

H.E. NO. 99-5

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

In the Matter of

BOARD OF EDUCATION OF THE CITY  
OF WILDWOOD, CAPE MAY COUNTY,

Respondent,

-and-

Docket No. CO-H-98-139

WILDWOOD EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Wildwood Board of Education committed an unfair practice when it failed to pay salary increments to its certified personnel after the expiration of a one year collective negotiations agreement.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which 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, Gorman & Rauh, attorneys  
(Bruce M. Gorman, of counsel)

For the Charging Party, Selikoff & Cohen, attorneys  
(Steven R. Cohen, of counsel)

HEARING EXAMINER'S REPORT  
AND RECOMMENDED DECISION

On October 27, 1997, the Wildwood Education Association filed an unfair practice charge with the Public Employment Relations Commission alleging the Wildwood City Board of Education engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.4a(1) & (5)<sup>1/</sup> when on September 1, 1997, after the

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<sup>1/</sup> These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.."

expiration of the most recent one-year collective negotiations agreement between the parties, the Board refused to pay increments as well as as increase longevity pay to its certificated personnel as provided for in the expired collective negotiations agreement.<sup>2/</sup>

A complaint and notice of hearing was issued on November 27, 1997. The Board filed an answer to the complaint admitting that it declined to pay increments after the expiration of the contract but asserting it was not legally obligated to pay increments and further denying it was contractually obligated to increase longevity payments. A hearing was conducted on March 23, 1998 at which time the parties were given an opportunity to introduce witnesses, present evidence and argue orally. Both parties submitted briefs which were received by May 8, 1998.

The Association represents the Board's teachers and other certificated personnel as well as its clerical personnel, custodians and aides. The parties entered into a one-year collective negotiations agreement effective from September 1, 1996 through August 31, 1997.

Article 2, Section E of the agreement provides:

No benefit accruing to either party pursuant to this Agreement may be eliminated or reduced without being negotiated unless otherwise provided in this Agreement or unless found to be

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<sup>2/</sup> The Association also moved for interim relief, which was granted. See I.R. No. 98-13, 24 NJPER 32 (¶29018 1998). Motion for stay denied, App. Div. Dkt. No. A-191-97T2.

contrary to the laws of the State of New Jersey or the United States of America. Proposed new rules or modifications of existing rules of the Board governing working conditions shall be negotiated with the Association before they are established.

Article 9, Salaries, Section B, provides in pertinent part:

c. Certificated personnel shall be eligible for and/or entitled to incremental increases on September 1.

d. Certificated personnel, once they have reached the top of the salary scale, shall receive, starting the following year, an additional amount of longevity as described below:

(1) 1996-1997 -- 4.00% of step K (11th step) that corresponds with the individual's credits or degree column. Plus, for 18 to 24 years, an additional \$1,000, and for 25 years and above an additional \$1,250 for a total of \$22,250.

e. All certificated personnel, already beyond Step (J), (10), top-of-the-scale, shall be entitled to longevity, based upon the years of experience in the district....

The contract contains incremental salary guides for teachers based on their educational degrees and years of experience. It also contains incremental salary guides for clerks, custodians, and aides.

The parties have stipulated that their 1990-1993 and 1993-1996 agreements contained language similar to that contained in Article 9B.

It is not disputed that after the one-year contract term ended, the Board did not advance teachers who had gained an extra year of experience on the appropriate salary guide.

Three witnesses for the Association, Thomas Marks, Stuart Hartman and Jonathan Stevenson, all testified that they were eligible for longevity increases but did not receive them.<sup>3/</sup> I credit this testimony.

Superintendent of Schools Arthur Motz testified without contradiction as to the economic condition of the school district. I credit his testimony. Since 1991, the tax burden of the City of Wildwood has gone up by a third, from \$4.7 million for 1991-92 to \$6.3 million for 1998-99, while State aid has declined in this same period (R-1). The budget has been defeated five times in the past seven years. As a consequence, the budget for the 1998-99 school years, \$19,132,721, is smaller than the 1991-92 budget of \$19,248,785. The Board's staff has been reduced from 126 members in 1991-2 to 112 in 1997-1998 (T. pg.46). Nevertheless, there has been a substantial growth of the school population.<sup>4/</sup> The district does not qualify for State aid as an urban special needs, or Abbott, district.

