

P.E.R.C. NO. 2020-49

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (CORRECTIONS),

Respondent,

-and-

Docket No. CO-2016-107

NEW JERSEY LAW ENFORCEMENT  
SUPERVISORS ASSOCIATION,

Charging Party.

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STATE OF NEW JERSEY (CORRECTIONS)

Respondent,

-and-

Docket No. CO-2016-118

NEW JERSEY SUPERIOR OFFICERS  
LAW ENFORCEMENT ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's conclusions of law that the State violated N.J.S.A. 34:13A-5.4a(5) and, derivatively, 5.4a(1) by unilaterally discontinuing the payment of salary guide step increments to New Jersey Law Enforcement Supervisors Association (NJLESA) and New Jersey Superior Officers Law Enforcement Association (NJSOA) unit employees upon the expiration of their respective 2011-2015 collective negotiations agreements (CNAs) during negotiations for a successor agreement. The Commission finds that, consistent with Atlantic Cty., 230 N.J. 237 (2017), the State failed to maintain existing conditions of employment per N.J.S.A. 34:13A-5.3 when it unilaterally discontinued the undisputed status quo of maintaining the payment of regular salary guide increments post-contract expiration. The Commission finds that the charges are not moot despite the State's eventual payment of increments following the settlement of successor MOAs. The Commission modifies the Hearing Examiner's remedy of prejudgment interest for the NJLESA so that it is reduced by the period of time when

NJLESA requested that its charge be held in abeyance pending the outcomes of certain court decisions.

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, Montgomery, McCracken, Walker &  
Rhodes, LLP, attorneys (William K. Kennedy, of counsel;  
Erin K. Clarke, on the brief)

For the Charging Party - Law Enforcement Supervisors  
Association, Crivelli & Barbati, LLC, attorneys  
(Donald C. Barbati, of counsel)

For the Charging Party - Superior Officers Law  
Enforcement Association, O'Brien, Belland & Bushinsky,  
LLC, attorneys (Kevin D. Jarvis, of counsel; Matthew B.  
Madsen, on the brief)

DECISION

This case comes to us by way of exceptions to a Hearing Examiner's decision on motions for summary judgment filed by the New Jersey Law Enforcement Supervisors Association (NJLESA) and the New Jersey Superior Officers Law Enforcement Association (NJSOA) and a cross-motion for summary judgment filed by the State of New Jersey (State). H.E. No. 2020-2, 46 NJPER 195 (¶49 2019). On December 22 and 28, 2015, NJLESA and NJSOA filed unfair practice charges alleging that the State violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by unilaterally discontinuing the payment of salary guide step increments upon the expiration of their respective July 1, 2011 through June 30, 2015 collective negotiations agreements (CNAs). On April 9 and 11, 2018, the Acting Director of Unfair Practices issued Complaints on NJLESA's and NJSOA's allegations that the State violated sections 5.4a(1) and a(5) of the Act by ceasing the payment of increments.<sup>1/2/</sup> The State filed

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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. . . . (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."

2/ Prior to issuance of the complaint, the parties had agreed to hold the unfair practice charges in abeyance pending a  
(continued...)

Answers to the Complaints on May 3, 2018. On June 6, 2018, the Acting Director of Unfair Practices consolidated the charges.

On July 6, 2018, NJLESA and NJSOA both filed motions for summary judgment accompanied by briefs and exhibits. NJLESA's motion for summary judgment was accompanied by the certifications of: Thomas Moran, former NJLESA President; William Toolen, current NJLESA President; and Frank M. Crivelli, an attorney with the law firm representing NJLESA in this matter. On August 17, 2018, the State filed opposition and a cross-motion for summary judgment, along with a brief, exhibits, and the certification of Erin K. Clarke, an attorney representing the State in this matter. The State did not submit a certification or affidavit disputing the facts set forth in Toolen or Moran's certifications. In August and September 2018, NJLESA and NJSOA filed reply briefs in opposition to the State's cross-motion. On September 26, 2018, the motion and cross-motion for summary judgment were referred to a Hearing Examiner for decision pursuant to N.J.A.C. 19:14-4.8(a).

