P.E.R.C. NO. 2014-40

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ATLANTIC,

Respondent,

-and-

Docket Nos. CO-2011-253, CO-2011-254 & CO-2011-255

PBA LOCAL 243, FOP LODGE 34 and PBA LOCAL 77,

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission rejects a Hearing Examiner's report and recommended findings in unfair practice cases filed by PBA Local 243, FOP Lodge 34, and PBA Local 77 against the County of Atlantic. The Hearing Examiner recommended that the Commission find that the County violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1) and (5), when it ceased paying increments to unit members after the expiration of the parties' collective negotiations agreements. The Commission rejects the hearing examiner's finding of repudiation which he based on application of the dynamic *status quo* doctrine. The Commission finds that the dynamic *status quo* was a Commission policy which, in the evolution of public sector labor negotiations in New Jersey, no longer fulfills the needs originally intended, and disserves rather than promotes the prompt resolution of labor disputes. Accordingly, public employers will instead be bound by a "static" *status quo*. The Commission holds that, because the dynamic *status quo* doctrine is no longer effective, the underpinnings of repudiation no longer exist and the unfair practice charges are dismissed.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Charging Parties.

Appearances:

For the Respondent, James F. Ferguson, County Counsel

For the Charging Parties, Plotkin Associates LLC (Myron Plotkin, Labor Relations Consultant

DECISION

On December 29, 2010, the New Jersey State PBA Local No. 243 (PBA No. 243), the Fraternal Order of Police Lodge No. 34 (Lodge No. 34), and the New Jersey State PBA Local No. 77 (PBA No. 77) filed separate unfair practice charges. The charges allege that the County of Atlantic violated subsections 5.4a (1), (2), (3), (5) and (7)[1/] of the New Jersey Employer-Employee Relations Act,

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

(continued...)

N.J.S.A. 34:13A-1 et seq. when it failed to pay increments to unit members upon the expiration of the parties' collective negotiations agreements.

The unfair practice charges were accompanied by applications for interim relief seeking an order directing the County to pay the increments. On March 7, 2011, the Chair denied the applications for interim relief and the cases were referred back to the Director of Unfair Practices. Only Lodge No. 34 filed a motion for reconsideration of the denial for interim relief. At its September 22, 2011 meeting, the Commission was unable to take action on the motion for reconsideration.

On April 27, 2012, the Director of Unfair Practices issued a Complaint on the 5.4a (1) and (5) allegations only, a Notice of Hearing, and an Order consolidating all three cases. On May 29, 2012, the County filed its Answer denying that it engaged in conduct violative of the Act. Hearing Examiner Perry O. Lehrer conducted a hearing on September 6, 2012. On November 14, 2012, the parties filed timely briefs. On March 1, 2013, the Hearing Examiner issued his report and recommended decision. H.E. No.

1/ (...continued)
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. (7) Violating any of the rules and regulations established by the commission."

2013-16, 39 NJPER 440 (¶141 2013). He found that the County violated the Act when it failed to pay increments to unit members after the expiration of the parties' contract pursuant to the parties' contracts and the dynamic *status quo* doctrine.

On March 25, 2013, the County filed exceptions to the Hearing Examiner's Decision. It argues that the dynamic *status quo* is no longer practical in light of the severe restrictions imposed upon local governments by the tax levy cap; the intent behind the legislative changes is frustrated by adherence to the dynamic *status quo* doctrine; this Commission should adopt a standard which is compatible with the intent of the Legislature's recent cost containment initiatives; the record does not contain a factual basis for the Hearing Examiner's conclusion that there was a contractual basis to compel the payment of salary increments, and the Hearing Examiner erred in recommending the payment of interest.

On April 8, 2013, the Charging Parties filed a reply contending that the Hearing Examiner's reliance on the dynamic *status quo* doctrine was proper; there was no legislative intent to prohibit the application of the dynamic *status quo* doctrine; an administrative burden to recoup the payment of increments does not justify a wholesale change in the expectations of the labor relations process; the parties' contracts required the payment of increments after their expiration; and the County never claimed

an inability to pay increments and has not shown an inability to pay.

We adopt and incorporate the Hearing Examiner's findings of fact. H.E. at 3 - 14, with the following clarification: The salary systems at issue in all three contracts herein consist of one column of salaries representing the salaries for employees during the year to which the column pertains. Each column consists of a series of steps representing the salary for an employee with the designated years of service represented by that step. Thus when the Hearing Examiner refers to Horizontal Movement, he is referring to the movement from column to column, and when he speaks of Vertical Movement, he is referring to movement from step to step on each column. The timing of these movements are governed by the language of the collective bargaining agreement in which they appear.

