

I.R. No. 2011-20

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WAYNE TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2011-124

WAYNE PARAPROFESSIONALS ASSOCIATION,

Charging Party.

Synopsis

A Commission Designee grants an application for interim relief based upon a charge alleging that the Board unilaterally changed the status quo during negotiations for a successor agreement when it refused to pay automatic step increments. The Association represents a group of non-certified paraprofessionals. The parties' collective agreement provided for the payment of a step increment upon the completion of a year of service. The Designee found that under Galloway and other Commission and court decisions, the Association had a substantial likelihood of success. Citing Ocean Cty., she rejected the Board's argument that economic hardship prevented it from fulfilling its obligations under the parties' agreement.

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Appearances:

For the Respondent,  
Schwartz, Simon, Edelstein, Celso and Zitomer,  
attorneys (Nathanya G. Simon, of counsel)

For the Charging Party,  
(Sasha Wolf, Uniserv Field Rep.)

INTERLOCUTORY DECISION

On September 24, 2010, the Wayne Paraprofessionals Association (Association) filed an unfair practice charge against the Wayne Township Board of Education (Board), together with an application for interim relief, certification of Association President Jacqueline Carola, supporting documents and a brief. The charge alleges that the Board violated 5.4a(1) and (5)<sup>1/</sup> of

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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  
(continued...)

the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. Specifically, the Association alleges that during negotiations for a successor agreement, the Board refused to pay automatic salary increments for the 2010-2011 school year due on September 1 despite repeated Association requests. By its refusal to pay, the Board has allegedly failed to maintain the status quo, creating a chilling effect during negotiations for a successor agreement. The application seeks an Order directing the Board to pay the salary increments based on the salary guides in the expired 2007-2010 collective negotiations agreement retroactive to September 1, 2010, with interest, and directing the Board to negotiate in good faith.

On October 1, 2010, I signed an Order to Show Cause, specifying October 21 as the return date for argument by telephone conference. I also directed the Board to file any papers in opposition to the application for interim relief and proof of service upon the Association. At the request of the Board and with the consent of the Association, an extension to file opposition papers was granted, and the return date for argument was rescheduled to October 29.

On October 19, 2010, the Board filed a letter brief in opposition to the application together with certifications of

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1/ (...continued)  
representative.”

Human Resources Manager Pat Brown-Kniesel and Business Administrator Juanita A. Petty together with exhibits.

On October 19, 2010, Charging Party requested leave to file a reply brief which I denied. The October 29 telephone conference was conducted as scheduled. The following material facts appear.

The Association represents a unit of non-certified para-professionals employed by the Board. Paraprofessional aides provide assistance to students classified in the special education program. Classified students are assigned paraprofessional services based on individualized educational plans (IEPs) and/or as mandated by State and Federal laws. Student need and classification dictates minimum staffing requirements, but the Board is permitted to exceed minimum staffing requirements. It has done so in the past.

In the 2010-2011 school year, as a result of significant losses of State funds and increase costs of operations including health care, the Board was required to cut approximately \$11 million dollars from its budget, resulting in the elimination of 23 paraprofessional positions. In order to meet State-mandated paraprofessional staff of 143 employees in 2010-2011, however, four aides were rehired using grant monies since no general budget funds were available. Rehiring the paraprofessionals whose positions had been eliminated prevented the Board from

re-instituting eliminated programs and re-hiring or retaining other personnel such as counselors.

Shortly after finalizing its 2010-2011 operating budget, the Board and Association entered into negotiations for a successor collective agreement. The parties' expired collective negotiations agreement had a three-year term from July 1, 2007 through June 30, 2010.

Article VII of the expired agreement, entitled Salaries, states in pertinent part:

All salaries are set forth in Appendix A (Hourly Rate). The guide reflects a 4.30%, 4.50% and 4.50% salary increase in each of the three years, respectively.