On November 13, 2019, the Hearing Examiner issued a report and recommended decision, H.E. 2020-2, supra, concluding that the State violated sections 5.4a(5) and, derivatively, a(1) of the Act by unilaterally discontinuing the payment of salary guide

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2/ (...continued)  
Superior Court matter involving the parties and related appeals involving other parties. H.E. at 3-5.

step increments to NJLESA and NJSOA unit employees upon the expiration of their respective 2011-2015 CNAs. H.E. at 102. In so finding the Hearing Examiner explained that, although the State eventually entered into MOAs with the unions providing for payment of the increments that were the subject of these unfair practice charges, this dispute was not moot because the withholding of salary increments for over three years is itself a cognizable injury for which the Commission and courts may award pre-judgment interest. H.E. at 23-30. The Hearing Examiner's Recommended Order recommended that the State:

- Cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act, and from refusing to negotiate in good faith with the majority representative concerning terms and conditions of employment, particularly by unilaterally discontinuing the payment of salary guide step increments to NJSOA and NJLESA unit employees during negotiations for a successor collective negotiations agreement and upon expiration of the NJSOA and NJLESA 2011-2015 CNAs;
- Negotiate in good faith with the NJSOA and NJLESA over any proposed changes to the salary guide increment systems set forth in the parties' CNAs and maintain the status quo regarding salary guide movement during those negotiations by paying salary increments to eligible NJLESA and NJSOA unit employees;
- Pay eligible NJLESA unit employees pre-judgment interest in accordance with the rates established under R.4:42-11, on the amount of salary increments withheld from them between July 1, 2015 through August 30, 2019;<sup>3/</sup> and

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<sup>3/</sup> The Hearing Examiner did not recommend prejudgment interest as part of the remedy for NJSOA unit members, as only the NJLESA, but not the NJSOA, sought prejudgment interest. H.E. at 18, 21, and 102-103.

- Post a notice to employees regarding the elements of the recommended order for at least sixty consecutive days.

On December 11, 2019, the State filed ten exceptions to the Hearing Examiner's report, summarized as follows:

1. General exception that the HE's conclusions of law that the State violated the Act is contrary to applicable law.
2. Exception to the HE's conclusion that the CNAs at issue do not limit the payment of increments to the terms of the applicable CNAs.
3. Exception to the HE's conclusion that the issues in these unfair practice charges are not moot.
4. Exception to the HE's recommendation that the Commission award prejudgment interest on the amount of increments withheld from NJLESA.
5. Exception to the HE's conclusion that the State committed an unfair practice by unilaterally changing terms and conditions of employment by "amending, changing, or modifying" the State Compensation Plan applicable to NJSOA or NJLESA in violation of Civil Service law and regulations.
6. Exception to the HE's conclusion that employees' receipt of increments was an "established term and condition of employment."
7. Exception to the HE's conclusion that the Commission's decision in William Toolen, et al., P.E.R.C. No. 2018-29, 44 NJPER 300 (¶83 2018), does not reject the HE's arguments under the incorporation doctrine and the Civil Service laws and regulations.
8. Exception to the HE's conclusion that the Annual Appropriations Acts and the Appropriations Clause of the New Jersey Constitution do not bar the payment of increments in these cases.
9. Exceptions to the HE's conclusion that the Commission should reject the decision and rationale of Atlantic County, P.E.R.C. No. 2014-40, 40 NJPER 285 (¶109 2013), and instead rule that salary increments must continue post-contract expiration as part of the status quo.

10. Exceptions to the HE's conclusion that the Commission is bound by the Appellate Division's decision regarding the status quo in Atlantic County, 445 N.J. Super. 1 (App. Div. 2016).

On January 9 and January 16, 2020, NJLESA and NJSOA filed their responses in opposition to the State exceptions. Both the NJLESA and NJSOA argued for adoption of the Hearing Examiner's report and rejection of the State's exceptions.

We have reviewed the record. The Hearing Examiner's findings of fact are supported by the record and we adopt them. (H.E. at 12-21). We summarize them as follows.

