I.R. NO. 2011-12

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BLOOMFIELD BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2010-509

BLOOMFIELD EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee grants an application for interim relief based upon a charge alleging that the Bloomfield Board of Education refuses to pay an annual increment to school employees following the expiration of a one-year collective agreement. The alleged refusal is occurring during collective negotiations for a successor agreement.

The Designee determined that the harm to the parties is roughly equivalent and stayed implementation of the order, pending the parties' opportunity to seek reconsideration from the Commission.

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Appearances:

For the Respondent
Schwartz Simon Edelstein Celso & Zitomer, LLC
(Andrew B. Brown, of counsel)

For the Charging Party
Oxfeld Cohen, P.C.
(Gail Oxfeld Kanef, of counsel)

INTERLOCUTORY DECISION

On June 28, 2010, the Bloomfield Education Association (BEA) filed an unfair practice charge against the Bloomfield Board of Education (Board), together with an application for interim relief, a certification, a copy of a collective negotiations agreement and a brief. The charge alleges that the Board refuses to pay salary increments following the June 30 expiration of the parties' one-year agreement and during negotiations for a successor agreement. The Board's omission allegedly violates

5.4a(1) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

The application seeks an Order requiring the Board to pay salary increments, ". . . as of September 1, 2010."

On July 9, 2010, I issued an Order to Show Cause, specifying July 28 as the return date for argument in a telephone conference call. I also directed the Board to file an answering brief, together with opposing certification(s) and proof of service upon the BEA by July 22.

The Board requested and was provided postponements of the dates for filing and argument to July 29 and August 3, 2010, respectively. On July 29, the Board requested an extension of time until July 30 to file its answering brief. I consented, requesting that the Board seek the Association's consent as well, and that it issue a letter confirming the arrangement. Later that day, the Board filed a letter seeking a stay of the proceeding, pending a Predominant Interest Determination before the Office of Administrative Law (pursuant to N.J.A.C. 1:1-17.1

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

et seq.) on a then-unspecified matter before the Commissioner of Education, together with the pending charge. On the same day, I issued a letter denying the request, advising that the pending charge was not ripe for a Predominant Interest Determination. On July 30, the Board filed a reply. On the rescheduled return date, the parties argued their cases in a conference call.

During the argument, the parties advised that they wished to file additional certifications, notwithstanding the filing date set forth in the modified Order. On August 5, the BEA filed another certification of its president. Also on August 5, I received copies of a "Verified Petition for Declaratory Judgment" addressed to the Commissioner of Education and a "Motion to Consolidate Cases and to Determine that the Commissioner of Education has the Predominant Interest," together with a brief and other documents. On August 9, the Board filed a certification. The following facts appear.

The Board and BEA signed a collective negotiations agreement extending from July 1, 2009 through June 30, 2010. Article 1 (Recognition) specifies that the BEA is the representative of certificated personnel and instructional aides, among others. Article 25 (Compensation) adopts salary guides,

> . . . for the salaries of employees of the Board of Education, effective as to the bargaining unit member, only upon recommendation of the Superintendent when said recommendations have been approved by the Board. The following guide shall not

> under any circumstances be considered as mandatory or binding upon the Board of Education or as entitling any employee to any salary therein mentioned unless and until the same has been specifically fixed by the Board of Education upon recommendation as aforesaid.
> [Article 25]

This provision has appeared in the parties' collective agreements for many years. Article 25 also incorporates attached salary guides, particularly the 2009-2010 "teachers' guide," setting forth 16 steps with incremental increases in compensation across six levels of educational achievement. Over the past 10 years or longer, salary guides appeared in the parties' collective agreements. They have been applied as "experience" guides, meaning that for each year of teaching experience, teachers have moved one step on the guide automatically. During the term of the 2006-2009 collective negotiations agreement, increments were paid "as a matter of course" in each of its three years but not in September 2009, following its expiration in June of that year. The successor agreement was ratified in spring, 2010 at which time increments were paid retroactively to September 2009.

The successor agreement was developed after a memorandum of agreement for a three year term (2009-2012) was signed by both parties in November 2009. The Board learned afterwards that it would lose "significant" State financial aid for the 2010-2011 school year, a fact verified on March 19, 2010. The Board then suggested to the BEA that a one-year agreement was desirable (as

it had already been budgeted) and that salary freezes and layoffs were likely in 2010-2011. The one year agreement was ratified by the Board in February 2010. The disputed increment will cost in excess of $750,000.

