I.R. NO. 2021-2

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST ORANGE COMMUNITY CHARTER SCHOOL,

Respondent,

-and- Docket No. CO-2020-317

EAST ORANGE COMMUNITY CHARTER EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief based on an unfair practice charge alleging in the pertinent part that the public employer unlawfully refused to pay a wage increase to unit employees for the 2020-2021 school year, following increases of 1.5%, 2% and 3% paid over each of the past three years, respectively. The Association was first certified as majority representative in August, 2019.

The Designee determined that the increases were "discretionary," rather than "automatic," thereby not obligating the Charter School to pay a requested wage increase. See e.g. Advanced Life Systems, 898 F. 3d 38 (D.C. Cir. 2018); Rutgers the State University and Rutgers University Coll. Teachers Ass'n, et al., P.E.R.C. No. 80-66, 5 NJPER 599 (¶10278 1979), aff'd as mod. NJPER Supp. 2d 96 (¶79 App. Div. 1981).

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Appearances:

For the Respondent,
New Jersey School Boards Association
(Kathleen Asher, of counsel)

For the Charging Party,
Selikoff and Cohen, PA, attorneys
(Keith Waldman, of counsel)

INTERLOCUTORY DECISION

On June 25, 2020, East Orange Community Charter Education Association (Association) filed an unfair practice charge against East Orange Community Charter School (Charter School), together with an application for interim relief, a certification, exhibits and a brief. The charge alleges that during collective negotiations for an initial agreement, following the Association's certification as majority representative on August 12, 2019, Counsel for the Charter School, on June 5, 2020, refused Acting Association President Jennifer Wien's email demand, ". . . to honor the past practice of advancing employees'

pay each year." The charge alleges that Charter School Counsel's email refusal provides in a pertinent part:

> [I]f these had been in an existing contract from which to apply the dynamic status quo, we would tend to agree. However, at this time, as we are in the process of creating our first contract, it is within our rights to begin the process at current salary levels."

The charge alleges that in 2017-2018, the Charter School paid a 1.5% wage increase to employees; in 2018-2019, a 2% wage increase; and in 2019-2020, it paid a 3% wage increase. The charge alleges that the Charter School unilaterally discontinued its practice of paying wage increases for the 2020-2021 school year, freezing employees' salaries at current levels.

The charge also alleges that on June 5, 2020, in response to Charter School Counsel's refusal to pay a wage increase, Wien replied in an email that she would advise the Association members to sign their [individual] employment contracts, ". . . but to note they are doing so with reservation of rights," adding: "You will be hearing from our lawyer." Charter School Human Resources Director Amy Yarbrough allegedly "reprimanded" Wien in a follow-up email, writing:

> We are attempting to be respectful with communication. Especially with multiple parties on an email. In the future, you can omit language such as, 'you will be hearing from our lawyer' and remain more professional. If the union's attorney wants to reach out, then he or she may do so.

This portion of the charge, alleging a violation of section 5.4a(3) and a (1)[1/] independently, of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act), is specifically omitted from the Association's application. The Association alleges that the Charter School's refusal to advance employees' pay, ". . . an average of 2% in accordance with established practice violates the dynamic status quo" and its withholding of salary adjustments during the pendency of negotiations for a first collective negotiations agreement violates section 5.4a(5)[2/] of the Act, in addition to section 5.4a(3) and (1).

The application seeks an order directing the Charter School to maintain the status quo by immediately advancing employees' pay for the 2020-2021 school year by 2% from the previous year

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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. (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 the act.

2/ This provision prohibits public employers, their representatives or agents from: (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.

and to rescind and reissue any 2020-2021 employment contracts that don't include such pay increases.

On June 26, 2020, an Order to Show Cause issued, setting a return date of July 22, 2020. On July 13, 2020, I partially approved Charter School Counsel's request for an extension of time in which to file a brief, over Charging Party's objection. On the return date, the parties argued their cases in a telephone conference call. The following facts appear.

Unit employees Jennifer Wien and Jeffrey Latko and unspecified other certificated and non-certificated Charter School employees have been employed by the Charter School for about 20 years. For the 2017-2018 school year, employees received a 1.5% wage increase. For the 2018-2019 school year, employees received a 2% wage increase. For the 2019-2020 school year, employees received a 3% wage increase (Association certification, para. 2, 5).