SUMMARY OF FACTS

The material facts concerning NJLESA's charge are:

- The NJLESA is the exclusive majority representative of primary level supervisory law enforcement employees of the State.
- The State and NJLESA are parties to a CNA extending from July 1, 2011 through June 30, 2015.
- Article XIII, entitled "Salary Compensation Plan and Program," and Appendix II of the NJLESA CNA set forth a salary guide structure for NJLESA unit members, which provides for the payment of annual salary guide increment steps to eligible unit members whose job performance is not unsatisfactory. Article XIII provides, in pertinent part:

A. Administration

1. The parties acknowledge the existence and continuation during the term of this Agreement of the State Compensation Plan which incorporates in particular, but without specific limit, the following basic concepts:

. . .

b) A salary range with specific minimum and maximum rates and intermediate incremental steps therein for each position.

\* \* \*



B. Compensation Adjustment

It is agreed that during the term of this Agreement for the period July 1, 2011 - June 30, 2015, the following salary and fringe benefit improvements shall be provided to eligible employees in the unit within the applicable policies and practices of the State and in keeping with the conditions set forth herein. . . .

2. Salary Increments: Normal increments shall be paid to all employees eligible for such increments within the policies of the State Compensation Plan during the term of this Agreement.

- By letter of June 29, 2015, the State notified NJLESA that it would stop paying salary increments as of July 1, 2015. The letter stated, in pertinent part:

If a new agreement is not in place by July 1, 2015, based on the express language in the collective negotiations agreement and governing case law, the following economic provisions will expire with the agreement on June 30, 2015, and will not be continued pending negotiations:

1. Article XIII(B) Compensation Adjustment, including increments under Paragraph (B) (2) effective the first full pay period after July 1, 2015; . . .

- Moran certified that for the entirety of his employment with the Department of Corrections (DOC) since 1985, he does not recall the State ever suspending employees' salary guide movement or discontinuing the payment of step increments during the period when a prior CNA expired and a successor CNA was being negotiated.
- Toolen, who has been a member of NJLESA since 2008 and employed by the DOC for approximately 20 years, certified that the State had never before suspended the payment of step increments to NJLESA members following the expiration of a CNA, and had never before taken the position that NJLESA employees should have their salary guide movement suspended until a new CNA was negotiated.

- Toolen certifies that the State never negotiated with NJLESA over increment payments prior to discontinuing the payment of increments to NJLESA members on July 1, 2015.
- On or about November 8, 2018, the State and NJLESA executed an MOA covering the period from July 1, 2015 through June 30, 2019. The 2015-2019 MOA provided for the payment of salary guide increments to NJLESA members for the period July 1, 2015 through June 30, 2019.
- On approximately August 30, 2019, the State paid NJLESA unit members their salary guide increments pursuant to the 2015-2019 MOA. The increments were retroactive back to the July 1, 2015 increment freeze, over four years prior.

The material facts concerning NJSOA's charge are:

- The NJSOA is the exclusive majority representative of full-time permanent and provisional state superior law enforcement officers in certain titles.
- The State and NJSOA are parties to a CNA extending from July 1, 2011 through June 30, 2015.
- Article XIII, entitled "Salary Compensation Plan and Program," of the NJSOA CNA provides, in pertinent part:

A. Administration

1. The parties acknowledge the existence and continuation during the term of this Agreement of the State Compensation Plan which incorporates in particular, but without specific limit, the following basic concepts:

. . .

b) A salary range with specific minimum and maximum rates and intermediate incremental steps therein for each position.

\* \* \*

B. Compensation Adjustment

It is agreed that during the term of this Agreement for the period July 1, 2011 - June 30, 2015, the following salary and fringe benefit improvements shall be provided to eligible employees in the unit within the applicable policies and practices of the State and in keeping with the conditions set forth herein. . . .

2. Salary Increments: Normal increments shall be paid to all employees eligible for such increments within the policies of the State Compensation Plan during the term of this Agreement.

