

P.E.R.C. NO. 2020-26

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EDISON TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2018-227

EDISON TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds, based upon stipulated facts in lieu of a hearing pursuant to N.J.A.C. 19:14-6.7, that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1) and (5), by unilaterally advancing a unit member two steps on the salary guide without negotiating with the Association. Finding that ordering the Board to recoup the additional salary already paid to the employee is not necessary for a sufficient remedy, the Commission orders the Board to prospectively conform the employee's salary to the level it would have been had her salary not been unilaterally increased.

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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Appearances:

For the Respondent, Scarinci Hollenbeck, attorneys
(Hope R. Blackburn, of counsel)

For the Charging Party, Detzky, Hunter & DeFillippo,
LLC (Stephen B. Hunter, of counsel)

DECISION

On March 23, 2018, the Edison Township Education Association (Association) filed an unfair practice charge against the Edison Township Board of Education (Board). The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5),^{1/} when it advanced an Administrative Secretary (hereinafter referred to as "the Secretary") two steps on the salary guide

^{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 . . . (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. . . ."

during the 2017-2018 school year without negotiating with the Association. On April 4, 2019, the Director of Unfair Practices issued a Complaint on the charge.

On July 25, the parties agreed, pursuant to N.J.A.C. 19:14-6.7, to waive a Hearing Examiner's Report and Recommended Decision and have the Commission issue a decision based on a stipulated record. To that end, the parties filed a joint stipulation of facts along with two joint exhibits. On August 23, 2019, each party filed a brief. The Board's brief attached one exhibit, which consisted of the parties' agreement to waive a hearing, along with the stipulated facts and exhibits. The Association's brief attached the certification of Matthew Hrevnak, a unit member who is a math teacher and the Association's Negotiations Chairperson, along with one exhibit.

FACTS

Based on the parties' stipulations and exhibits, the record is comprised of the following facts. The Board is a public employer and board of education governed by our Act and by Title 18A of the New Jersey statutes. The Association is the exclusive majority representative for, among other titles, the Board's non-supervisory, non-confidential secretarial personnel. The Board and Association are parties to a collective negotiations agreement (CNA) effective July 1, 2017 through June 30, 2020. The Secretary has been employed by the Board as an Administrative

Secretary assigned to the Maintenance Department, with secretarial responsibilities to the Buildings and Grounds Director. The Secretary's position is included in the Association's negotiations unit. The Secretary is tenured pursuant to N.J.S.A. 18A:17-2.

The Secretary had purchased additional pension time under PERS and at some point during the 2017 calendar year she asked then Superintendent Richard O'Malley if she could be moved additional steps on the negotiated secretarial salary guide because of her purchase of additional PERS pension time. By resolution dated November 20, 2017, the Board, upon the recommendation of Superintendent O'Malley, increased the Secretary's salary from Step 5, \$47,670 (effective 7/1/2017 - 6/30/2018) to Step 7, \$52,550 (effective 9/1/2017 - 6/30/2018).

On December 8, 2017, the Association filed a grievance challenging the Board's November 20, 2017 resolution as violating the CNA by agreeing to adjust a unit member's salary without negotiating with the Association. On January 10, 2018, Superintendent O'Malley responded to the Association's grievance, stating, in part, that the Secretary "shall be returned to the salary guide increment step she was at prior to the action taken during the November 20, 2017 Board Meeting - i.e. she will be returned to Step 5 on the Administrative Secretary Salary Guide." On January 22, 2018, the Board tabled a resolution that would

have changed the Secretary's title from Administrative Secretary - Maintenance Step 5, salary \$47,670 (effective 9/1/2017 - 6/30/2018 to Executive Secretary - Maintenance Education Center, salary \$52,550 (effective 9/1/2017 - 6/30/2018). By resolution dated February 26, 2018, the Board, upon the recommendation of Superintendent O'Malley, approved the grievance settlement by returning the Secretary to Administrative Secretary - Maintenance Step 5, salary \$52,550 (pro-rated, effective 9/1/2017 - 6/30/2018). Although the Board returned the Secretary to Step 5 on the negotiated salary guide, it has maintained or "frozen" her salary at \$52,550.

