eight percent for the upcoming 2010-2011 school year. 227 N.J. at 195. The township encompassing the school district also

notified the board in May 2010 that local education funding would be reduced for the 2010-2011 school year. Id. at 195-196. Faced with these fiscal challenges, the board requested the local education association re-open their 2010-2011 CNA for renegotiation to address these challenges. The association declined. The board then, to address its budget shortfall, unilaterally imposed three days of involuntary, uncompensated furlough days on teaching staff members for the 2010-2011 school year, effectively reducing teachers' compensation and work hours without negotiations with the association. Id. at 196.

The association challenged the furloughs by filing an unfair practice charge against the board. Id. at 196. The board contended the furloughs were a proper exercise of a non-negotiable, managerial prerogative in response to an economic crisis. Id. at 196-197. The Supreme Court disagreed. Noting that "rates of pay and working hours" were "prime examples" of mandatorily negotiable terms and conditions of employment under the Act, the Court asserted that a public employer cannot ". . . throw a collectively negotiated agreement out the window" by claiming it was responding to an "economic crisis." 227 N.J. at 199, 203. The Court wrote:

> Allowing a claimed need for management prerogative to prevail in tight budgetary times in order for municipal governmental policy to be properly determined would eviscerate the durability of collective negotiated agreements. Collective negotiated

> agreements–promises on wages, rates of pay, and hours, and other traditional terms and conditions of employment–would mean nothing in the wake of any financial setback faced by a local governmental entity. That drastic public-policy course alteration was not explicit or implicit in the opinion setting forth the reasoning to support our holding in *Keyport* [222 N.J. 314 (2015)]. We do not endorse it now for to do so would undermine *Local 195* and decades of public sector labor law on collective negotiations. [227 N.J. at 203-204]

Based on these principles, the Supreme Court reversed the Appellate Division and held the board violated the statutory duty to negotiate in unilaterally imposing the furlough days. 227 N.J. at 203-204.

The Commission in Atlantic County based its decision not to apply the unilateral change doctrine to salary increments on changing economic conditions, Atlantic County's fiscal situation, legislative changes reducing the tax levy cap, and a concern for controlling the rate of growth of government spending. 40 NJPER at 287-288. While all of these concerns are legitimate, they are policy concerns that should be addressed by the Legislature, consistent with Laezza and Robbinsville. The Commission should have enforced the statutory duty to negotiate the payment of salary increments following the expiration of a CNA in accordance with Section 5.3, Katz, and thirty-plus years of Commission precedent.

Negotiations: Incentives and Impediments

The Commission in Atlantic County also declined to apply the unilateral change doctrine to salary increments based on the observation that the payment of increments after a CNA expired would serve as a "disincentive" to the "prompt resolution of labor disputes" and that payment "disserves rather than promotes the prompt resolution of labor disputes." 40 NJPER at 288-289. The underlying premise here is that unions will not agree to modify salary increment systems if they know their members will automatically receive salary increments upon expiration of their CNA. However, unions and employers can and have negotiated modifications to automatic salary increment systems during challenging economic times. Here are some examples of those agreements:

> (1) In 1975, in response to the State's fiscal crisis[45/], the State of New Jersey and majority representatives of the state-wide administrators' and clerical units agreed to re-open their CNA, which extended from July 1, 1974 through June 30, 1977, and modify their automatic increment systems. The agreed-upon modifications to the increment system included, but were not limited to, delaying the payment of increments to some employees by one quarter (three months) and providing cash payments to some employees in the unit equal to one-quarter the annual value of their increments. The modifications are set forth in Article V(A) of the 1974-

45/ State of New Jersey and Council of NJ College Locals; E.D. No. 79, 1 NJPER 39, 40 (1975), aff'd, 141 N.J. Super. 470 (App. Div. 1976).

1977 CNA and are discussed in State of New Jersey, 7 NJPER at 537.

(2) Franklin Township Education Association entered into a CNA with Franklin Township Board of Education (Somerset County) that extended from July 1, 2002 through June 30, 2005. The parties agreed to clear language waiving the right of unit employees to receive salary increments upon expiration of their CNA. Specifically, the CNA provided: "In the event that salary guides for a successor agreement are not ratified prior to the expiration of the agreement, the Board shall not be required to pay teachers' salary increments following expiration of the Agreement. Upon ratification of salary guides for the successor year, all compensation shall be retroactive to July 1."

