

I.R. No. 2011-43

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE-OPERATED SCHOOL
DISTRICT OF THE CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2011-220

NEWARK TEACHERS UNION
LOCAL 481, AFT, AFL-CIO,

Charging Party.

SYNOPSIS

A Commission Designee denies in part, and grants in part an application for interim relief based upon an unfair practice charge alleging that the State-Operated School District of the City of Newark refused to pay automatic salary increments to two collective negotiations units represented by the Newark Teachers Union, Local 481, AFT, AFL-CIO, following the expiration of two one-year agreements, both extending from July 1, 2009 - June 30, 2010. The NTU seeks payment of the increments for the 2010-2011 school year.

The Designee denied the application for the unit including teachers and clerks, based upon a balancing of hardships to the parties and harm to the public interest, as set forth in Bloomfield Tp. Bd. of Ed., P.E.R.C. No. 2011-55, 37 NJPER 2 (12 2011). The application was granted for the separate negotiations unit representing aides and per diem substitutes largely because the increments, representing an increase in salary of about 1.75%, could be recouped in the event that the negotiated wage increase for the 2010-2011 school year was less than the cost of the increments.

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Appearances:

For the Respondent, Lisa Pollak, General Counsel
(Jeffrey Reiner, Senior Associate Counsel)

For the Charging Party, Zazzali, Fagella, Nowak,
Kleinbaum & Friedman, attorneys (Sidney H. Lehmann, of
counsel)

INTERLOCUTORY DECISION

On November 30, 2010, the Newark Teachers Union Local 481, AFT, AFL-CIO (NTU) filed an unfair practice charge against the State-Operated School District of the City of Newark (Newark Public Schools or NPS), together with an application for interim relief, a proposed Order to Show Cause, a certification, exhibits and a brief. The charge alleges that on or after November 2, 2010, NPS failed to respond to the NTU's demand that automatic increments be paid to employees in the "teacher/clerk" negotiations unit and in the "aide-per diem substitute" unit. Both units are covered by collective negotiations agreements with

NPS extending from July 1, 2009 through June 30, 2010. The charge alleges that the increments, based upon guides, were payable in either the first paycheck in July or September 2010, depending upon whether the unit positions were for 12 months or 10 months. The "teacher/clerk" agreement also provides increments for longevity and educational attainment. The "aide/per diem substitute" agreement provides longevity payments. The charge alleges that the parties are in negotiations for successor agreements. NPS's failure to pay the increments allegedly violates 5.4a(1), (2), (3) 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 NPS to pay salary increments, longevity increments and educational achievement increments.

On December 10, 2010, I issued an Order to Show Cause, specifying January 20, 2011 as the return date for argument on

^{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. (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. (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."

the application. I also directed the NPS to file an answering brief, together with opposing certification(s) and proof of service upon the NTU by January 10. On the return date, the parties argued their cases. I advised that the Commission had placed a motion for reconsideration of Bloomfield Tp. Bd. of Ed., I.R. No. 2011-12, 36 NJPER 330 (¶129 2010) on its agenda for the upcoming monthly meeting and that the parties would have the opportunity to file supplemental briefs addressing the significance of Bloomfield to the circumstances of this case. I also held the record open to permit the parties to submit certifications and letters concerning NPS's receipt in September 2010 of \$23.5 million in federal aid.

On February 3, 2011, the Commission issued Bloomfield Tp. Bd. of Ed., P.E.R.C. No. 2011-55, 37 NJPER 2 (¶2 2011). On February 15, the parties filed supplemental briefs and certifications. On March 11 and 18, 2011, the NTU and NPS filed unsolicited letters, documents and a certification. The following facts appear.

