P.E.R.C. NO. 88-5

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOUSING AUTHORITY OF THE
CITY OF CAMDEN,

Respondent,

-and-

Docket No. CO-85-305-20

CAMDEN COUNCIL NO. 10,

Charging Party.

SYNOPSIS

The Commission finds that the Housing Authority of the City of Camden violated the New Jersey Employer-Employee Relations Act when it withheld increments to unit employees during collective negotiations and its Executive Director told a unit employee "there will be no increments because you joined the union." A Hearing Examiner recommended this conclusion and the Commission, in the absence of exceptions, adopts it.

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CAMDEN COUNCIL NO. 10,

Charging Party.

Appearances:

For the Respondent, Capehart & Scatchard, Esqs.
(Alan R. Schmoll, of counsel)

For the Charging Party, Tomar, Seliger, Simonoff, Adourian & O'Brien, Esqs. (Mary L. Crangle, of counsel)

DECISION AND ORDER

On May 21, 1985, Camden Council No. 10 ("Council 10") filed an unfair practice charge against the Housing Authority of the City of Camden ("Authority"). The charge alleges the Authority violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3) and (5),[1/] when it

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1/ These subsections 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

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unilaterally rescinded its salary increment system and denied eligible employees increments they were entitled to under that system. The charge further alleges that these actions "were taken in discriminatory retaliation for these employees having voted for union representation in a PERC conducted election."

On August 2, 1985, a Complaint and Notice of Hearing issued.

On September 13, 1985, Hearing Examiner Jonathon Roth conducted a hearing. The parties stipulated facts, examined witnesses and introduced exhibits. They also filed post-hearing briefs.

On May 22, 1987, the Hearing Examiner issued his report and recommended decision. H.E. No. 87-68, 13 NJPER 510 (¶18191 1987). Relying on Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978), he determined that the Authority violated subsections 5.4(a)(1) and (5) of the Act when it withheld increments to unit employees during collective negotiations since it altered the status quo. He also found that the Authority violated subsection 5.4(a)(1) of the Act when its Executive Director told

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1/ Footnote Continued From Previous Page

employees in the exercise of the rights guaranteed to them by this act; and (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."

Warren White that, "[t]here will be no increments because you joined the union." The Hearing Examiner recommended that the subsection 5.4(a)(3) allegation be dismissed.

As a remedy for the violations, the Hearing Examiner recommended that the Authority pay increments the unit members would have received plus interest and post a notice of the violation.

The Hearing Examiner informed the parties that exceptions were due by June 5, 1987. Neither party filed exceptions or requested an extension of time.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-6) are accurate. We adopt and incorporate them here. We also agree with the Hearing Examiner that the Authority violated the Act and adopt his recommended remedy.

ORDER

The Housing Authority of the City of Camden is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by threatening Warren White and refusing to pay increments to Authority supervisory employees during collective negotiations with Camden Council No. 10.

2. Refusing to negotiate in good faith with Camden Council No. 10 concerning terms and conditions of employment, particularly by unilaterally withholding increments to unit employees on their anniversary dates of hire during collective negotiations with Camden Council No. 10.

B. Take the following affirmative action:

1. Pay forthwith to unit employees represented by Camden Council No. 10 increments they would have received on anniversary dates but for the February 21, 1985 unilateral rescission, less increments paid retroactive to January 1, 1985 secured through collective negotiations between the parties, together with interest at a 9.5% rate for 1986 and a 7.5% rate for 1987.

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 on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be 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 Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
July 14, 1987
ISSUED: July 15, 1987

APPENDIX A

NOTICE TO ALL 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

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by threatening Warren White and refusing to pay increments to Authority supervisory employees during collective negotiations with Camden Council No. 10.

WE WILL cease and desist from refusing to negotiate in good faith with Camden Council No. 10 concerning terms and conditions of employment, particularly by unilaterally withholding increments to unit employees on their anniversary dates of hire during collective negotiations with Camden Council No. 10.

WE WILL pay forthwith to unit employees represented by Camden Council No. 10 increments they would have received on anniversary dates but for the February 21, 1985 unilateral rescission, less increments paid retroactive to January 1, 1985 secured through collective negotiations between the parties.

Docket No. CO-85-305-20

HOUSING AUTHORITY OF THE CITY OF CAMDEN
(Public Employer)

Dated _____

By _____
(Title)

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 St., CN 429, Trenton, NJ 08625 (609) 984-7372.