(3) The Police Benevolent Association Local 138 (Sheriff's Unit) and the County of Sussex (Sheriff's Office) entered into a CNA extending from January 1, 2004 through December 31, 2006. The negotiations unit included all sheriff's officers in the County of Sussex. Article XXXIV, Section 3 of the CNA provided: "No salary increment shall be earned or granted after the expiration of this Agreement, unless agreed upon during negotiations for a successor agreement."

(4) Woodbury Heights Education Association entered into a CNA with the Woodbury Heights Board of Education extending from July 1, 2007 through June 30, 2008. Article 3(E) of the CNA provides: "The parties agree that, absent a ratified successor Agreement in place by September 1, 2008, increments shall not be paid until mutual ratification."

(5) Ho-Ho-Kus Board of Education entered into a CNA with the Ho-Ho-Kus Education Association extending from July 1, 2012 through June 30, 2015. Article XIX of the CNA provides, in pertinent part: "The Board and Association agree that in the absence of

> a contractual settlement for a successor agreement prior to June 30, 2015, increments for certified personnel shall not be automatic in the 2015-2016 school year (i.e., increments shall not be paid unless and until the parties agree to a successor contract).
>
> (6) The Teaneck Township Board of Education entered into a CNA with the Teaneck Township Education Association extending from July 1, 2011 through June 30, 2016. Article XIV of the CNA provides, in pertinent part: "No increments or movement across the salary guides will be paid upon expiration of this Agreement prior to the negotiation of a successor agreement."

All of these CNA provisions are examples of clear waivers of the statutory right to receive salary increments during negotiations over salary increment systems. They also illustrate that the collective negotiations process can resolve these issues, even during difficult economic times.

Even if a union or an employer does not have an incentive to modify a particular contractual provision, that lack of incentive does not make the provision non-negotiable. A union or employer's incentive (or lack thereof) to negotiate is not a relevant factor under the *Local 195* test for negotiability. Local 195, 88 N.J. at 404-405. As explained previously, the payment of salary increments satisfies the three-prong test for determining whether a subject is mandatorily negotiable. That should be the beginning and the end of the Commission's inquiry on the subject. In Atlantic County, however, it was not even part of the Commission's inquiry

There are some contractual provisions that an employer may be unwilling to modify without getting a great deal of consideration from the union. That is part and parcel of the "give and take" process of negotiations. Take, for instance, advisory arbitration. Some CNAs provide for advisory arbitration of grievances, which means an employer is not bound by an arbitrator's decision that it violated the CNA.[46/] While the employer may value that provision a great deal and would be unwilling to agree with the union to binding arbitration, the subject of grievance procedures and whether they may be submitted to binding or advisory arbitration is mandatorily negotiable. N.J.S.A. 34:13A-5.3, West Windsor v. PERC, 78 N.J. 98 (1978). A union and public employer can agree to advisory arbitration and remain bound by it under the unilateral change doctrine until the union and employer negotiate a new arbitration provision. West Windsor, 78 N.J. at 107-108. The fact that it may be practically difficult for the union to obtain the employer's assent to binding arbitration does not make the subject non-negotiable.[47/]

46/ There are CNAs throughout the State of New Jersey that provide for advisory arbitration of grievances. They are available on the Commission's public sector contract database at the following internet link: https://www.perc.state.nj.us/publicsectorcontracts.nsf

47/ The same may also be said of other provisions in a CNA that save the public employer significant sums of money, such as provisions that require employees to contribute towards their health insurance premiums. The fact that it may be

(continued...)

The same is true of salary increments and other mandatorily negotiable terms and conditions of employment.

Application of the Unilateral Change Doctrine

Under the unilateral change doctrine, the Unions and State were obligated to honor the terms and conditions of the 2011-2015 CNAs during successor contract negotiations. Middletown; Laborers Health and Welfare Trust; Litton; Wilkes-Barre. The status quo during negotiations is defined by the terms of the 2011-2015 CNAs. Wilkes-Barre; Litton. Under the 2011-2015 CNAs, unit employees automatically received a salary increment according to a salary guide upon satisfactory completion of 12, 18, and 24 months of service for the State (movement through steps 1-8 required 12 months of satisfactory service, movement from salary steps 8-9 required 18 months of satisfactory service, and movement from step 9 to 10 required 24 months of satisfactory service). These terms are not only part of the CNA, but the automatic increases based on length of satisfactory service is codified at N.J.S.A. 52:14-15.28 and incorporated by reference under Article III of the Unions' CNAs. Since the scheduled increases were given periodically based on fixed criteria (length of satisfactory service), the status quo under the unilateral

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47/ (...continued)
practically difficult for a union to get an employer to give up or reduce employee contributions towards health insurance costs does not make the subject matter non-negotiable.

change doctrine required continued salary guide movement for unit employees following expiration of the 2011-2015 CNAs. Wilkes-Barre; Prime Healthcare.