Motz admitted that the Board was aware of its financial condition when it entered into the 1996-1997 agreement as well as the 1990-1993 and 1993-1996 agreements (T. pgs.58, 66).

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<sup>3/</sup> An arbitrator's decision and award concerning longevity payments was jointly moved into evidence. However, the award sheds little light on this dispute. Rather, the award only defines when a "new scheme for computing longevity" became effective.

<sup>4/</sup> There has also been a corresponding decline in the summer tourist industry. Within the past ten years a majority of summer residences have been converted into year around rentals.

In the Spring of 1997, when the parties began negotiating for a new contract, the school budget was defeated and the City Council cut the budget by \$537,000. An appeal of the budget cut was filed with the Commissioner of Education. Meanwhile, the Board offered a zero increase in negotiations, and the Association moved to a demand of a 3.75% increase. In October, the parties were in mediation and the Board offered an increase of 1.75%. Subsequently, in January of 1998, the Commissioner of Education restored \$220,000 of the Board's budget. The parties met in January, 1998 at which time the Board raised its offer to 2.2%; however, no agreement was reached.

William Hybbeneth, a professional mediator who represents the Board in negotiations, testified and I so find that the cost of paying increments for the 1997-1998 school year amounted to 1.72% of base payroll costs for the 1997-1998 school year. Roughly two-thirds of the employees in the unit are at the top of the salary guide and do not receive increments. The Board's offer of 2.2% if adopted, would grant each faculty member an increase, exclusive of increments, of a bit more than one-half of a percent or \$241.00 (T. pgs. 91-96). Under CIEFA, the Cap Law, the Board of Education may not increase its current expense budget by more than three percent in one year. If the Board were to spend the full amount of its allowed cap increase for 1997-1998 on salaries, after the payment of increments, the amount left would fund a staff salary increase of 1.28%.

In Hybbeneth's professional opinion it would be very difficult to sell the Association's proposal of 3.75% for the first year of a two year agreement to senior faculty who would not receive an increment.<sup>5/</sup> However, Hybbeneth conceded that if the Board acquiesced to the Association's demand for a 3.75% raise, the Association would probably accept such an offer (T. pg. 109).

#### ANALYSIS

The Commission, following Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Assn., 78 N.J. 25 (1978), has consistently held that good faith negotiations requires the maintenance of established terms and conditions of employment, i.e. the status quo and the payment of increments is part of the status quo. Id. @ 49. The refusal to pay increments is a unilateral alteration of the status quo and a per se illegal refusal to negotiate in good faith. Such conduct so interferes with the negotiation process that a traditional remedy at the conclusion of the hearing process would not effectively remedy the violations of the Act. Evesham Tp. Bd. of Ed., I.R. No. 95-10, 21 NJPER 3, 4 (¶26001 1994); Hudson Cty Bd. of Chosen Freeholders v. Hudson Cty. PBA Local No. 51, App. Div. Dkt. No. A-2444-77 (4/9/79) aff'g P.E.R.C. No. 78-48, 4 NJPER 87 (¶4041 1978); Rutgers, the State Univ. and Rutgers Univ. College Teachers Ass'n, P.E.R.C. No. 80-66, 5 NJPER 539 (¶10278 1979), aff'd and modified App. Div. Dkt. No. A-1572-79 (4/1/81); State of New

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<sup>5/</sup> The Association was also seeking 4.13% for the second year of the agreement.