The NTU and NPS signed separate collective negotiations agreements designated "teacher-clerk" and "aide-per diem substitute," respectively, and both extend from July 1, 2009 through June 30, 2010. Articles VIII and XIV of the "teacher-clerk" agreement sets forth 2008-2009 and 2009-2010 salary schedules, including steps and longevity payments for clerks,

teachers and other certificated personnel. The guides for teachers are also delineated by educational degree and academic credits. Article X of the "aide-per diem substitute" agreement sets forth 2008-2009 and 2009-2010 salary schedules, including steps and longevity payments for six-hour aides, six-hour aides with sixty college credits, and educational interpreter. Aides earned between \$28,000 and \$33,000 annually, without longevity increments, in the 2009-2010 school year. Educational interpreters earned \$37,000 to \$40,000, without longevity payments, in the 2009-2010 school year. No facts indicate the number of employees in the unit.

Employees advance one step on their appropriate guide upon completing a year of service, until they reach the top step. Payments inclusive of increments are issued to unit employees in the first paycheck in July or September, depending upon their status as 10-month or 12-month employees.

The parties are in collective negotiations for successor agreements. On October 22, 2010, NTU counsel issued a letter to the NPS, demanding payment of all salary increments. On November 1, 2010, a NPS representative issued a letter to NTU counsel, writing that ". . . the NTU's demand [is] under advisement and [NPS] will notify you shortly of its position." No other response was issued.

On January 6, 2011, NPS Business Administrator/CFO Valerie Wilson filed a certification reporting that "State aid" to NPS in the 2010-2011 school year was \$42.6 million less than the previous fiscal year, resulting in \$77 million less in "revenue" than the budget in the previous fiscal year. Among the reductions needed to address that shortfall are eliminating 283 classroom teachers for a reduction of \$19,781,000; eliminating 111 tutors for a reduction of \$5,769,000; eliminating 47 resource teacher coordinators for a reduction of \$2,797,000; eliminating 199 clerical and administrative positions for a reduction of \$8,278,000; eliminating 82 substance abuse coordinators for a reduction of \$2,761,000, etc.

The cost of the increments sought for 2010-2011 is \$6,358,000, or an increase of 1.75% over the prior year. Wilson certified that payment of the increments will result in a layoff of ". . . approximately 100 teachers."

On February 15, 2011, the NTU filed a certification of its president, Joseph Del Grasso, supported by an attachment dated September 20, 2010 issued by Acting Commissioner of Education Rochelle Hendricks advising that the U.S. Department of Education approved ". . . New Jersey's application for \$268 million in federal funds," of which Newark's share was \$23,695,429. The letter urges superintendents to be "mindful" of how the funds are spent, requesting them to ". . . consider reserving this one-time

funding for the 2011-2012 school year if possible." Hendricks "encouraged" districts to ". . . avoid spending decisions that would significantly grow future year obligations that could prove to be unsustainable." She continued:

In other words, these one-time funds should not only preserve critical jobs, they should provide your district with the breathing room needed to plan for educationally sound, balanced budgets in the austere days to come.

The attachment is a thirteen-page listing of each New Jersey school district's "allocation," followed by a four-page question and answer formatted document entitled, "Education Jobs Fund Guidance-New Jersey." The document provides in pertinent parts:

A-1. What is the Education Jobs Fund (Ed Jobs) program?

The Ed Jobs program is a new Federal program that provides \$10 billion in assistance to states to save or create education jobs for the 2010-2011 school year (unused funds can also be used the following school year). Jobs funded under this program include those that provide educational and related services for early childhood, elementary, and secondary education.

A-2. What is New Jersey's allocation of Ed Jobs funds?

After administrative expenses, New Jersey's school districts will receive a total of \$262,742,643.

A-3. What is the period of availability of Ed Jobs funds?

The funds will be available for obligations that occur as of August 10, 2010 (the date of enactment of the Act) to support educational

and related services during the 2010-2011 school year. A district that has funds remaining after the 2010-2011 school year may use those remaining funds through September 30, 2012. This period includes the additional year of fund availability authorized under the Tydings Amendment (Section 421(b)(1) of the General Education Provisions Act (GEPA), 20 U.S.C. 1225(b)(1)).