Lodge No. 34

The County and Lodge No. 34 were parties to a collective with a term of January 1, 2007 through December 31, 2010. Article V, B., Movement on the Above Guide, states the following:

> Movements across the grade (i.e., from year to year) shall occur on January 1 of each year whereas movements through the steps of the guide shall occur on an Officer's anniversary date. The anniversary date for salary guide purposes shall be the first (1st) of the month following the Officer's actual anniversary date. Movement to the maximum step shall be on January 1 of the Officer's maximum year (i.e., an Officer on

> step 7 in 2007 will move to step 8 in January 1, 2008).

Article XXIII, Miscellaneous Provisions, contains paragraph D., Continuation of Benefits, which provides:

> All terms and conditions of employment, including any past or present benefits, practices or privileges which are enjoyed by the employees covered by this Agreement that have not been included in this Agreement shall not be reduced or eliminated and shall be continued in full force and effect.

Negotiations for a successor agreement were not completed by the time the Agreement expired. For at least 17 years, the County has automatically moved unit employees vertically on the salary grid, from one step to the next, on the anniversary of the employee's hire date, in accordance with the terms of the expired agreement. However, upon expiration of the Agreement, unit employees were not moved horizontally along the salary grid. Had step increments been given in 2011 and beyond, it would have resulted in salary increases in excess of 2% for unit employees.

Local 243

The County and Local 243 were parties to a collective negotiations agreement with a term of January 1, 2006 through December 31, 2009. Article IX, D. provided in relevant part that "[a]fter the initial calendar year of hire, each employee will be given an anniversary date for purposes of salary increase. . . ." The County and Local 243 did not reach a successor agreement by the time the Agreement expired on December 31, 2009. During

calendar year 2010, the unit employees did not move horizontally on the salary guide, but they did receive vertical step movements on their anniversary dates pursuant to the terms of the collective agreement.

Local 77

The County and Local 77 were parties to a collective negotiations agreement with a term of January 1, 2007 through December 31, 2010. Article III, Wages and Longevity, states that "all employees shall continue to receive anniversary increments in January, April, July or October." Article XIX, "Duration and Termination," provides:

> All provisions of this Agreement will continue in effect until a successor Agreement is negotiated.

No successor agreement had been reached when the Agreement expired. On January 1, 2011, the County advised Local 77 that it would discontinue increments for unit employees until a successor agreement was reached.

In correspondence dated December 22, 2010, the County advised the Charging Parties it would no longer provide step increments to employees included in the collective negotiations units represented by the Charging Parties. The County wrote in relevant part:

> Normally when contracts expire, the officers who remain on the salary guide continue to move through the guide of the expired

contract and then salaries are adjusted retroactively when a successor agreement is reached. Although that practice is normally followed, the County believes that it is no longer efficacious or reasonable to do so. Effective January 1, 2011, the County will not move any officers through the salary guides on the expired contracts.

The County believes that the entire negotiations landscape has undergone major changes. The first was the change in the law effective this summer when the New Jersey Legislature passed and the Governor signed in to law legislation which imposed a 2% tax cap levy on governmental entities. The second major change was the recently enacted Bill which imposes a 2% cap on the base salary component of interest arbitration awards. The Bill's definition of base salary would include increments from a salary guide. This Bill was passed almost unanimously by both houses of the New Jersey Legislature and was signed by the Governor on December 21st. The County believes that these legislative changes have preempted the previous standards of practice and render continued salary guide movement impractical and unduly burdensome.

Both of these legislative enactments will significantly restrict the salary increases that can be given and this would include the increments from the salary guide. The County believes that the continued movement of officers through an expired salary guide will likely result in increases that exceed the amounts that can legally be granted under the recently enacted legislation which will have a detrimental impact upon both the County and the individual officer. If the new agreement results in lesser amounts, which is likely under the new "cap" laws, then an anomaly will be created whereby the individual officer would be required to remit the excess payments to the County. Such an adjustment process would be unfair to both the individual officers and a burden on the

> administrative personnel who would have to process myriad adjustments.
>
> The County's action will not have a detrimental impact upon the individual officers because whatever salary guide provisions are contained in a new agreement, will be paid retroactively so the officers will be no worse off. [J-1]

In 2010, P.L. 2010 c. 44 was enacted by the State Legislature and signed into law by the Governor. The statute reduced the previous cap on tax levies from 4% of the previous year's tax levy to 2%. The statute imposed a new formula which placed restrictions on the County's ability to raise taxes to fund its budget in the successive year. The tax levy cap law does not mandate a 2% limit applicable to any single line item, such as salaries. In general, subject to certain exemptions, P.L. 2010 c. 44 requires that the County's overall tax levy not exceed 2% more than the prior year's tax levy.