Jersey, I.R. No. 82-2, 7 NJPER 532 (¶12235 1981); City of Vineland, I.R. No. 81-1, 7 NJPER 234 (¶12142 1981), interim order enforced and leave to appeal denied App. Div. Dkt. No. A-1037-80T3 (7/15/81); Belleville Bd. of Ed., I.R. No-87-5, 12 NJPER 629 (¶17262 1980); Hunterdon Cty Bd. of Social Services, I.R. No. 87-17, 13 NJPER 215 (¶18091 1987); Township of Marlboro, I.R. No. 88-2, 13 NJPER 662 (¶18250 1987); Borough of Palisades Park, I.R. No. 87-21, 13 NJPER 260 (¶18106 1987); Sheriff of Middlesex Cty., I.R. No. 87-19, 13 NJPER 251 (¶18101 1987); County of Bergen, I.R. No. 91-20, 17 NJPER 275 (¶22124 1991); County of Sussex, 17 NJPER 234 (¶22100 1991); Burlington County, I.R. No. 93-2, 18 NJPER 405 (¶23184 1992); Somerset County, I.R. No. 93-15, 19 NJPER 259 (¶24129 1993).

In Board of Education of Neptune Township v. Neptune Township Education Association, 144 N.J. 16 (1996), the Supreme Court revisited this area of the law. Specifically, the Court resolved the conflict between the Act and N.J.S.A. 18A:29-4.1 which provides:

A board of education of any district may adopt a one, two or three year salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law. Such policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of one, two or three years from the effective date of such policy but shall not prohibit the payment of salaries higher than those required by such policy or schedules nor the subsequent adoption of policies or schedules providing for higher salaries, increments or adjustments. Every school budget adopted, certified or approved by the board, the voters of the district, the board of school estimate, the



governing body of the municipality or municipalities, or the commissioner, as the case may be, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year.

The Court found that teaching staff members were not entitled to receive automatic increments after the expiration of three-year agreements, since requiring increments following the expiration of a three-year agreement would make contracts "binding for a fourth year, beyond the statutory term." *Id.* @ 33. The Court observed that

[b]ecause the legislature has never explicitly authorized the Board to adopt schedules beyond the term of N.J.S.A. 18A:29-4.1, reading that statute to prohibit the contract from being binding for more than three years supports that principle of limited board power. Id. at 27.

The Court limited its decision to teaching staff members, that is, employees affected by N.J.S.A. 18A:29-4.1.

To the extent that any of the litigants in this case are not 'teaching staff members' then the prohibition against increments in N.J.S.A. 18A:29-4.1 does not apply. Contracts with those employees should be governed by labor law only since no education law preempts that general rule. Id. at 30.

The Board cites language in Neptune which acknowledges the difficulties an economically strapped Board faces when it pays increments pursuant to an expired agreement.

Thus, the practice of automatically paying an increment will limit a board's ability to respond to ever-changing economic conditions of the district. Schools that need to cut budget growth will face serious problems. Id. at 28

The Court also observed that with the automatic payment of increments,

Teachers will have a reduced incentive to agree to a new CBA. Indeed, teachers may resist negotiating and wait for more generous increments that will accrue under the expired CBA. Those teachers who have received increments under the old schedule will obtain a larger share of a shrinking pie. Id.

The Board argues that it should not be obligated to pay increments because of its financial condition. In fact, the payment of increments, pursuant to the Commission's Interim Order, has had a chilling effect on negotiations since those teachers at the top of the guide have little incentive to settle.

The Board further urges that the Neptune Court's comments about the negative aspects of automatic increments are an invitation to the Commission to re-examine its longstanding legal precedent.

While the Commission cannot ignore Neptune's cautionary dicta concerning the economic impact of increments, the Court did not impose a static model of status quo on non-teaching staff members. Nor did the Court overrule Commission precedent or otherwise direct the Commission to take specific action. Board of Education of the Township of East Hanover and East Hanover Education Association, I.R. No. 98-4, 23 NJPER 537 (¶28264 1997).

Rather, Neptune's cautionary economic language was meant to buttress the Court's decision limiting the payment of increments to a three year period.

The Court made these observations when it contrasted the Commission's "dynamic" view of status quo, with a "static" view, where increments are not considered part of the status quo. The Court addressed the advantages of a static approach where an employer faces economic hardship within the context of a three year contract. No one can predict four years into the future.