While the CNAs provide for salary increments "during the term of this agreement," that language does not constitute a "clear and unmistakable" waiver of the *statutory* right to continued salary increments during negotiations over salary increments. Metro Edison Co.; Red Bank Regional Bd. of Ed.; Honeywell; Wilkes Barre; State of New Jersey, 7 NJPER 532; State of New Jersey, 12 NJPER 744. The 2011-2015 CNAs, unlike the CNAs in Atlantic County, are silent as to whether increments should be paid after the CNAs expire. In the absence of clear, explicit contractual language terminating the Unions' statutory right to continued status quo benefits (such as salary increments) during negotiations, the State was obligated under the unilateral change doctrine and Section 5.3 to preserve the CNA's salary increment system until the parties negotiated a modification to that system. Joint Executive Board of Las Vegas; Honeywell; Middletown.

The State admits it unilaterally discontinued the payment of salary increments when the 2011-2015 CNAs expired. For these reasons, I find the State violated Section 5.3 and the unilateral change doctrine by discontinuing the payment of salary increments

to NJSOA and NJLESA unit employees upon expiration of their 2011-2015 CNAs.

The State's Defenses

I will address the State's defenses to the Unions' charges in *seriatim*.

First, the State contends that the language in the NJSOA and NJLESA CNAs providing for the payment of salary increments "during the term of this agreement" clearly bars the payment of salary increments to unit employees after the CNA expires. (Pages 1, 10-12 of the State's 8/17/18 brief). The State also argues that language from the Compensation Compendium providing for increment payments "during Fiscal Year 2015" is a "clear and unmistakable statement" that increments would cease upon expiration of the CNA. (Page 15 of State's 8/17/18 Brief). I disagree with each contention because these clauses do not constitute a clear and unmistakable waiver of unit employees' statutory right to receive salary increments during negotiations over modification(s) to the salary increment system. Middletown; State of New Jersey; 12 NJPER 744; Wilkes-Barre; Honeywell. The parties could have negotiated clear and explicit language terminating the right of unit employees to receive salary increments. They did not. Absent such language, the status quo with respect to salary guide movement should have been preserved

under the unilateral change doctrine and Section 5.3. Wilkes-Barre.[48/]

Second, the State contends it cannot be ordered to pay salary increments under the "Annual Appropriations Act" and under the Appropriations Clause of the New Jersey Constitution. (Pages 14-16, 20-22 of the State's 8/17/18 Brief). According to the State, the Commission cannot order the State to pay increments to unit employees without legislative appropriations for the same and the Legislature has not yet appropriated funds for the same. While I agree that the Commission cannot order the Legislature to appropriate funds, that premise does not change the outcome in this case. The Governor's Office, not the Legislature, is the public employer within the meaning of the Act. State of New Jersey, P.E.R.C. No. 91-107, 17 NJPER 310, 313 (¶22137 1991). The Governor's Office, as an employer within the meaning of the Act, has the discretion to enter into binding CNAs with majority representatives of State employees. Id. While I agree that the State's payment of increments is subject to legislative appropriation, the Governor's Office can be ordered to request appropriations for the payment of increments. Id.; New Jersey Turnpike Authority; P.E.R.C. No. 2010-68, 36 NJPER 68, 70 (¶32 2010) (Commission notes that parties can negotiate a contract

48/ Please also refer to the waiver principles concerning statutory rights discussed in the section entitled "Katz and the Duty to Negotiate."

provision requiring the State to request funding for contractual salary and benefits). Thus, a decision finding the State violated the Act does not impinge on the Legislature's ultimate authority to appropriate funds for compliance with the Act and the cases cited by the State in this regard are inapposite.