The ratable tax base is the fair value of property located in the County. The tax rate is derived from the value of the ratable tax base. In 2008, the County's ratable base was approximately $58.3 billion. In 2010, the ratable base was approximately $55.5 billion, and by 2012, the ratable base decreased to approximately $48.7 billion. Thus, between 2008 and 2012, the ratable base decreased by approximately $9.6 billion and between 2010 and 2012 the ratable base decreased by approximately $6.8 billion. In recent years, casinos and others

have filed tax appeals which have resulted in significant decreases in the ratable base and resultant tax revenues. In light of the ratable tax base decline, for the 2011 budget it is estimated that tax revenue will decrease by $6 million. As the ratable base decreases, the tax rate on the County's residents automatically increases. The change in the County's ratable base is not within the County's control.

At the end of 2010, the County employed 1,830 people. Wages and benefits represent approximately 60-65% of the County's budget. The employees represented by the Charging Parties are included in the public safety portion of the budget and comprise nearly 40% of the County's overall budget. The annualized cost of increments for public safety employees would range from 5% to 6%. For the period of 2010 to 2012, non-public safety wages increased by 1.5% whereas public safety wages increased by 4.8%.

Since 2008, the County has cut its expenses by $1 million and has frozen or eliminated 98 positions. To save this money, County departments have cut public services and projects but have tried to avoid employee layoffs. Non-public safety employees were involuntarily furloughed four days and the Sheriff's department laid off one public safety employee to save money. The Prosecutor and Sheriff also froze positions. However, the County is constrained from cutting its complement of public safety employees in the courts due to guidelines issued by the

Administrative Office of the Courts and other State mandates pertaining to staffing levels in the jails. Public safety employees were exempt from the furloughs.

In 2010 and 2011, the County carried budget surpluses and limited its overall budget growth to under the allowable 2% tax levy cap. Notwithstanding all of the foregoing fiscal changes which have occurred in the County, the actions taken by the County to manage its fiscal circumstance has resulted in its being able to maintain fiscal stability. The County has maintained its good bond rating issued by the bond rating agencies.

The Respondent takes exception to the Hearing Examiner's Decision regarding the County's action unilaterally discontinuing to move employees on the salary guides after expiration of the contracts, in which those increments were set forth.

Thus, the Commission is asked to review in this case its view of the continuing propriety of what is known as the dynamic *status quo* doctrine. That doctrine had its genesis in our decision in Galloway Tp. Bd. of Ed. in which we held that the Board's unilateral determination not to pay any increments after the expiration of a contract negated the teacher's additional year of service and thus altered the existing salary guide system. P.E.R.C. No. 76-32, 2 NJPER 186 (1976), rev'd 149 N.J. Super. 346 (App. Div. 1977), rev'd 78 N.J. 25 (1978). For the

first time we defined this as a "dynamic *status quo*" which needed to be maintained. Interestingly, our decision in Galloway, was based upon our previous decision in In re Piscataway Township Board of Education, P.E.R.C. No. 91, 1 NJPER 49 (1975), app. dism'd as moot, App. Div. Dkt. No. A-8-75, certif. den. 70 N.J. 150 (1976), which examined the right of a Board of Education to cease paying for its employees' medical insurance upon the expiration of a labor agreement. Nothing in that case involved the issue of salary increments, nor did it define what would become known as the "dynamic *status quo*" doctrine. Rather it merely enunciated the long standing labor relations policy that an employer could not unilaterally alter the *status quo* at the expiration of an agreement. In Galloway, the Appellate Division reversed our decision, holding that settlement of the contract in that case had mooted the parties' dispute. The Supreme Court reversed the Appellate Division. While the Court discussed the *status quo* doctrine, it ultimately held that N.J.S.A. 18A:29-4.1, an education law statute applicable only to teaching staff members, required the Board to pay the disputed increments. However, the Court specifically refused to decide upon the validity of the dynamic *status quo* doctrine of the Commission, finding that the case was resolved by application of the Education Law. Id. at 231. Thus, the defining of the *status quo* as "dynamic" was a creation of this Commission which imparted an

obligation on employers to maintain terms and conditions of employment upon the expiration of a collective negotiations agreement, inclusive of increment payments due on salary guides which had been negotiated in the expired agreement.