- Upon expiration of the 2011-2015 NJSOA CNA and effective July 1, 2015, the State unilaterally discontinued the payment of salary guide increments to eligible NJSOA unit members.
- On or about July 17, 2018, the State and NJSOA executed a MOA extending from July 1, 2015 through June 30, 2019. The MOA provided for the payment of salary guide increments to NJSOA unit members retroactive to July 1, 2015.
- On December 7, 2018, the State paid NJSOA unit members salary guide increments pursuant to the 2015-2019 MOA. The increments were retroactive back to the July 1, 2015 increment freeze, more than three years prior.

#### STANDARD OF REVIEW

The standard we apply in reviewing a Hearing Examiner's decision and recommended order is set forth in part in N.J.S.A. 52:14B-10(c). In the context of a motion for summary judgment, the relevant part of the statute provides:

The head of the agency, upon a review of the record submitted by the [hearing examiner], shall adopt, reject or modify the recommended report and decision . . . after receipt of such recommendations. In reviewing the decision . . . , the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so. . . . In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). N.J.A.C. 19:14-4.8(e) provides:

If it appears from the pleadings, together with the briefs, affidavits and other documents filed that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

In determining whether there exists a "genuine issue" of material fact that precludes summary judgment, we must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540. We "must grant all the favorable inferences to the non-movant." Id. at 536. The summary judgment procedure is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 183 (App. Div. 1981), certif. denied, 87 N.J. 388 (1981).

ANALYSIS

N.J.S.A. 34:13A-5.3 sets forth a public employer's obligation to negotiate with a majority representative 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.

Consistent with the Act, the Commission and courts have held that changes in negotiable terms and conditions of employment must be addressed through the collective negotiations process because unilateral action is destabilizing to the employment relationship and contrary to the principles of our Act. See, e.g., Atlantic Cty., 230 N.J. 237, 252 (2017); 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, 337-338 (1989); and Galloway Twp. Bd. of Educ., 78 N.J. 25, 52 (1978).

In Galloway, supra, the New Jersey Supreme Court explained that the proscription of any unilateral implementation of changes in terms and conditions of employment incorporated by the Legislature in N.J.S.A. 34:13A-5.3 is similar to, and more expansive than, the private sector labor law principle set forth in the United States Supreme Court decision NLRB v. Katz, 369 U.S. 736 (1962). Galloway, 78 N.J. at 48. The New Jersey Supreme Court described the Katz principle as:

The basis of the rule prohibiting unilateral changes by an employer during negotiations is the recognition of the importance of maintaining the then-prevailing terms and conditions of employment during this delicate period until new terms and conditions are arrived at by agreement. Unilateral changes disruptive of this status quo are unlawful because they frustrate the "statutory objective of establishing working conditions through bargaining." NLRB v. Katz, supra, 369 U.S. at 744, 82 S. Ct. At 1112.

[Galloway, 78 N.J. at 48.]

More recently, in Atlantic Cty., supra, the New Jersey Supreme Court reiterated this statutory duty to negotiate:

Thus, employers are barred from "unilaterally altering . . . mandatory bargaining topics, whether established by expired contract or by past practice, without first bargaining to impasse." Bd. of Educ. v. Neptune Twp. Educ. Ass'n, 144 N.J. 16, 22, 675 A.2d 611 (1996) (citation omitted); accord Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass'n, 78 N.J. 25, 48, 393 A.2d 218 (1978) (finding Legislature, through enactment of EERA, "recognized that the unilateral imposition of working conditions is the antithesis of its goal that the terms and conditions of public employment be established through bilateral negotiation").

[Atlantic Cty., 230 N.J. at 252.]

In Atlantic Cty., the Supreme Court determined that the parties' expired contracts provided for the continuation of salary guide increments post-contract expiration, so the freeze of those increments during collective negotiations violated the Act. The Court held:

We find that salary step increments is a mandatorily negotiable term and condition of employment because it is part and parcel to an employee's compensation for any particular year. . . . Accordingly we must determine whether the salary increment systems provided for in the expired CNAs still governed working conditions during the hiatus period between agreements. See N.J.S.A. 34:13A-5.3 - 5.4(a)(1), and -5.4(a)(5). Here, we need not look beyond the contracts themselves to conclude that the step increases continued beyond the expiration of the contracts. . . . Because the salary increment system was a term and condition of employment that governed beyond the CNA's expiration date, Atlantic County and Bridgewater Township committed an unfair labor practice when they altered that condition without first attempting to negotiate in good faith, in violation of N.J.S.A. 34:13A-5.3, -5.4(a)(1), and -5.4(a)(5).