By letter of March 5, 2018, the Board's former counsel notified the Association's counsel that the Board's February 26 resolution returned the Secretary to Step 5 in order to approve the grievance settlement between the Association and Superintendent O'Malley. The March 5 letter explained the Secretary's salary amount as follows:

To the extent that the ETEA sought to reduce [the Secretary's] salary, that relief is not available under the grievance, nor does the Board have the authority to grant such relief. As [the Secretary] is a tenured secretary, her salary cannot be reduced in compensation absent successful tenure charges. See N.J.S.A. 18A:17-2c. Accordingly, [the Secretary's] salary will be frozen at its current level until the applicable salary guide "catches up."

By resolution dated May 2, 2018, upon the recommendation of Superintendent O'Malley, the Board reappointed the Secretary to the position of Administrative Secretary - Maintenance Education Center at the frozen salary of \$52,550.^{2/}

ARGUMENTS

The Association asserts that the Board violated the Act when it advanced the Secretary two steps on the salary guide in 2017 without negotiating with the Association. It argues that a public employer violates the Act when it changes the terms and conditions of employment of certain unit members without negotiating with the majority representative. The Association contends that even though the Board returned the Secretary to Step 5, it still maintained her salary at the higher Step 7 rate of \$52,550. It asserts that because the Board's attempted corrective action nonetheless resulted in the Secretary receiving \$7,872 more than she was contractually entitled to via regular salary guide movement, the Board committed an unfair practice by individually negotiating with the Secretary concerning her

^{2/} The Hrevnak certification and attachment indicate that the Secretary received \$7,872.00 more in salary during the operative time period (the 2017-2018 and 2018-2019 school years) than she would have received if she had progressed through the CNA's negotiated salary in the same manner as the unit's other Administrative Secretaries. Although the Board has not disputed the Hrevnak certification or his calculation of the total dollar amount of the Secretary's salary overpayment, it was not included in the parties' stipulated facts and we do not consider it in making our determination.

pension credit purchase and salary. The Association contends the Board's violation of the principle of "exclusivity of representation" has resulted in a relative windfall for only the Secretary, which could negatively affect the collective negotiations process and encourage other unit members to engage in similar individual negotiations with the Board.

The Association argues that placing the Secretary back at her appropriate Step 5 salary level retroactive to September 1, 2017 would not violate the tenure laws because boards of education are permitted to recoup overpayments without filing tenure charges. It cites Trenton Education Association, et al. v. City of Trenton Bd. of Ed., State Board of Education, 1999 N.J. AGEN LEXIS 1525 (December 1, 1999), in which tenured custodial employees had their bi-weekly paychecks reduced to recoup overpayments based on erroneous calculations. The Association contends that the facts here are more compelling because it was not a clerical error that caused the Secretary's incorrect salary, but the result of impermissible Board action in violation of the Act. It asserts that the Board could recoup the additional salary improperly paid to the Secretary, rather than just freezing her at the Step 7 salary until the guide catches up to her. Alternatively, the Association argues that the Board could be ordered to provide all other Administrative Secretaries similar enhanced compensation.

The Board asserts that it has not committed an unfair practice because it fully implemented the negotiated grievance settlement agreement with the Association by returning the Secretary from Step 7 to Step 5. It argues that it could not have returned the Secretary to the Step 5 salary level because, pursuant to N.J.S.A. 18A:17-2, it cannot reduce the compensation of a tenured employee absent the filing of tenure charges. Citing Dowd v. City of East Orange Bd. of Ed., OAL Dkt. No. EDU 1905-85 (January 13, 1986), aff'd, Comm'r of Education (February 26, 1986), the Board contends that even where an employee's salary was established in error, the proper resolution is to withhold any further salary increases until time in service, periodic increments, or other circumstances warrant the payment of an even higher salary. The Board asserts that freezing the Secretary's salary until the salary guide progression she had been on catches up will synchronize her pay to the negotiated step while not violating her tenure rights. The Board argues that as it has remedied the overpayment to the extent it is legally able, the Association's unfair practice charge is moot.

ANALYSIS

N.J.S.A. 34:13A-5.3 defines when a public employer has a duty to negotiate before changing working conditions:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. .

. . In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.

Consistent with the Act, the Commission and courts have held that changes in negotiable terms and conditions of employment must be achieved through the collective negotiations process. See, e.g., Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1997), aff'd, 334 N.J. Super. 512 (App. Div. 1999), aff'd, 166 N.J. 112 (2000); Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989); and Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 52 (1978). A public employer's unilateral change to negotiable compensation terms may constitute an unfair practice in violation of subsections 5.4a(1) and a(5) of the Act. See, e.g., County of Atlantic, 230 N.J. 237 (2017); and Hunterdon Cty., supra. For the Commission to find a 5.4a(5) violation, the charging party must prove: (1) a change; (2) in a term or condition of employment; (3) without negotiations. State of New Jersey (Ramapo State College), P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985); Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985). An employer independently violates 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Lakehurst Bd. of Ed. and Lakehurst Ed. Ass'n,

P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004), aff'd, 31 NJPER 290 (¶113 App. Div. 2005).