From that time forward, our agency's decisions required the continuance of automatic increment payments after contracts expired,[2/] with certain exceptions. One notable departure from this doctrine was a result of the Supreme Court's decision in Bd. of Ed. of Neptune Twp. v. Neptune Twp. Ed. Ass'n, 144 N.J. 16 (1995). In that case, the Board had filed a declaratory judgment action with the Commissioner of Education seeking a determination that N.J.S.A. 18A:29-4.1 prohibited it from paying increments

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2/ See, e.g., 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); State of New Jersey, I.R. No. 82-2, 7 NJPER 532 (¶12235 1981); City of Vineland, I.R. No. 81-1, 7 NJPER 324 (¶12142 1981), enf'd Mot. No. M-3982-80 and lv. to app. den. App. Div. Dkt. No. AM-1037-80T3 (7/15/81); Belleville Bd. of Ed., I.R. No. 87-5, 12 NJPER 629 (¶17262 1980); Hunterdon Cty., I.R. No. 87-17, 13 NJPER 215 (¶18091 1987); Marlboro Tp., I.R. No. 88-2, 13 NJPER 662 (¶18250 1987); Borough of Palisades Park, I.R. No. 87-21, 13 NJPER 260 (¶18107 1987); Middlesex Cty. Sheriff, I.R. No. 87-19, 13 NJPER 251 (¶18101 1987); Bergen Cty., I.R. No. 91-20, 17 NJPER 275 (¶22124 1987); Sussex Cty., I.R. No. 91-14, 17 NJPER 232 (¶22100 1991); Burlington Cty., I.R. No. 93-2, 18 NJPER 406 (¶23185 1992); Somerset Cty., I.R. NO. 93-15, 19 NJPER 259 (¶24129 1993); Hudson Cty. Voc. Tech., I.R. No. 96-7, 21 NJPER 366 (¶26228 1995); Ramapo-Indian Hills Reg. H.S. Dist. Bd. of Ed., I.R. No. 97-8, 22 NJPER 386 (¶27207 1996); Essex Cty. Voc. Tech. Bd. of Ed.; Evesham Tp. Bd. of Ed., I.R. No. 95-10, 21 NJPER 3, 4 (¶26001 1994); Morris Cty. Prosecutor, I.R. No. 96-18, 22 NJPER 146 (¶27076 1996).

after the expiration of a three year collective negotiations agreement. When the case reached the Supreme Court it held that the education statute (N.J.S.A. 18A:29-4.1)limited any salary policy adopted by a Board of Education to a term of no more than three years for teaching staff members, and that therefor PERC's decisions regarding the obligation of a Board to pay increments after the expiration of a contract was inapplicable to teaching staff members. In light of its view that the case was controlled by the Education Law, the Court specifically declined to review the "dynamic *status quo*" doctrine at all. As a result of the decision in Neptune we no longer could apply the "dynamic" *status quo* to increments for teaching staff whose contracts expired after a duration of three years.

In 1999, we extended the holding in Neptune to also exclude non teaching staff employees in a mixed unit from application of the dynamic *status quo* doctrine on the basis that it would be "unwise labor relations policy" to have one group of employees in a bargaining unit receiving post expiration increments while others would be required to negotiate for those increments. East Hanover Board of Ed., P.E.R.C. No. 99-71, 25 NJPER 119 (¶30052 1999) aff'd 26 NJPER 119 (¶31081 App. Div. 2000), cert. den. 165 N.J. 489 (2000). In its decision in this matter, the Appellate Division called attention to the fact that neither the Neptune nor the Galloway decisions of the Supreme Court required the

application of the "dynamic *status quo*" doctrine, but rather it was a determination made by the Commission as an application of its expertise in the area of public sector employment relation, and rejected the arguments of Appellant Education Association that our decision in this case was not entitled to deference because it is inconsistent with Neptune and Galloway.

The conclusion is inescapable that where a doctrine has been applied by the Commission, if it determines and articulates that circumstances warrant, the Commission can modify that doctrine. Indeed, in two recent cases, we reversed interlocutory rulings ordering the payment of increments following contract expiration. Bloomfield Bd. of Ed., P.E.R.C. No. 2011-055, 37 NJPER 2 (¶2 2011) and State Operated School District of Paterson, P.E.R.C. No. 2012-3, 38 NJPER 132 (¶33 2012). In both cases we found that despite the expired agreements having a duration of less than three years, (thus removing them from the impact of the decision in Neptune, supra.), various conditions in which the parties found themselves made the cases inappropriate for the interim relief sought, and led the Commission to deviate from the "dynamic" *status quo* doctrine.