[Atlantic Cty., 230 N.J. at 253-254, 256; emphasis added.]

The Court stated that if the parties had intended to cease increment payments, they could have negotiated "clear contractual language [that] leaves no room for confusion" such as "increments shall not be paid unless and until the parties agree to a successor contract." Id. at 256. The Court also explained that "[h]ad the . . . agreements been silent about whether the terms of the salary increment system were to continue, the issue in this appeal . . . might well have required careful consideration

of past practices, custom and viability of the dynamic status quo doctrine." Ibid.<sup>4/</sup>

Similarly, in Galloway, the Supreme Court found that if continuation of a scheduled salary increment is determined to be an existing working condition that constitutes an element of the status quo, then "the unilateral denial of that increment would constitute a modification thereof without the negotiation mandated by N.J.S.A. 34:13A-5.3 and would thus violate N.J.S.A. 34:13A-5.4(a)(5)." 78 N.J. at 49-50.<sup>5/</sup>

Following Galloway, this principle has been applied by the Appellate Division. In Hudson Cty., NJPER Supp.2d 62 (¶44 App. Div. 1979), the Appellate Division affirmed the Commission's decision holding that the employer committed an unfair practice by unilaterally freezing salary increments during negotiations

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<sup>4/</sup> While noting "that the Appellate Division based its conclusion on the dynamic status quo doctrine," the Court affirmed on other grounds, concluding: "Given our reliance on contract principles, we need not reach that issue." Id. at 256-257.

<sup>5/</sup> The Galloway Court ultimately did not need to decide whether the salary guide steps at issue were automatic scheduled increases that could not be unilaterally altered during the hiatus between contracts, because it found that an education law, N.J.S.A. 18A:29-4.1, specifically bound the board of education to the terms of the salary schedule for the two year period, effectively becoming "an element of the status quo." Id. at 51-52. It held: "Since the payment of the salary increments herein should have been automatic upon the start of the new school year in September 1975, PERC correctly determined the Board's unilateral withholding of the increments contravened N.J.S.A. 34:13A-5.3." Id. at 52.



for a successor agreement, even though the agreement was silent regarding the continued payment of increments. The Court found that because there was an "established practice of increment payments" to qualified employees based on their anniversary date of hire, "the payment of increments constituted a term and condition of employment under which the parties have been operating and, therefore, was an element of the status quo." Hudson Cty., NJPER Supp.2d at 62. The Court held that "[t]he Board's unilateral decision not to pay these increments was a negation of this benefit" and "an alteration of the status quo." Ibid.

In Rutgers, The State University, NJPER Supp.2d 96 (¶79 App. Div. 1981), the Appellate Division affirmed the Commission's decision holding that if the status quo based on long standing practice included the payment of regular increments according to a salary guide, then it would violate the Act to unilaterally freeze such payments during collective negotiations. Citing Galloway, the Court held that because "a prior practice had been in effect for some years regarding salary payments to coadjutant faculty," the University violated the Act by unilaterally altering that status quo when it froze those increments during contract negotiations. Rutgers, NJPER Supp.2d at 96.

Based on the judicial guidance of Galloway, Hudson Cty., and Rutgers, the Commission and its designees have regularly held

that if a scheduled salary increment is an existing rule governing working conditions, then a unilateral change to that status quo is an unfair practice under the Act. See, e.g., Howell Tp. Bd. of Ed., P.E.R.C. No. 86-44, 11 NJPER 634 (¶16223 1985); State of New Jersey, P.E.R.C. No. 87-21, 12 NJPER 744 (¶17279 1986); Camden Housing Authority, P.E.R.C. No. 88-5, 13 NJPER 639 (¶18239 1987); Scotch Plains-Fanwood Bd. of Ed., P.E.R.C. No. 91-114, 17 NJPER 336 (¶22149 1991); and CWA and State, I.R. No. 82-2, 7 NJPER 532, 536-537 (¶12235 1981).