H.E. NO. 87-68

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

In the Matter of

HOUSING AUTHORITY OF THE
CITY OF CAMDEN,

Respondent,

-and-

Docket No. CO-85-305-20

CAMDEN COUNCIL NO. 10,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Camden Housing Authority violated subsection 5.4(a)(5) and derivatively (a)(1) of the Act when it withheld salary increases of employees who were about to vote in a Commission secret ballot election. He also recommends that the Housing Authority committed an independent (a)(1) violation when the Executive Director of the Housing Authority commented to one employee that his annual increment would not be paid because "[he] joined the union."

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.

H.E. NO. 87-68

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

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Appearances:

For the Respondent
Capehart & Scatchard, Esqs.
(Alan R. Schmoll, of counsel)

For the Charging Party
Tomar, Seliger, Simonoff, Adourian & O'Brien, Esqs.
(Mary L. Crangle, of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On May 21, 1985, Camden Council No. 10 ("Council 10") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the Housing Authority of the City of Camden ("Authority" or "Employer") engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Union alleged on February 21, 1985, that the Employer violated §§ (a)(1), (3) and (5) of the Act when it rescinded a salary increment which it established by resolution on July 12, 1984. The charge also alleged that the Housing Authority refused to grant eligible employees

increments on their annual review date and that its actions were taken in retaliation against employees who voted in a secret ballot election on February 13, 1985. On August 2, 1985, the Director of Unfair Practices issued a complaint and notice of hearing in this matter. I conducted a hearing on September 13, 1985, at which the parties were able to present evidence, examine and cross-examine witnesses and argue orally. Post hearing briefs were submitted by November 27, 1985. Based upon the entire record I make the following:

FINDINGS OF FACT

The parties stipulated:

1. The Housing Authority of the City of Camden is a public employer within the meaning of the Act.

2. Camden Council No. 10 is a public employee representative within the meaning of the Act.

3. Camden Council No. 10 filed a representation petition on September 4, 1984, Docket No. RO-85-17, seeking to represent a unit of all supervisors employed by the Housing Authority of the City of Camden.

4. An election was conducted among this unit on February 13, 1985 and a tally of ballots reflected that 15 employees voted for union representation. On February 22, 1985, the Commission issued a Certification that Camden Council No. 10 was the collective bargaining representative.

5. There are 16 employees in the bargaining unit with the following titles: 1) Supervisors/Accountant Clerk; 2) Housing Manager; 3) Boiler Inspector; 4) Maintenance Repair Foreman; 5) Executive Assistant; 6) Homemaker Service Supervisor. There was one additional title that was voted subject to challenge and that is Tenant Selection Supervisor.

6. J-1 is the minutes of the July 12, 1984 meeting of the Housing Authority of the City of Camden. On pages 13 and 14 of the minutes, the Housing Authority, by resolution, established an increment system for employees in confidential, supervisory and staff positions. One of the conditions of the increment system was that an employee must receive a satisfactory performance review before receiving an increment of salary increase.

7. J-2 is the minutes of the February 21, 1985 regular meeting of the Housing Authority of the City of Camden. On page 9, the Housing Authority rescinded the increment system for bargaining unit supervisors. The resolution states:

> WHEREAS, the Housing Authority of the City of Camden recognizes that the Supervisors have voted to establish a union, which will become the bargaining unit for said Supervisors; and
>
> WHEREAS, said bargaining unit will have the exclusive right to bargain for increased salaries and other matters regarding said union.
>
> NOW, THEREFORE, BE IT RESOLVED that the Housing Authority of the City of Camden hereby declares that salary increases to Supervisors, which heretofore took place on the anniversary of the Supervisors' employment, shall be delayed pending negotiations with the newly formed Supervisory Union.

BE IT FURTHER RESOLVED that all increases due Supervisors shall be retroactive to January 1, 1985, upon the conclusion of bargaining with the newly formed Supervisory Union.

8. All employees in the collective negotiations unit have received satisfactory performance reviews since the institution of the increment system in July 1984.

9. No employee within the bargaining unit has received an increment since January 1, 1985 with the exception of one bargaining unit employee who received an increment on her anniversary date after January 1, 1985, which increment was rescinded as result of the February 21, 1985 resolution.

10. All other non-union employees who were subject to the increment system established in July 1984 have in fact received an increment on their anniversary date. There are approximately 13 employees in this category.

11. J-3 is a memorandum from the Executive Director of the Authority to Warren White, a bargaining unit employee. The parties further stipulated that the memorandum represents a typical memorandum which was sent to all employees covered by the increment system established in July 1984 and differs only as to an employee's name, title, salary and anniversary date.

I find as follows:

12. Warren White is a maintenance repair foreman who has been employed by the Housing Authority for 24 years. In August 1984, White received a memorandum, J-3, stating that the date of the performance review was February 7. On February 7, 1985, White did

not receive an increment. White visited the office of the Housing Authority and spoke with the Personnel Officer, Denise Rivers. He asked Rivers why he had not received the increment. She responded that the increment would be based on a satisfactory performance review. White obtained a copy of his performance review and the next day hand-delivered it to Rivers at the office.