On August 12, 2019, the Commission issued a Certification of Representation, certifying the Association as the exclusive representative of all certificated and non-certifications Charter School employees, excluding managerial executives, confidential employees and others (Dkt. No. RO-2020-001). The parties are currently in negotiations for an initial collective negotiations agreement (Association certification, para. 3).

On June 1, 2020, Charter School Human Resources Director Amy Yarbrough emailed Association Acting President Wien:

> I'm working on sending out contracts for the new school year this week. Is the membership planning on holding the contracts for negotiations purposes? In efforts to keep my records of returned contracts as accurate as possible, please provide a list of those employees who will be holding them, if that is the approach the union will be taking. Let me know your thoughts. [Association Exhibit A]

On June 2, 2020, Wien replied, writing in an email that the membership has been advised to sign their contracts, ". . .so you do not need a list of those who may be holding them." She also wrote:

> I watched the last Board meeting when you mentioned that these contracts will not include raises. This violates the reservation of rights. Since the status quo has been for the Charter School to advance employees at least 2% each year, withholding the 2% during negotiations violates the dynamic status quo . . . [Association Exhibit A]

On June 5, 2020, Charter School Counsel Kathleen Asher emailed Wien, acknowledging her previous email but insisting that, ". . . it is within our rights to begin the [negotiations for a first contract] process at the current salary levels" (Association Exhibit B).

Later on June 5, Wien emailed a response to Asher, asserting that, ". . .the practice has been to grant raises and the failure to grant raises is a violation of the dynamic status quo that

existed as a matter of practice." She also wrote that the Charter School's refusal to grant raises, ". . . tends to undermine the standing of the union as an equal in the negotiations process in the eyes of the members." She wrote: "You will be hearing from our lawyer" (Association Exhibit B).

Minutes later, Yarbrough emailed Wien, writing: "We are attempting to be respectful with communication. Especially with multiple parties on an email. In the future you can omit language, such as, 'you will be hearing from our lawyer' and remain more professional. If the union's attorney wants to reach out, then he or she may do so" (Association Exhibit C). Wien soon replied, acknowledging a distinction between her roles as an employee and as "union president." She wrote that her earlier advice was a "factual statement."

Wien (and two other employees) certify that over the three previous years, ". . . all employees had regularly and consistently received pay increases averaging 2% per year . . . but now excluding the 2020-2021 school year" (Wien cert. para. 5).

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain 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 ireparable

harm will occur if the requested relief isn't 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 (1992); 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 Charter School has not contested the facts set forth in the Association's application. The Association argues that it meets the requisite likelihood of success standard because the Charter School unilaterally changed terms and conditions of employment during negotiations for an initial collective negotiations agreement, the term and condition being the annual "automatic" pay adjustments over the past three years by an average of 2 per cent. It cites Atlantic County and FOP Lodge 34 and PBA Local 77, P.E.R.C. No. 2014-40, 40 NJPER 285 (¶109 2013), rev'd 42 NJPER 433 (¶117 App Div. 2016), aff'd on other grounds, 230 N.J. 237 (2017); Galloway Tp. Board of Education v. Galloway Tp. Education Ass'n, 78 N.J. 25 (1978); Rutgers, the State University and Rutgers University Coll. Teachers Ass'n, et al, H.E. No. 80-6, 5 NJPER 406 (¶10212 1979), aff'd P.E.R.C. No. 80-66, 5 NJPER 539 (¶10278 1979), aff'd as mod. NJPER Supp. 2d 96 (¶79 App. Div. 1981).

I disagree that the Association has demonstrated a substantial likelihood of success on the legal merits. Rutgers, like this case, involved an alleged unilateral withholding of salary increases (to adjunct faculty) during the pendency of negotiations for an initial collective negotiations agreement. In Rutgers, adjunct faculty who fulfilled certain conditions set forth in Rutgers representative's letter[3/] issued five years earlier, had advanced one incremental step annually in their particular salary range on a salary guide until the parties engaged in negotiations for their first agreement. The Commission described the University's position:

> The University maintains in effect that unilaterally adopted policies affecting terms and conditions of employment of unionized employees could be unilaterally rescinded at any time and could not serve to define the status quo relating to the salaries of these employees once they were organized and represented by an employee organization [Rutgers, P.E.R.C. No. 80-66, 5 NJPER at 540].

