

I.R. NO. 81-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF VINELAND,

Respondent,

-and-

Docket No. CO-81-226

VINELAND P.B.A. LOCAL #266,

Charging Party.

SYNOPSIS

On a Motion for Interim Relief brought by the Vineland P.B.A. Local #266, a designee of the Public Employment Relations Commission has ordered that the City of Vineland pay increments which were due to the police officers pursuant to a schedule of increments in the negotiated contract for the police which expired on December 31, 1980. N.J.S.A. 34:13A-21 provides that wages and other terms and conditions of employment shall not be changed by either party during the pendency of proceedings before an arbitrator. It was held that the failure to pay increments constituted a violation of the statute and further that the statute was created to preserve the respective negotiations positions of the parties. Accordingly, the failure to pay increments alters the parties' relationship and constitutes irreparable harm.

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Appearances:

For the Respondent, Tusso, Guccio, Pepper,
Buonadonna, Giovinazzi & Butler, P.C.
(Lawrence Pepper, Jr., of Counsel)

For the Charging Party, Selikoff & Cohen, P.A.
(Ralph H. Colflesh, Jr., of Counsel)

INTERLOCUTORY DECISION

On February 2, 1981, the Vineland PBA Local #266 (the "Charging Party" or the "PBA") filed an Unfair Practice Charge with the Public Employment Relations Commission (the "Commission") alleging that the City of Vineland (the "City" or the "Respondent") violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). More specifically, the charge alleged that the Township violated Subsections 5.4(a) (1), (3) and (5),^{1/} by refusing to grant the increments which are due under the term of the expired agreement and continue to refuse to grant the same.

^{1/} These subsections prohibit public employers, their representatives or agents from: (1) "Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act; and (5) Refusing to negotiate in good faith
(continued)

On May 6, 1981, the PBA filed an Order to Show Cause with the Commission asking that the City show cause why an Order should not be entered permanently directing Respondent to pay salary increments required by the expired agreement until said agreement is replaced by a successor agreement.

The Order was executed and made returnable on May 21, 1981. I, Edmund G. Gerber, conducted the Order to Show Cause hearing, having been delegated the authority to act upon requests for interim relief on behalf of the Commission. Both parties submitted briefs prior to the hearing and argued orally at the hearing.

At the conclusion of the hearing, I entered my reasoning and determinations on the record. The Respondent declined to waive a written decision and therefore I have prepared the instant report.

The standards that have been developed by the Commission for evaluating the appropriateness of interim relief are quite similar to those applied by the courts when confronted with similar applications. The test is twofold: the substantial likelihood of success on the legal and factual allegations in the final Commission decision, and the irreparable nature of the harm

1/ (continued)

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."

that will occur if the requested relief is not granted.^{2/} Both standards must be satisfied before the requested relief will be granted.

It is undisputed that the most recent contract between the majority representative of the police officers (which in 1979 was Cumberland Lodge #8, Fraternal Order of Police) and the City expired on December 31, 1980, and the PBA has filed to initiate compulsory arbitration with this agency since an agreement for a successor contract had not been reached within the statutory time permitted. The expired contract contained a salary schedule known as Schedule "A." The schedule contained three columns, the first was years of service and the second two were salaries which corresponded to years of service. The two salary columns were titled "1979"/"1980" respectively. Since the expiration date of the contract, the City has refused to pay increments listed under the 1980 column of Schedule "A."

It is well settled that when a labor relations contract expires, no alteration in the provision of the agreement may be tentatively altered by the employer prior to the exhaustion of the Commission's impasse procedures. See, In re City of Jersey City, P.E.R.C. No. 78-58, 4 NJPER 158 (¶4075 1978) and In re Rutgers The State University, P.E.R.C. No. 80-114, 6 NJPER 181 (¶11085

^{2/} See for example, In re Township of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975); In re State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); and In re Township of Stafford, P.E.R.C. NO. 76-9, 1 NJPER 59 (1975).