This history of the evolution of the Commission's doctrine of the dynamic *status quo* is illustrative of its nature; to wit it was first applied over thirty years ago, and its initial pronouncement was predicated upon a prior decision in Piscataway

Township Board of Education, supra., which did not involve the concept of a post expiration increase in remuneration, but instead a post expiration discontinuance of payment of medical insurance premiums for employees. Further, in Galloway, supra., the Commission described its goal as maintenance of the *status quo* as representing "that situation which affords the least likelihood of disruption during the course of negotiations for a new contract. Because the *status quo* is predictable and constitutes the terms and conditions under which the parties have been operating, it presents an environment least likely to favor either party."

However, contrary to this expectation, in the evolution of public sector labor negotiations in New Jersey, a post expiration requirement that employers continue to pay and fund a prior increment system creates myriad instabilities in the negotiations process.

First, the economic conditions which led to the recent legislative changes of a reduced tax levy cap, and a hard cap on the growth of salary expenditures on police and firefighters which are subject to interest arbitration were unanticipated thirty years ago. These legislative initiatives, reflective of new public policies designed to control the rate of growth in government spending have significantly impacted upon the way increments are treated during negotiations. It is in both sides'

interest to have the ability to negotiate over adjustments in the number of incremental steps to be contained in a successor agreement and the dollars to be attributed to those newly negotiated steps, in light of the total dollars available. Increments carried over from an agreement negotiated years earlier create either a mandated diversion of funds to only some members of a bargaining unit at the disadvantage to others, or an actual potential reduction of salaries to those members to whom the expired increments have been awarded.

A second change in the labor relations climate in the last thirty years is that of the public policy underlying labor negotiations in New Jersey. In its decision in Neptune, supra., 78 N.J. at 28, our Supreme Court described that policy:

> Any increments granted become binding pursuant to the tenure statute. Thus, the practice of automatically paying an increment will limit a board's ability to respond to ever-changing economic conditions of the district. Schools that need to cut budget growth will face serious problems. Teachers will have a reduced incentive to agree to a new CBA. Indeed, teachers may resist negotiating and wait for the more generous increments that will accrue under the expired CBA. Those teachers who have received increments under the old schedule will obtain a larger share of a shrinking pie. The New York Court of Appeals, in ruling [in Board of Coop. Educ. Serv. v. New York Pub. Employment Relations Bd., 41 N.Y.2d 753, 363 N.E.2d 1174, 1177-78 (N.Y. 1977)] that a board need not pay increments (a decision later reversed by statute), recognized that problem:

> [I]n times of escalating costs and diminishing tax bases, many public employers simply may not be able in good faith to continue to pay automatic increments.... In times either of inflation or depression, employees, quite naturally, will be reluctant to accept abolition of automatic increments which they have been receiving. To the extent that it provides that such increments must be paid even after expiration of contract, the proposition gives an edge and makes negotiation of that point that much more difficult.

Thus, after thirty years of experience, we find that the dynamic *status quo* no longer fulfills the needs of the parties in that it serves as a disincentive to the prompt settlement of labor disputes, and disserves rather than promotes the prompt resolution of labor disputes. While public employers will continue to be bound by the strictures of maintenance of the *status quo*, that will be defined as a "static" rather than a dynamic *status quo*.

Based upon the decision set forth above the unfair labor charge regarding the increment withholding is found to be without merit, and is dismissed.

Additionally, we disagree with the Hearing Examiner's conclusions that the descriptions in the charging parties collective negotiations agreements of the methodology by which employees moved from step to step on their respective salary guides constituted an express agreement to continue that movement

beyond the termination date of their agreements. Read in context, they apply to the salary guides in effect during each year of the agreement. But for the dynamic *status quo* doctrine there is not one word in any of the agreements by which the parties agreed to continue to provide incremental increases beyond the termination date of the agreements. In this matter the Hearing Examiner based his conclusion of repudiation on his belief that continuance of the award of incremental movement was required by the dynamic *status quo*. Since for the reasons set forth above that doctrine is no longer effective, the underpinnings of repudiation no longer exist. For this reason the allegations in the charge of repudiation of the agreement is dismissed as well.

ORDER

The Hearing Examiner's Report and Recommendations have been modified as set forth above, and the underlying unfair practice charges are dismissed.[3/]

BY ORDER OF THE COMMISSION

Chair Hatfield recused herself. Commissioners Bonanni, Boudreau and Eskilson voted in favor of this decision. Commissioner Jones voted against this decision. Commissioners Voos and Wall were not present.

ISSUED: December 19, 2013

Trenton, New Jersey

3/ On December 17, 2013, PBA Local 243 withdrew Docket No. CO-2011-253. Therefore, it is no longer a party to this consolidated matter.