Finally, the State argues that the Commission is not bound by the Appellate Division's opinion in Atlantic County because the Supreme Court in Atlantic County declined to address whether the Appellate Division correctly analyzed the dynamic status quo doctrine (Pages 18-20 of State's 8/17/18 Brief). I agree that the Supreme Court declined to address the Appellate Division's holding about the viability of the dynamic status quo doctrine and whether increments should be paid in the absence of CNA language requiring the payment of increments after a CNA expires. The bulk of the analysis in this decision is an attempt to address those questions. But, as an administrative agency, the Commission is not ". . . free to disregard . . ." an Appellate Division decision. Kosmin v. New Jersey State Parole Board, 363 N.J.Super. 28, 40 (App. Div. 2003); Tomaino v. Burman, 364 N.J.Super. 224, 233 (App. Div. 2003). Until the Appellate Division or Supreme Court directs otherwise, the Commission is

bound by the Appellate Division's opinion in Atlantic County. Id.[49/]

CONCLUSIONS OF LAW

1. The State violated N.J.S.A. 34:13A-5.4(a)(5) and, derivatively, N.J.S.A. 34:13A-5.4(a)(1) by unilaterally discontinuing the payment of salary guide step increments to NJSOA unit employees upon the expiration of the 2011-2015 NJSOA CNA.

2. The State violated N.J.S.A. 34:13A-5.4(a)(5) and, derivatively, N.J.S.A. 34:13A-5.4(a)(1) by unilaterally discontinuing the payment of salary guide step increments to NJLESA unit employees upon the expiration of the 2011-2015 NJLESA CNA.

REMEDY

The State has paid NJSOA and NJLESA unit employees their salary increments retroactive to July 1, 2015. The NJLESA seeks prejudgment interest on the amount withheld, while the NJSOA has expressed that it does not seek prejudgment interest. Both the NJSOA and NJLESA seek a cease and desist order and a posting notifying employees of the State's violations. Given these parameters, I will recommend the Commission award prejudgment interest on the amount of the increments withheld from NJLESA

49/ The State's remaining arguments are addressed in the prior sections of this decision.

unit employees and not recommend the same for NJSOA unit employees. I will also recommend the Commission order the State to maintain the status quo with respect to salary guide increments during negotiations for successor CNAs and cease and desist from violating the Act.

RECOMMENDED ORDER

A. That the State of New Jersey cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act, particularly by unilaterally discontinuing the payment of salary guide step increments to NJSOA and NJLESA unit employees during negotiations for a successor collective negotiations agreement and upon expiration of the NJSOA and NJLESA 2011-2015 CNAs.

2. Refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by unilaterally discontinuing the payment of salary guide step increments to NJSOA and NJLESA unit employees during collective negotiations for a successor agreement and upon expiration of the 2011-2015 CNA.

B. That the State of New Jersey take the following action:

1. Within thirty (30) days of a final agency decision in this case, pay eligible NJLESA unit employees pre-judgment interest in accordance with the rates established under R. 4:42-

11, on the amount of salary increments withheld from NJLESA unit employees between July 1, 2015 through August 30, 2019.

2. Negotiate in good faith with the NJSOA and NJLESA over any proposed changes to the salary guide increment systems set forth in the parties' CNAs and maintain the status quo regarding salary guide movement during those negotiations by paying salary increments to eligible NJLESA and NJSOA unit employees.

3. 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.

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

/s/ Ryan Ottavio
Ryan Ottavio
Hearing Examiner

DATED: November 13, 2019
Trenton, New Jersey

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

Any exceptions are due by November 27, 2019.

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 NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by this Act, particularly by unilaterally discontinuing the payment of salary guide step increments to NJSOA and NJLESA unit employees during negotiations for a successor collective negotiations agreement and upon expiration of the NJSOA and NJLESA 2011-2015 CNAs.

WE WILL NOT refuse to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by unilaterally discontinuing the payment of salary guide step increments to NJSOA and NJLESA unit employees during collective negotiations for a successor agreement and upon expiration of the 2011-2015 CNA.

WE WILL within thirty (30) days of a final agency decision in this case, pay eligible NJLESA unit employees pre-judgment interest in accordance with the rates established under R. 4:42-11, on the amount of salary increments withheld from NJLESA unit employees between July 1, 2015 through August 30, 2019.

WE WILL negotiate in good faith with the NJSOA and NJLESA over any proposed changes to the salary guide increment systems set forth in the parties' CNAs and maintain the status quo regarding salary guide movement during those negotiations by paying salary increments to eligible NJLESA and NJSOA unit employees.

WE WILL 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.

WE WILL notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this ORDER.

Docket Nos. CO-2016-107
CO-2016-118

State of New Jersey (Corrections)
(Public Employer)

Date: _____ By: _____

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830

APPENDIX "A"