The parties are negotiating a successor agreement.

On June 9, 2010, BEA President John Shanagher issued an email to Board Superintendent Catherine Mozak. It provided:

> At the pre-negotiating meeting you indicated that the Board would not be moving BEA members horizontally or vertically on the salary guide until we have a new agreement. I am writing to inquire if that is still the Board's position.

A short time later that day, Mozak replied to Shanagher: "Yes, your recollection is correct."

On unspecified occasions before June 9, 2010, unspecified Board representatives advised Shanagher that salary increments would not be paid.

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De

Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

The BEA argues that the collective agreement provides annual salary increments to certificated staff, based upon years of service in the district and permits withholding them ". . . in situations when the district can establish cause exists to do so for a particular employee" (Assn. ltr., p. 2). It also argues that New Horizons Community Charter School, I.R. No. 2006-10, 31 NJPER 380 (¶149 2005), sets forth the legal standard for the payment of increments during negotiations:

> The payment of an experienced-based salary increment to a teaching staff member who has satisfactorily completed an additional year of teaching is part of the dynamic status quo that must be preserved during collective negotiations for a new agreement. See Neptune Tp. Bd. of Ed. v. Neptune Tp. Ed. Ass'n., 144 N.J. 16 (1996); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25 (1978). Thus, failure to pay increments at the start of a new school year is a unilateral change in the terms and conditions of employment of teaching staff. [31 NJPER 381]

The BEA contends that the payment of increments after the expiration of its one year collective agreement with the Board will be consistent with Commission decisions requiring payment after the expiration of agreements shorter than three years. (Neptune Tp. Bd. of Ed. construes N.J.S.A. 18A:29-4.1 to limit

the obligation to pay salary increments to teaching staff under an expired collective agreement to no more than three years.)

After our Supreme Court issued Neptune Tp. Bd. of Ed., a Commission Designee ordered the payment of automatic increments to school employees following the expiration of a one-year collective negotiations agreement. Wildwood City Bd. of Ed., I.R. No. 98-13, 24 NJPER 32 (¶29018 1997). Also see, Waldwick Bd. of Ed., I.R. No. 99-6, 24 NJPER 498 (¶29231 1998) (Designee orders payment of automatic increments to school employees following the expiration of a two-year agreement).

The Board argues that Article 25's provision that the salary guide does not entitle ". . . any employee to any salary," demonstrates that "guide movement is not an entitlement" (Board ltr., p. 6). It cites Hawthorne Bd. of Ed., I.R. No. 98-11, 23 NJPER 638 (¶283112 1997), in which the Designee denied an application for interim relief seeking payment of increments following the expiration of a collective negotiations agreement. This provision appeared in the expired agreement:

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

The Designee found that the provision failed to prove an "automatic incremental structure," leaving the Association unable to demonstrate a substantial likelihood of success on the merits.

Article 25 does not disavow automatic increments as did the quoted provision in Hawthorne Bd. of Ed. Perhaps the Board's ratification of the collective agreement, including the guides, establishes its "approval" at least during the term of the agreement because no facts indicate that the Board ever acted independently of ratification to "approve" increment payments. And except for the "Neptune year" -- the September following the expiration of the 2006-2009 collective negotiations agreement -- no facts suggest that increment payments were ever withheld or presaged by any act demonstrating Board "approval" following the expiration of any agreement. These facts (or more precisely, inferences drawn by omissions) necessarily imbue meaning to an unclear contract provision. See New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978). I find that Article 25, standing alone, does not show that automatic payment of increments is not the current condition of employment or status quo. Galloway. Accordingly, the BEA has demonstrated a substantial likelihood of prevailing in a final Commission decision.

The withholding of automatic salary increments during collective negotiations causes irreparable harm. The Court wrote in Galloway:

> Indisputably, the amount of an employee's compensation is an important condition of his employment. If a scheduled annual step increment in an employee's salary is an

ORDER

The application for interim relief is granted. In light of the rough equivalence of the harms however, I stay its implementation, pending the parties' opportunity to seek reconsideration from the Commission. N.J.A.C. 19:14-8.4.

Jonathan Roth
Commission Designee

DATED: August 13, 2010
Trenton, New Jersey