B. Allowable Uses of Funds

B-1. For what purposes may a district use its Ed Jobs funds?

A district must use its funds only for compensation and benefits and other expenses, such as support services, necessary to retain existing employees, to recall or rehire former employees, and to hire new employees, in order to provide early childhood, elementary, or secondary educational and related services.

B-3. What categories of expenses may a district support with Ed Jobs funds?

For purposes of this program, the phrase "compensation and benefits and other expenses, such as support services" includes, among other things, salaries, performance bonuses, health insurance, retirement benefits, pension fund contributions (see B-2), tuition reimbursement, student loan repayment assistance, transportation subsidies, and reimbursement for childcare expenses.

B-4. Which employees may a district support with Ed Jobs funds?

A district may use the funds to pay the salaries of teachers and other employees who provide school-level educational and related services. In addition to teachers, employees supported with program funds may include,

among others, principals, assistant principals, academic coaches, in-service teacher trainers, classroom aides, counselors, librarians, secretaries, social workers, psychologists, interpreters, physical therapists, speech therapists, occupational therapists, information technology personnel, nurses, athletic coaches, security officers, custodians, maintenance workers, bus drivers, and cafeteria workers.

B-7. May a district use Ed Jobs funds to change previously established employee salary schedules or to reduce the number of furlough days?

Yes. A district may use Ed Jobs funds, for example, to restore reductions in salaries and benefits and to implement salary increases for the 2010-2011 school year. In addition, a district may use the funds for any additional salary and benefits costs associated with the elimination of furlough days that had been scheduled for the 2010-2011 school year.

A district may not use Ed Jobs funds to compensate employees for any period prior to August 10, 2010, the date of enactment of the Act.

Also on February 15, NPS filed a "supplemental" certification of Business Administrator/CFO Wilson. She wrote that the "funding mechanism" of the federal "Educational Jobs Act" operates on a "draw-down basis, i.e., a school district must first spend a portion of the funds allocated to it, and then must make an application for reimbursement of the funds it has spent."

Wilson certified that she ". . . reiterates and confirms that if NPS is required to pay the \$6.3 million in increments at

this time, NPS will be required to lay off approximately 100 teachers." Referencing her earlier certification of a \$77 million shortfall in revenue, leaving the NPS "unable to budget for any salary increases (including increments) for any of its employees," Wilson certifies that, "the NPS, in the context of its negotiations with NTU, is seeking a wage freeze with no increment movement on the salary guide for fiscal year 2010-2011."

On March 11, 2011, the NTU filed an unsolicited letter, together with an attached listing from the Education Commissioner of the Governor's February 23rd proposed fiscal year 2012 budget for school districts, including Newark. The Governor proposed \$681,061,000 for NPS, an increase of \$8,495,000 over the previous fiscal year.

On or about March 18, 2011, the NPS filed an unsolicited letter, together with a "second supplemental" certification of Business Administrator/CFO Wilson. She wrote that the Governor's proposed increase to NPS in fiscal year 2012, together with the (as-yet-unspent) \$23,695,000 in federal funding demonstrates that ". . . NPS [otherwise] would have \$32,190,593 less in revenue available to balance its budget for fiscal year 2011-12." That fact, Wilson certifies,

says nothing whatever as to the financial impact and harm to NPS, its students or to the 100 NTU teachers who would nonetheless have to be laid off if NPS was required to

now pay the \$6.3+ million in step increments that NTU seeks.

NPS has calculated the 'expense' side of its expected 2011-12 fiscal year budget on a 'static' or 'no increase' basis - i.e., what would NPS' expenses for the upcoming year be if it did not increase any spending over which it has any degree of control? Among other items that will, no doubt, arise (over which NPS has no ability to control), NPS is faced with (a) an increase in its statutory Charter School Aid obligation of \$32.8 million, (b) an increase in its statutory unemployment compensation benefit obligation of \$9.0 million, (c) an increase in its statutory health benefit costs of \$8.0 million, and (d) an increase in its statutory pension obligation of \$3.8 million. Therefore, NPS' 2011-12 fiscal year budget - even if not one (1) single dollar of 'discretionary' spending is made - will increase by at least \$53.6 million.