Given the contract at issue here is for only for one year. Neptune, does not apply.

Upon review of all the evidence, I recommend the Commission not find an exception to its dynamic status quo policy on the facts here.

The economic problems faced by the Board are genuine. But these same economic problems existed when the Board voluntarily entered into the 1996-1997 contract, creating the very obligations it now seeks to avoid. The Board was aware of its steady economic decline before it signed the 1996-1997 contract. It cannot claim it was somehow "blind-sided" by the local economy. Significantly, the Board's last offer to the Association to settle the contract is for a sum greater than the cost of increments. As the Court also noted in Probst v. Haddonfield Bd. of Ed., 127 N.J. 518 (1992). The purpose of N.J.S.A. 18A:29-4.1 is to

prevent local boards from using the budget process to avoid salary schedules they had already agreed to in collective bargaining negotiations, thereby providing security to teachers who had negotiated multi-year salary schedules with school boards. Id. at 526.

Although the Board's financial situation is difficult, the Board has the ability to pay increments.

I also do not believe that here, the payment of increments constitutes an impediment to settlement. As admitted by the Board's expert witness, the Association would likely settle this matter for the offer it had on the table, before increments were paid. It is for the Association, not the Board, to determine whether a settlement is acceptable to its membership.

Accordingly, I conclude that the Board violated N.J.S.A. 13A-5.4a(1) and (5) of the Act when it failed to pay increments and longevity payments on September 1, 1997.

Article 9(e) of the contract grants longevity based upon years of experience, yet longevity payment increases were not granted.

In South Harrison Twp. Bd. of Ed. P.E.R.C. 96-84 22 NJPER 242 (¶27126, 1996) the Commission noted that the Commissioner of Education has construed longevity payments to be increments. See, e.g., Rosania v. Middlesex Bd. of Ed. CD 18 +-88 (210-87) (1/22/88). Since longevity payments are a form of increment I also conclude the Board violated N.J.S.A. 13A-5.4(a)(1) and (5) of the Act when it failed to grant longevity pay increases.

#### CONCLUSIONS OF LAW

The Board of Education of the City of Wildwood violated N.J.S.A. 13A:5.4(1) and (5) of the Act when it failed to pay

increments and longevity pay increments to its teaching staff members on September 1, 1997.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A.) The Board of Education of the City of Wildwood cease and desist from:

1.) Interfering with, restraining or coercing employees represented by the Wildwood Education Association by refusing to pay increments and longevity payments effective September 1, 1997.

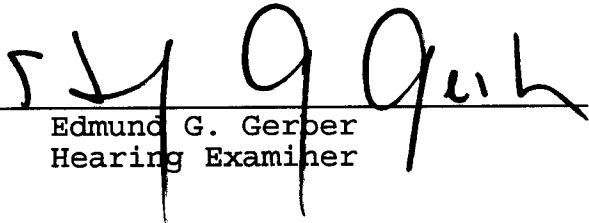
2.) Refusing to negotiate in good faith with the Wildwood Education Association by refusing to pay increments on longevity payments effective September 1, 1997.

B.) Take the following affirmative action:

1.) To the extent that increments and longevity payments have not been paid, pay them retroactive to September 1, 1997.

2.) Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

  
Edmund G. Gerber  
Hearing Examiner

Dated: September 29, 1998  
Trenton, New Jersey



RECOMMENDED



# 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,

H.E. 99-5

**We hereby notify our employees that:**

**WE WILL NOT** interfere with, restrain or coerce employees represented by the Wildwood Education Association by refusing to pay increments and longevity payments effective September 1, 1997.

**WE WILL NOT** refuse to negotiate in good faith with the Wildwood Education Association by refusing to pay increments on longevity payments effective September 1, 1997.

**WE WILL,** to the extent that increments and longevity payments have not been paid, pay them retroactive to September 1, 1997.

Board of Education of the City  
of Wildwood, Cape May County

(Public Employer)

Docket No.

CO-H-98-139

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, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"