Section 5.3 of the Act also sets forth that the exclusive right and obligation to negotiate terms and conditions of employment for unit members is vested not in an individual employee or group of employees, but in the majority representative. It provides, in pertinent part:

Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes . . . shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit. . . . A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership.

[N.J.S.A. 34:13A-5.3.]

Our Supreme Court has described exclusive representation as "the keystone of sound labor-management relations." D'Arrigo v. New Jersey State Bd. of Mediation, 119 N.J. 74, 78 (1990).

Exclusive representation by the majority representative is essential to collective negotiations, whereas fractured bargaining by individuals or subgroups of the unit can be destructive to the process enshrined in the Act. In Lullo v.

Int'l Ass'n of Firefighters, Local 106, 55 N.J. 409 (1970), the

Court explained:

[T]he major aim [of achieving an equitable balance of bargaining power with employers] could not be accomplished if numerous individual employees wished to represent themselves or groups of employees chose different unions or organizations for the purpose. Such absence of solidarity and diffusion of collective strength would promote rivalries, would serve disparate rather than uniform overall objectives, and in many situations would frustrate the employees' community interests.

[Lullo, 55 N.J. at 426.]

The Court specifically discussed the harm to the collective negotiations process caused by a public employer's granting of increased benefits to individual employees:

It has been said that advantages to an employee through an individual contract "may prove as disruptive of industrial peace as disadvantages." Individually negotiated agreements constitute "a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole." J.I. Case Co. v. N.L.R.B., supra, 321 U.S. at 338-339, 64 S. Ct. at 581; N.L.R.B. v. Allis-Chalmers Mfg. Co., supra, 388 U.S. at 180-181, 87 S. Ct. 2001.

[Lullo, 55 N.J. at 428.]

Individual agreements are thus void "to the extent that they conflict with collective agreements or interfere with the

principles of collective negotiation.” Troy v. Rutgers, 168 N.J. 354, 375-376 (2001); see also New Jersey Transit Auth. v. New Jersey PBA, 314 N.J. Super. 129, 139-140 (App. Div. 1998).

The Commission has therefore held that public employers violate subsection 5.4a(5) by negotiating directly with individual employees or groups of employees rather than with their majority representative over negotiable terms or conditions of employment, even where individual negotiations resulted in greater benefits. See, e.g., City of Hackensack, P.E.R.C. No. 2018-54, 45 NJPER 18 (¶5 2018) (unilateral salary increases for some unit members to settle federal lawsuit); Town of West New York, P.E.R.C. No. 99-110, 25 NJPER 332 (¶30143 1999) (unilateral placement of unit member at highest salary level to settle lawsuit); Camden County, P.E.R.C. No. 94-121, 20 NJPER 282 (¶25143 1994) (unilateral salary increase); City of Union City, P.E.R.C. No. 90-37, 15 NJPER 626 (¶20262 1989) (unilateral salary range increase for two positions); and Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545, 548 (¶15254 1984) (employer created incentive program by direct dealing with employees).

Here, the facts are not in dispute that, effective September 1, 2017, the Superintendent and Board advanced the Secretary two extra steps on the negotiated salary guide without negotiating with the Association. The Board later reversed the salary guide advancement and placed her back at Step 5 on paper, but it froze

the Secretary's salary at the Step 7 level for the 2017-2018 and 2018-2019 school years. Thus, although by the 2019-2020 school year the Secretary's frozen Step 7 salary came back into conformance with where she would have been on the negotiated salary guide (i.e., Step 7), in the interim she had earned Step 7 instead of Step 5 salary for one year, and Step 7 instead of Step 6 salary in the second year. We find that these undisputed facts demonstrate that the Board violated its duty under section 5.3 of the Act to negotiate with the exclusive representative - the Association - over negotiable terms and conditions of employment,^{3/} thereby committing an unfair practice in violation of subsection 5.4a(5), and derivatively 5.4a(1), of the Act.