It is extraordinarily helpful, in our effort to balance NPS's 2011-12 fiscal year budget, that NPS will have the \$32+ million in federal Education Jobs Act funds and State aid increase. this reduces the budget shortfall - which we must find a way to fully eliminate - to 'only' \$21.4+ million. If NPS was required to pay the \$6.3+ million in step increments at this time, that would increase our budget shortfall on a dollar-for-dollar basis - i.e., the shortfall would increase from \$21.4+ to \$27.7+ million, and would have to find a way to reduce expenses by that much more.

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).

In Bloomfield Tp. Bd. of Ed., the Commission granted the Board's motion for reconsideration and vacated an interim relief order granting an application for interim relief, based upon an unfair practice charge alleging that a Board had unlawfully refused to pay automatic increments to certificated personnel following the expiration of a one-year collective negotiations agreement. See I.R. No. 2011-12, 36 NJPER at 330. The Commission wrote that the facts demonstrated ". . . that interim relief should not be granted after weighing the relative hardship to the parties and considering the harm to the public interest." Bloomfield, 37 NJPER at 3.

The Commission acknowledged that the law ". . . requires a dynamic status quo, including the payment of automatic increments during the hiatus period after the expiration of a collective negotiations agreement," citing Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978). Bloomfield, 37 NJPER

at 3. See also, Hudson Cty., P.E.R.C. No. 78-48, 4 NJPER 87 (¶4041 1978), aff'd NJPER Supp. 2d 62 (¶44 App. Div. 1979); Rutgers, the State Univ., P.E.R.C. No. 80-66, 5 NJPER 539 (¶10278 1979), aff'd as mod. NJPER Supp. 2d 96 (¶79 App. Div. 1981). The Commission noted that in Neptune Tp. Bd. of Ed. v. Neptune Tp. Ed. Ass'n., 144 N.J. 16 (1996), our Supreme Court held that school boards are precluded from paying increments to certificated staff after the expiration of a three-year agreement, relying upon N.J.S.A. 18A:29-4.1. The Court had observed that tenure statutes prohibit boards from reducing teachers' compensation and that permitting increment payments after the expiration of three-year agreements would render an increase permanent and binding for a fourth year and each year thereafter. The Commission wrote:

The relative hardship to the Board if it were required to pay the increments is substantial. The loss of State aid to school districts has been widely publicized. School districts are attempting to manage the loss of State aid while still continuing to meet their educational obligations to students. For the 2010-2011 school year, Bloomfield's State aid was reduced by \$4.4 million, which is approximately 7% of its budget. The employees will incur some hardship in not immediately receiving their increments. In most cases in which increments are paid upon the expiration of a collective negotiations agreement, the amount of the increment received is a factor in successor negotiations and/or subtracted from the amount of the increase agreed upon in successor negotiations. However, in this case, the Board is seeking a wage freeze in

negotiations with no increment movement on the salary guide. Payment of the increment would cost the Board \$735,506. Should the successor contract reflect the wage freeze sought by the Board, the amount of the increments paid cannot be a factor worked out between the parties through the regular negotiations process. Under tenure law, the increments are irretrievable once paid, so the Board will have no opportunity to recoup the money. Neptune, 144 N.J. at 33. There are 414 tenured teachers on the salary guide who would receive an irretrievable increment. We reject the Association's argument that the teachers' salaries may be 'red-circled' as a recoupment option because the Board still currently suffers the harm of having to pay the money. All of these facts establish that the substantial hardship to the Board if it were required to pay the increments outweighs the hardship to the employees in not receiving the increments. Given these same considerations, the interests of the public would also be harmed if interim relief were granted. Accordingly, by resolving this preliminary issue on a narrow ground, we need not revisit the 'dynamic status quo' doctrine at this time. See Gauer v. Essex County Div. of Welfare, 108 N.J. 140, 151 (1987). [Bloomfield, 37 NJPER at 4]

Finally, the Commission noted that the Bloomfield district received about \$707,000 in federal funds that it has not used, ". . . given the Department of Education's recommendation that it be reserved for the 2011-2012 school year." Id., 37 NJPER at 4.