After learning that Mr. Herd, the Executive Director and Secretary Treasurer of the Housing Authority, had denied his request for payment, White asked Rivers if he could speak with him. White explained to Herd that he had not received the increment due on February 7. Herd's response was: "There will be no increments because you joined the union." White responded "I beg your pardon, I didn't hear that." Herd answered: "There will be no increments, I have to take it back to the Board and let them make another resolution that everyone that signed-up for the union would not get a raise." The brief meeting ended when Herd directed White to leave his office (T10).

White denied that Herd stated that the reason why he was not receiving the increment was because the union election was coming up the following week (T14). White and Herd had no conversations after that date. In view of White's matter-of-fact repetition of his direct testimony under a rigorous cross-examination and in the absence of any conflicting testimony presented by the employer, I credit White's version of the events

which occurred at the Executive Director's office on February 9.1/

Richards had spoken with Herd about her belief that the supervisors would be voting in favor of union representation because of their dissatisfaction with the increment system established in July 1984 (T21). Her belief was based upon discussions with the individual employees in her role as Personnel Officer.

ANALYSIS

The principal issue is whether the Housing Authority violated the Act by withholding increments of unit employees. The New Jersey Supreme Court held in Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978) that a public employer's withholding of "automatic" increments to unit employees in the course of collective negotiations violated subsections (a)(5) and (a)(1) of the Act. Following Galloway, the Commission issued numerous decisions concerning alleged violations of the law when

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1/ Rivers testified that when White entered the office with his performance review, she adjourned to Herd's office and explained to Herd that White demanded to know why he had not received his increment. Rivers asserted that Herd explained that "negotiations for the members of the bargaining units [sic] would have a representative there, there would be someone to represent them and that would be a negotiated item and [sic] everything will be retroactive back to January 1, 1985" (T17). Assuming the veracity of Rivers testimony, I find that her recitation of facts is not necessarily inconsistent with White's testimony or his recollection of his conversation with Herd.

employers withheld payment of annual increments to unit employees during collective negotiations. Union Cty. Reg. H.S. Bd. of Ed., P.E.R.C. No. 78-27, 4 NJPER 11 (¶4007 1977); 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 (¶14041 1978); 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); City of Vineland, I.R. No. 81-1, 7 NJPER 324 (¶12142 1981) interim order enforced and leave to appeal denied, App. Div. Docket No. AM-1037-80T3 (7/15/81); State of New Jersey, I.R. No. 82-2, 7 NJPER 532 (¶12235 1981); Newark Public Library, I.R. No. 84-9, 10 NJPER 321 (¶15154 1984); Belleville Bd. of Ed., I.R. No. 87-5, 12 NJPER 692 (¶17262 1986).

On February 13, 1985, the Authority knew that the employees voted unanimously for union representation and in the following days it failed to file any election objections, pursuant to N.J.A.C. 19:11-9.2(h).[2/] The Housing Authority passed its resolution

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2/ N.J.A.C. 19:11-9.2(h) states:

> (h) Within five days after the tally of ballots has been furnished, any party may file with the Director of Representation an original and four copies of objects to the conduct of the election or conduct affecting the results of the election. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objects shall be served simultaneously on the other parties by the party filing them, and a statement of service shall be

Footnote Continued on Next Page

withholding the increments one day before the Commission certified Camden Council No. 10 as the majority representative of Authority supervisors. The employer had effective notice of its imminent duty to collectively negotiate terms and conditions of employment. Moreover, an employer acts at its peril in making unilateral changes in terms and conditions of employment during the period before certification and after a Commission-conducted secret ballot election. Fugazy Continental Corp v. NLRB, 725 F.2d 1416, 115 LRRM 2571 (1984).3/

The amount of an employee's compensation is an important condition of his or her employment. If a scheduled annual increment in an employee's salary is an "existing rule governing working conditions," unilateral denial of the increment violates § (a)(5) of

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made. A party filing objections must furnish evidence, such as affidavits or other documentation, that precisely and specifically shows that conduct has occurred which would warrant setting aside the election as a matter of law. The objecting party shall bear the burden of proof regarding all matters alleged in the objections to the conduct of the election or conduct affecting the results of the election and shall produce the specific evidence which that party relies upon in support of the claimed irregularity in the election process.