Every employee who is employed in the district on or before January 31<sup>st</sup>, and is continuously employed for the balance of that school year, shall be advanced one step on the salary guide at the start of the next school year (September 1<sup>st</sup>), unless that employee's increment has been withheld. Any employee initially hired on February 1<sup>st</sup> or later shall receive no step movement in the following year.

At the negotiations table, the Board's position with respect to salary for the 2010-2011 school year is that salary and steps should be frozen for that year. During a negotiations session on July 14, 2010, the Association made a verbal request to the Board to move all members of the unit one increment step on the salary guide beginning September 1, 2010. The Association reduced this request to writing on August 2.

September 15 was the first pay day for the 2010-2011 school year. No paraprofessional was advanced a step on the salary guide of the expired collective agreement. The salaries for the Association's members remained frozen at their 2009-2010 school year levels. The cost of the salary step increment for the current paraprofessional staff in 2010-2011 is approximately \$42,577.

Other district bargaining units, including a custodial/maintenance unit, transportation supervisors unit, and bus drivers unit, had agreements that expired on or before June 30, 2010. Their step increments were not paid during their respective negotiations. The custodial/maintenance unit signed a memorandum of agreement including a zero percent salary increase with no step movement until 2011-2012.

#### ANALYSIS

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. DeGioia, 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 Association asserts that the Board changed the status quo during successor negotiations when it refused to pay paraprofessionals automatic salary increments for the 2010-2011 school year. In Galloway Twp. Bd/Ed v. Galloway Twp. Ed. Assn., 78 N.J. 25 (1978), the Supreme Court affirmed the Commission's decision holding that at the expiration of collective agreement, prevailing terms and conditions of employment, including the payment of automatic (not discretionary) salary increments according to a negotiated salary schedule, remain in effect until a new collective negotiations agreement was entered into or until the parties had reached impasse. The Court recognized the importance of prohibiting unilateral changes by an employer during negotiations because such changes interfere with the objective of establishing working conditions through negotiations.

The Board argues, however, that since the collective agreement was for a specific term (2007-2010) and the agreement provided for across-the-board salary increases only in each year of the agreement, the step increments are not automatic and do not survive beyond the expiration date of the collective agreement. This argument was considered and rejected by the Commission in State of New Jersey, I.R. No. 82-2, 7 NJPER 532

(¶12235 1981). There, the Commission considered several defenses raised by the State to justify its non-payment of salary increments pursuant to the terms of the parties' expired agreement.<sup>2/</sup> The State argued, as does the Board here, that the increments only had to be paid during the term of the parties' agreement. In particular, the Board points to Article XV, paragraph A that provides the parties' agreement is effective from July 1, 2007 through June 30, 2010 and shall "expire on the date indicated unless it is extended in writing." In State of New Jersey, the State, also, contended that the increments at issue were discretionary until a new agreement was reached that provides for their continued payment, since the collective agreements provided that increments be paid to eligible employees during the term of the agreement. This language, the State argued, should be construed to limit its obligation to the calendar term of the agreement.

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2/ The Board, also, contended in oral argument that the Superintendent has not approved any increment for the paraprofessionals and that, therefore, the Board has no authority to pay the automatic increments. First, there is no fact to support this assertion by either certification or affidavit. It is mere supposition and not considered by me in this decision. However, even if the Board required the Superintendent's approval before it was authorized to approve payment of the automatic increments, the Commission has held that an employer cannot evade its responsibility not to unilaterally alter terms and conditions of employment which it had agreed upon in negotiations by not acting to provide the benefit because it failed to meet its legal obligations - e.g. passing an ordinance. Tp. of Denville, P.E.R.C. No. 81-146, 7 NJPER 359 (¶12162 1981).



The Commission rejected the State's argument and stated in pertinent part:

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 upon the passage of additional periods of service measured by assigned anniversary dates. The employees involved herein have successfully completed that additional period of service. Their proper placement on the salary guide which remains in effect requires that they move up one step and receive the appropriate salary increment. Id. at 536-537.