The Hearing Examiner, citing Galloway Tp., principally, found that the annual salary increments paid by the University from 1972 through 1978 were "automatic" and not "discretionary", thus concluding that Rutgers unilaterally altered a term and

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3/ The 1973 letter provided: "In subsequent years, an adjunct faculty member at University College will advance one increment step on his or her salary range for each academic year (exclusive of summer session)in which six or more credits were taught . . ."

condition of employment during the pendency of negotiations, violating section 5.4a(5) of the Act. The Commission agreed, explaining that terms and conditions of employment can be "derived from a contract or some other source, i.e., from past practices affecting employees, whether organized or not," as codified in section 5.3 of the Act: "Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." 5 NJPER at 539. The Commission found, ". . . a long-standing practice involving members of the Co-Adjutant faculty wherein all Co-Adjutants would receive a salary increment within their respective ranges for each academic year (exclusive of the summer session) in which six or more credits were taught." Id., 5 NJPER at 540.

The analytical distinction between "automatic" and "discretionary" wage increases is traceable to NLRB v. Katz, 369 U.S. 736 (1962) and later, in New Jersey, to section 5.3 of the Act, as the Commission noted in Rutgers. Cogently stated, ". . . if the increases were 'automatic', they could not be altered under the unilateral change doctrine,[4/] whereas if they were

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4/ The doctrine "enforces the statutory right of a majority representative, on behalf of unit employees, to negotiate working conditions with an employer before an employer established or changes these working conditions" State of New Jersey (Corrections) H.E. No. 2020-2, citing Ocean Cty. P.E.R.C. No. 86-107,12 NJPER 341,347(¶17130 1986).

largely 'discretionary,' increases were not required." State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195, 209 (¶49 2019), aff'd P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020).

Not all salary terms established by a past practice or a collective negotiations agreement define the status quo under the unilateral change doctrine. As a general rule, when a union and employer are negotiating a collective negotiations agreement for the first time, the employer, ". . . may not make pay increases or award bonuses to represented employees without first negotiating their terms with the Union. Indeed, unilaterally instituting such payments would be an unfair labor practice, in violation of an employer's section 8a(5) duty to bargain with the employees' chosen union over terms and conditions of employment" (citations omitted). Advanced Life Systems v. NLRB, 898 F. 3d 38, 46 (D.C. Cir. 2018); State of New Jersey (Dept. of Corrections) H.E. No. 2020-2.

The exception, as explained in Advanced Life Systems, is where an employer has a "long standing practice" of awarding automatic pay increases or bonuses, ". . . in predictable amounts at known intervals." Id., at 898 F. 3d 46. In this case, unlike cases cited by the moving party, the amount payable isn't predictable (Board of Education of Township of Neptune v. Neptune Tp. Educ. Ass'n, 144 N.J. 16 (1996); Rutgers; Somerville Bor., P.E.R.C. No. 84-90, 10 NJPER 125 (¶15064 1984); Township of

Nutley, H.E. No. 99-18, 25 NJPER 199 (¶30092 1999); Cty. of Sussex I.R. No. 84-7, 10 NJPER 192 (¶15095 1984)).

Also analytically helpful is posing the issue in an alternative manner - could the Charter School have been found to have violated the Act if it had granted, rather than withheld, a 2% or 1.5% increase (as the Association requests). See Newark Public Library I.R. No. 84-9, 10 NJPER 321 (¶15154 1984). Under the rationale in NLRB v. Katz, the answer is affirmative if the increase was "discretionary" and negative if it was "automatic." Under NLRB v. Katz's rationale, I believe the answer is "yes" because either payment would not perpetuate an existing term and condition of employment (See Barnegat Tp. Bd. of Ed., P.E.R.C. No. 91-18, 16 NJPER 484 (¶21210 1990) (an existing employment condition deemed unlawfully changed upon cessation of a consecutive two year practice).

For these reasons, I conclude that the Association has not demonstrated a substantial likelihood of success. I deny the application for interim relief. The case shall be processed in the normal course.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: July 23, 2020
Trenton, New Jersey