3/ In interpreting the Act, the New Jersey Supreme Court has suggested that experience and adjudications under the National Labor Relations Act, 29 USCA 151 et seq., should serve as a guide Lullo v. Int'l Assn. of Firefighters, 55 N.J. 409, 424 (1970).

the Act. Galloway. The key test according to the court in Galloway is:

> ...whether payment of the salary increment withheld by the [employer] constituted an element of the status quo whose continuance could not be disrupted by unilateral action. The answer to this question turns, to some extent, on whether the annual step increments in the [employees'] salaries were "automatic," in which case their expected receipt would be considered as part of the status quo, or "discretionary," in which case the grant or denial of the salary increases would be a matter to be resolved in negotiations. [Id. at 48]

Payment of automatic increments does not actually change conditions of employment: it continues the status quo by perpetuating existing terms and conditions of employment. Receipt of expected benefits does not subvert an employee's support for the bargaining agent or disrupt the bargaining relationship. Galloway, citing NLRB v. Katz, 369 U.S. 736 (1962).

The Authority contends that the increment rescinded by the February 25 resolution was discretionary because "the supervisor must receive a satisfactory performance review before an increment is granted" and that granting increments to some supervisors (on their anniversary dates) and not all would precipitate the union's filing of an unfair practice charge.

I reject the Authority's arguments and find that the withholding of increments on the supervisors' anniversary dates of employment violates §§ 5.4(a)(5) and, derivatively, (a)(1) of the Act. The parties stipulated that beginning in July 1984, all non-unit employees subject to the new increment system received

increments on their anniversary dates of hire. They also stipulated that all unit employees received satisfactory performance reviews. The regularity of the payments is evidenced by the Authority's February 21 resolution stating in part that prior salary increments paid to unit employees "heretofore took place on the anniversary of the supervisors' employment...." Furthermore, nothing in the record established that Authority supervisors were ever denied the increment payments. Finally, the February 21 resolution states in essence that the only reason increments were not paid was because the popularly elected majority representative would negotiate any "salary increases." Under these circumstances, I find that the increments were "automatic" and that the Authority's refusal to pay them constitutes a unilateral alteration of the status quo.

That payment of the increments was technically subject to a "satisfactory performance review" fails to contradict the Authority's stipulated practice of paying increases to employees on their anniversary dates of hire. See Rutgers. Furthermore, the absence of a specific statute requiring payments of salary increments (as was the circumstance in Galloway) does not relieve the Authority's obligation to maintain the status quo (and its neutrality). See Hudson County. Finally, an employer may defer increases to avoid election interference but cannot withhold increases that it would have paid but for the presence of the union. Compare Sugardale Foods, 221 NLRB No. 206, 91 LRRM 1071 (1975) and Gates Rubber Co., 182 NLRB No. 15, 74 LRRM 1049 (1970).

The standard to determine whether an employer has violated § (a)(1) of the Act was stated in New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 55 (¶10285 1979):

> It shall be an unfair practice for an employer to engage in activities which, regardless of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of the rights guaranteed by the Act, provided the actions lack a legitimate and substantial buisness justification. [Id. at 551 n. 1]

Herd's comments to White are direct proof of anti-union animus that interfered with White's statutory rights under the Act. I also find that the timing and content of the Authority's February 21 resolution tended to interfere with, restrain and coerce the supervisors' rights guaranteed by the Act. That the Authority may have passed the resolution with an eye toward collective negotiations fails to demonstrate a legitimate business justification for its action so close to the February 13 secret ballot election. Accordingly, the Authority's actions violate § (a)(1) because they had a chilling effect on White's and the unit employees' statutory rights.4/

4/ Council 10 also alleged that the Authority's withholding of increments violated § (a)(3) of the Act. Assuming that Herd's comments established anti-union animus with respect to White's protests, the union failed to establish any nexus between Herd's comments on February 8 or 9 and the Authority's resolution of February 21. Moreover, the resolution does not establish a prima facie showing that protected union conduct was a motivating factor in the Authority's decision to withhold increments. It demonstrates that the Authority was taking a position in recognition of upcoming collective negotiations. Accordingly, I recommend that the Commission dismiss the (a)(3) allegation. See Township of Bridgewater v. Bridgewater Public Works Assn., 95 N.J. 235 (1984).

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the Authority cease from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by threatening Warren White and refusing to pay increments to Authority supervisory employees.

2. Refusing to negotiate in good faith with Camden Council No. 10 concerning terms and conditions of employment, including unilateral withholding of increments to unit employees on their anniversary dates of hire.

B. That the Authority take the following affirmative action:

1. Pay forthwith to unit employees represented by Camden Council No. 10 increments they would have received on anniversary dates but for the February 21, 1985 rescission, less increments paid retroactive to January 1, 1985 secured through collective negotiations between the parties, together with a 9.5% interest for 1986 and 7.5% for 1987.

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 on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be 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 Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

Jonathan Roth, Hearing Examiner

DATED: May 22, 1987
Trenton, New Jersey