1980). This rule has been applied to the withholding of salary increments. See, Galloway Twp. Board of Ed v. Galloway Ed Ass'n, 78 N.J. 25 (1978) and Hudson County Board of Chosen Freeholders and Hudson County P.B.A. Local #51, P.E.R.C. No. 78-48, 4 NJPER 87 (¶4041 1978, aff'd per curiam App. Div. Docket No. A-2444-77 (April 9, 1979).

Significantly, the Police and Fire Arbitration provisions of the Act, specifically 34:13A-21 provide:

During the pendency of proceedings before the arbitrator, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other, any change in or of the public employer or employee representative notwithstanding; but a party may so consent without prejudice to his rights or position under this supplementary act.

Appendix A of the contract provides a clear salary structure based on length of service. It is self-evident that on January 1, 1981, all police officers who were employed on January 1, 1980 would have their length of service increased by one year over where they were on January 1, 1980. It follows that all employees whose salaries were tied to the 1980 guide should receive an increment in their pay reflective of their increased length of service.

The Commission, via its then Special Assistant to the Chairman, Stephen B. Hunter, recognized the irreparable nature of the harm in the denial of increments during negotiations:

The Commission and the Courts have... recognized that normally the very act of unilateral modifying a particular term and condition of employment, at least in the absence of a genuine post fact-finding impasse, contradicts in and of itself, the meaning of collective negotiations inasmuch as ordinarily one cannot unilaterally act and still collectively negotiate about the same subjects. (Citing In re City of Jersey City, PERC No. 77-58, 3 NJPER 122 (1977) and NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962). The status quo relating to terms and conditions of employment may be established by relying upon past practice or prior negotiations agreements. (emphasis supplied) In re Union County Reg. H.S. Bd of Ed, P.E.R.C. No. 78_27, 4 NJPER 11 (¶4007 1977).

This same thinking most certainly applies to a violation of 34:13A-21.

The City, however, argues that it is entitled to refuse to pay the salary increment designated in the salary increment schedule of the contract because the established past practice and status quo between the City of Vineland and the police unit was to withhold salary increments pending the completion of negotiations for a successor agreement.

It is undisputed that the contract, whose term expired in January of 1981, is the third contract executed between the City and the designated majority representative of the police and after the expiration of the first two contracts, the employer did not pay increments. It is on this history that the employer claims past practice as a defense to the payment of increments.

I am confident that the Commission here would find that this past history cannot constitute a binding past practice. The

Act at §13-21 allows that if both parties agree, wages and terms and conditions of employment be changed during the arbitration procedure, but such consent is "without prejudice."

The fact that the FOP may have acquiesced in the City's denial of increments after the first two contracts expired cannot constitute a permanent waiver of this right.^{3/} To find otherwise would violate the express terms of the statute.

I therefore conclude that the City violated N.J.S.A. 34:13A-5.4(a)(5) by refusing to negotiate in good faith by its failure to comply with §13A-21. I also find that the City's violation of N.J.S.A. 34:13A-5.4(a)(5) has necessarily interfered with, restrained and coerced employees in the exercise of their rights under the Act and therefore further find that the Board has violated N.J.S.A. 34:13A-5.4(a)(1).

ORDER

For the reasons expressed above, I HEREBY ORDER that the City of Vineland pay its police officers in the unit represented by Vineland P.B.A. Local #266, their increments pursuant to the 1980 salary schedule during the course of negotiations and arbitration with the Vineland P.B.A. Local #266.

IT IS FURTHER ORDERED that the City of Vineland pay the affected employees in the above-mentioned unit, the monetary

^{3/} The first time the employer withheld an increment was before the enactment of the statute, but to hold that doing an act on only one occasion can rise to the level of a past practice offends the protections afforded by the statute.

difference between the amount these employees would have received had their increment not been unilaterally withheld, and the amounts they were in fact paid subsequent to December 31, 1980.

BY ORDER OF THE COMMISSION

A handwritten signature in cursive script, reading "Ed G Gerber", is written over a horizontal line.

Edmund G. Gerber
Hearing Examiner

DATED: May 29, 1981
Trenton, New Jersey