Nevertheless, we find that under these circumstances a sufficient remedy need not include recoupment. Consistent with other Commission cases concerning unilateral salary increases made without negotiating with the majority representative, we will direct the Board to prospectively conform the Secretary's salary to the level it would have been had she never been increased to Step 7, but without recoupment of the salary increases already received. See, e.g., West New York, 25 NJPER

^{3/} Salary guide placement is a mandatorily negotiable compensation issue. See, e.g., Middletown Tp., 166 N.J. 112 (2000); Belleville Ed. Ass'n v. Belleville Bd. of Ed., 209 N.J. Super. 93 (App. Div. 1986); and Manalapan-Englishtown Regional Bd. of Ed. and Manalapan-Englishtown Ed. Ass'n, P.E.R.C. No. 2007-42, 33 NJPER 3 (¶3 2007), aff'd, 35 NJPER 230 (¶82 App. Div. 2009).

at 334; Hackensack, 45 NJPER at 23; Camden County, 20 NJPER at 284 (“We will not ordinarily order the recoupment of benefits unilaterally granted as part of a return to the status quo and do not do so here.”) As it was the Board’s duty - not the Secretary’s - to negotiate with the Association, “it would unduly punish the employee for the employer’s unfair practice to allow the employer to recoup salary already paid to the employee.” Camden County, 20 NJPER at 284. We also note that because the Secretary’s frozen Step 7 salary is now in conformance with where she would have been through regular advancement from Step 5 prior to the increase, no reduction in compensation is necessary to implement this remedy, so the Board’s concern about conflicting with tenure laws is moot.

Finally, we note favorably that the record shows that the Board responded fairly quickly to the Association’s grievance by rescinding the Secretary’s step advancement and reversing the associated salary increase to the extent it was able to at the time given the Secretary’s protected salary per N.J.S.A. 18A:17-2. On the other hand, we reject the Board’s assertion that because it allegedly settled the Association’s grievance by placing the Secretary back at Step 5 and freezing her at the Step 7 salary level, this unfair practice charge is moot. The unfair practice issue before us concerns the Board’s failure to negotiate over compensation with the majority representative and

the Commission is uniquely positioned to order the Board to negotiate with the Association before making any future unilateral changes in terms and conditions of employment.^{4/} Galloway Twp. Bd. of Educ. v. Galloway Twp. Ed. Ass'n, 78 N.J. 25, 39 (1978) (the Legislature granted the Commission the "authority to adjudicate unfair practices . . . even where the offending conduct has ceased").^{5/}

ORDER

The Edison Township Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with the Edison Township Education Association before increasing the salary of the Secretary.

2. Refusing to negotiate in good faith with the Association concerning terms and conditions of employment of

^{4/} Upon finding an unfair practice violation, the Commission is empowered to "take such reasonable affirmative action as will effectuate the policies of this act." N.J.S.A. 34:13A-5.4c.

^{5/} "There can be no guarantee that a party charged with an unfair practice, having voluntarily ceased its unlawful conduct, will not at some future time disavow its adherence to the Act's requirements. The imposition of a continuing obligation on that party to conform its conduct to law is the best means of diminishing the likelihood that it will repeat its demonstrated disdain for employee rights and statutory mandate." Galloway, 78 N.J. at 46.

employees in the unit, particularly by unilaterally increasing the salary of the Secretary.

B. Take this action:

1. Prospectively conform the Secretary's salary to the level it would be had her salary not been unilaterally increased in 2017.

2. Negotiate in good faith with the Association concerning any proposed salary changes and any other negotiable terms and conditions of employment.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Board's authorized representative, be posted immediately and maintained by it for at least sixty (60) days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

4. Notify the Chair of the Commission within twenty (30) days of receipt what steps the Board has taken to comply herewith.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Jones and Papero voted in favor of this decision. None opposed. Commissioner Voos was not present.

ISSUED: November 26, 2019

Trenton, New Jersey



NOTICE TO 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 failing to negotiate with the Edison Township Education Association before increasing the salary of the Secretary.

WE WILL cease and desist from refusing to negotiate in good faith with the Association concerning terms and conditions of employment of employees in the unit, particularly by unilaterally increasing the salary of the Secretary.

WE WILL prospectively conform the Secretary's salary to the level it would be had her salary not been unilaterally increased in 2017.

WE WILL negotiate in good faith with the Association concerning any proposed salary changes and any other negotiable terms and conditions of employment.

Docket No. CO-2018-227

EDISON TOWNSHIP BOARD OF EDUCATION
(Public Employer)

Date: _____

By: _____

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 Street, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830