Applying the criteria set forth in Bloomfield for weighing the relative hardship to the parties and considering the harm to the public interest in this case, I find that the hardship to the NPS if it were required to pay increments to teachers outweighs the hardship to them in not receiving increments. In the 2010-

2011 school year, State aid to NPS was reduced by \$42.6 million which is about 6% of its budget. (NPS received about \$23.7 million in federal aid that it has not used, given the Department of Education's recommendation that it be reserved for the 2011-2012 school year. Applying that aid to the projected 2011-2012 budget yields a remaining deficit of \$21.4 million).

Certificated staff will incur some hardship in not receiving their increments. In this case, the NPS is seeking a wage freeze with no increment movement for certificated and non-certificated unit employees. Payment of the increment to all contested employees will cost the NPS \$6,358,000. If the successor agreement reflects the wage freeze sought by NPS, the amount of the increments paid to certificated staff could not be a factor worked out between the parties through the regular negotiations process. Under tenure law, increments are unretrievable once paid, so that the NPS will have no opportunity to recoup the money. Neptune. All of the teachers - recipients of the largest share of the dollars - would receive an irretrievable increment. These facts demonstrate that the hardship to the Board if it were required to pay the increments outweighs the hardship to the certificated employees in not receiving the increments. This consideration also shows that the interest of the public would also be harmed if interim relief were granted.

In East Hanover Bd. of Ed., P.E.R.C. No. 99-71, 25 NJPER 119 (¶30052 1999), the Commission held that a school board cannot be compelled, after a three-year contract expires, to pay automatic increments to non-certificated employees in a mixed unit with teaching staff members. The Commission wrote:

It seems unwise to us, as a matter of labor relations policy, to have separate rules for increment payments for different types of employees within a single, broad-based negotiations unit. That would mean that some employees would have incremental raises already paid while other employees would have to negotiate for those raises.
[Id., 25 NJPER at 122]

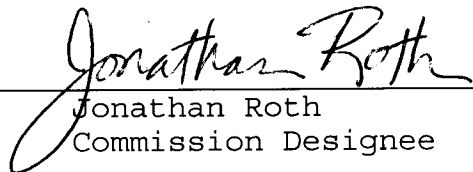
"Clerks" are included with "teachers" in one negotiations unit at NPS. Although I cannot find that this unit is "broad-based," an order requiring increment payments to non-certificated unit personnel would create uneven negotiations pressures within the unit, a result which the Commission in East Hanover sought to avoid.

The same concern and the Commission's concern in Bloomfield about irretrievable increment payments to teachers do not apply to the "aide-per diem substitute" unit represented by the NTU. These non-certificated unit employees seeking increments representing about a 1.75% increase in salaries are protected by case law mandating a dynamic status quo during negotiations for a successor agreement. See Galloway; Hudson Cty; and Rutgers. Unlike the circumstances in Bloomfield (and those of teachers in

this case), recoupment of paid increments to aides is feasible if the negotiated increase for the 2010-2011 school year is less than 1.75%. In these particular circumstances, I find that the hardship to the aides and per diem substitutes in not receiving increments outweighs the hardship to the NPS in having to pay the increments.

ORDER

The application for interim relief is denied, in part and granted, in part. The application is denied for the "teacher/clerk" collective negotiations unit. The application is granted for the "aide/per diem substitute" unit; the Board is ordered to immediately pay the 2010-2011 automatic salary increments to unit employees retroactively to July 1, 2010.


Jonathan Roth
Commission Designee

DATED: May 11, 2011
Trenton, New Jersey