See also, Newark Public Library, I.R. No. 84-9, 10 NJPER 321 (¶15154 1984) (Library ordered to pay automatic increments even though collective agreement addressed payment of increments only during term of collective agreement).

The Board's reliance on Hawthorne Bd. of Ed., I.R. No. 98-11, 23 NJPER 638 (¶28312 1997) is misplaced. In Hawthorne, the parties' collective agreement clearly stated that secretaries were not entitled to automatic salary increases. In the instant matter, the parties' expired collective agreement provides in clear language for the payment of an increment at the completion of a year of service. It is an experience-based increment distinguishable from the across-the-board percentage increases negotiated for specified years of the collective agreement which cease until a successor agreement is negotiated. The step

movement, therefore, continues as part of the status quo. Contrast, Hudson Cty. Sheriff, P.E.R.C. No. 93-56, 19 NJPER 64, (¶24029 1992) (expired salary schedule lacking consistent structure or uniform advancement year to year reflected fixed salary increases tied only to years of the collective agreement, not automatic increments tied to years of service).

Next, the Board argues that an evaluation of past practice is necessary in determining whether automatic increment payments are appropriate. It asserts that its other bargaining units agreed to forego and were not paid step increments during recent contract negotiations. Thus, the Board reasons, its practice is not to pay increments at the expiration of collective agreements. This asserted practice is irrelevant. The conduct of other units in recent negotiations for successor agreements is not a practice that binds the Association and Board.

Moreover, there is no contrary practice articulated or demonstrated as to the Board and Association that would negate the clear contract language entitling the paraprofessionals in this instance to the payment of automatic salary increments until the negotiation of a successor agreement. See generally, Winslow Township, I.R. No. 2007-7, 33 NJPER 38 (¶16 2007), (Township ordered to immediately pay eligible employees salary increments at expiration of parties' three-year agreement where agreement provided that on January 1 of each year employees move one step

on guide automatically); Hawthorne (clear contract language supercedes any contrary past practice). The agreement of other bargaining units to forego any entitlement to automatic increments does not act as a waiver of the Association's rights to payment of those increments during negotiations established under Galloway and other Court and Commission decisions. Union Cty. Reg. H.S. Bd. of Ed., P.E.R.C. No. 78-27, 4 NJPER 11 (¶4007 1977).

The cases cited by the Board to support its position that the Association must first demonstrate a practice of the Board paying automatic increments before its members are entitled to be paid are distinguishable and/or inapposite. For instance, in City of Vineland, I.R. No. 81-1, 7 NJPER 324 (¶12142 1981), the Commission Designee rejected the City's argument that since it had withheld increments during two prior negotiations for successor agreements, this practice was the status quo and a defense to its non-payment in current negotiations. The Designee held that the union's acquiescence to the City's denial of increments in the past cannot constitute a permanent waiver of the right. Thus, applying Vineland's reasoning, the Board's practice in regard to other units is irrelevant.

In Howell Tp. Bd. of Ed., P.E.R.C. No. 86-44, 11 NJPER 634 (¶16223 1985), the Commission reaffirmed principles enunciated in Galloway and did not address the issue of past practice. This

case does not support the Board's position in the instant matter. Also, in Rutgers, The State University v. Rutgers University College Teachers Assn., App. Div. Docket No. A-1572-79 (4/1/81), aff'g P.E.R.C. No. 80-66, 5 NJPER 539 (¶10278 1979), the Commission affirmed a Hearing Examiner's decision determining that the University violated the Act when it refused to pay an automatic salary increment during negotiations for a first collective agreement. Unlike the matter before me, there was no contract language to consider, so the Commission looked to the parties' longstanding practice to establish what the condition of employment was that had to be maintained by the University during negotiations. Finally, Hudson Cty. Bd. of Chosen Freeholders v. Hudson Cty. PBA Local No. 51, App. Div. Docket No. A-2444-77 (4/9/79), aff'g P.E.R.C. No. 78-48, 4 NJPER 87 (¶4041 1978) is also distinguishable. In Hudson Cty., the parties' past practice regarding paying increments was examined to clear up ambiguous language in a memorandum memorializing an oral agreement regarding the increment payments. Parole evidence of the past practice was permitted to clear up this ambiguous language. No such ambiguity is before me.

Based on the foregoing, it appears that Charging Party has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations.

As to irreparable harm, in Galloway, supra, at pp. 48-49, the Supreme Court stated:

. . . The basis of the rule prohibiting unilateral changes by an employer during negotiations is the recognition of the importance of maintaining the then-prevailing terms and conditions of employment during this delicate period until new terms and conditions are arrived at by agreement. Unilateral changes disruptive of this status quo are unlawful because they frustrate the 'statutory objective of establishing working conditions through bargaining.'

Additionally, in Union Cty. Reg. H.S. Bd. of Ed., supra, the Commission Designee wrote in pertinent part:

Particular types of unilateral action relating to terms and conditions of employment, such as the non-payment of salary increments, may so undercut the negotiations process and adversely affect the ability of a majority representative to effectively represent its particular constituency that traditional monetary awards that would be ordered at the conclusion of a case would not effectively remedy a violation of the Act. . . . To permit the Board not to pay increments during the pendency of negotiations for a successor agreement would be to permit the Board to apply illegal pressure on negotiations proposals in order to receive increments in fact due under the old agreement. Id. at 14.

Finally, in considering harm to the public interest and the relative hardship to the parties in granting or denying relief, the Board argues that granting the interim relief and ordering payment of the increments would impede its ability to negotiate a salary freeze for 2010-2011 and would negatively impact other

educational programming. There is no doubt that the downturn in the economy has placed tremendous stress on State and local budgets, forcing employers to adjust by cutting back services. These cutbacks can be especially difficult when dealing with educational services and particularly services provided to children with special needs. As the Board opines, state and federal mandates prohibit the Board from reducing its paraprofessional staff below a certain point. Thus, layoffs to offset costs may not be feasible if it has to incur the cost of the increments.

Recently, in County of Ocean, P.E.R.C. No. 2011-6, 36 NJPER 303 (¶115 2010), the Commission recognized the County's argument that paying increments during negotiations for a successor agreement might exceed any negotiated increases, but rejected unilateral employer action that stripped the collective negotiations agreements of their undisputed meaning and effect. The Commission suggested that the County could layoff employees or the parties could arrange for recoupment, red-circling or any other method to ensure that employees receive only what is negotiated on their behalf. Although layoffs of paraprofessionals may or may not be possible in this instance, due to state and federal mandates, the Board might still layoff other non-essential personnel and/or may be required to identify other avenues to capture the savings it seeks, including

reviewing its current negotiations position in order to adjust to a changed economic circumstance.

In Ocean Cty., the Commission determined that difficult choices do not justify unilateral employer action. It is not within the authority of the Commission Designee to set new policy for the Commission. The Commission has determined that maintaining the integrity of the collective negotiations process enhances labor relations stability and promotes the public interest.

Finally, in considering the relative hardship to the parties, I find that enforcing the collective agreement and preserving the status quo during negotiations outweighs the cost to the Board. The Board asserts that the 2010-2011 increments would cost approximately \$42,577, money that is not in its current budget. However, in light of Court and Commission decisions, the payment of the automatic increments was a foreseeable expense in the current school year. Allowing the Board to claim inability to pay under these circumstances, and given that the Board may maintain its current posture in negotiations and, if successful, may recoup expended funds, does not justify the employer's unilateral action.

ORDER

The application for interim relief is granted, the Board is ordered to immediately pay the 2010-2011 automatic salary increments pursuant to the parties' expired collective agreement and Appendix A of the agreement retroactive to the first pay period of the 2010-2011 school year.

  
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Wendy L. Young  
Commission Designee

Dated: November 01, 2010  
Trenton, New Jersey