Consistent with the Supreme Court's recent Atlantic Cty. decision, the Commission interprets the status quo during collective negotiations as a continuation of the prevailing terms and conditions of employment established through the expired CNA, past practice, or otherwise.<sup>6/</sup> The terms and conditions of employment dictate whether the parties have established a salary guide increment system through which employees may advance, and whether advancement on such a guide is to continue post-contract expiration until the parties have agreed on a successor contract. The Commission does not apply an external requirement for how certain compensation terms should progress from year to year.

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<sup>6/</sup> Prior to the Supreme Court's 1996 decision in Neptune Bd. of Educ. v. Neptune Twp. Educ. Ass'n, 144 N.J. 16 (1996), neither the Commission, nor the courts in Galloway, Hudson Cty., or Rutgers, used the term "dynamic status quo" or characterized the status quo required to be maintained per the Act as either "dynamic" or "static."

Here, the unopposed facts regarding the status quo were that the State had never before frozen or discontinued regular increments under the applicable contract language during the period when a prior CNA expired and a successor CNA was negotiated. Thus the status quo included a payment system by which increments were regularly paid based on satisfactory performance,<sup>7/</sup> and a past practice of continued adherence to that increment system post-contract expiration. The State did not negotiate with NJLESA or NJSOA prior to changing the status quo of the past practice pending negotiations for a new agreement.

Furthermore, neither CNA contained language explicitly waiving continuation of the status quo by agreeing to freeze increments post-contract expiration. The State urges that language in portions of the salary clauses regarding the "existence and continuation during the term of this Agreement of the State Compensation Plan" and "within the policies of the State Compensation Plan during the term of this Agreement" support freezing increments post-contract expiration. However,

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<sup>7/</sup> The applicable salary guide generally provided for annual increments, but depending on what step of the guide an employee was on and for how long, the time between increments could be greater. H.E. at 14 (Article XIII(B) (2) (b)-(c) of the NJLESA CNA provides that employees at the eighth step of the same range for 18 months or longer, and employees at the ninth step of the same range for 24 months or longer "shall be eligible for movement to the [next] step providing their performance warrants this salary adjustment.")

those terms are general durational clauses that do not provide any indication that the parties intended to freeze the salary guide's usual progression during negotiations for a successor CNA. As, by operation of law per N.J.S.A. 34:13A-5.3, the terms of a CNA are to continue unchanged until impasse or a new agreement is reached, the "term" of an agreement is by itself too vague to constitute a clear intention that a particular condition of employment will be discontinued the day after a contract expiration date.

The Commission has previously found that identical language between the State and other state employee unions does not explicitly waive the status quo on regular salary guide increments. The Commission in State of New Jersey, supra, 12 NJPER at 745 and a former Commission Chair in CWA and State, supra, 7 NJPER at 537, found that the facts did not support that the language "normal increments shall be paid to all employees eligible for such increments within the policies of the State Compensation Plan during the term of this Agreement" was meant to be a waiver of the obligation to pay increments per the status quo. Thus, as in State of New Jersey and CWA and State, we find that the language "during the term of this Agreement" contained in the State's increment clauses with NJLESA and NJSOA did not explicitly waive the State's obligation under the Act to maintain

the status quo regarding continuation of regular increments post-contract expiration.<sup>8/</sup>

Moreover, no other facts support the State's proffered interpretation of the CNAs; rather, the parties' practice of continuing increment payments instead of freezing them when the contract expires supports the status quo position of the unions. Accordingly, we adopt the Hearing Examiner's conclusions of law that the State violated N.J.S.A. 34:13A-5.4(a)(5) and, derivatively, N.J.S.A. 34:13A-5.4(a)(1) by unilaterally discontinuing the payment of salary guide step increments to NJLESA and NJSOA unit employees upon the expiration of their respective 2011-2015 CNAs. H.E. at 98-99, 102.

The State urges us to follow Atlantic County and FOP Lodge 34 and PBA Local 77, P.E.R.C. No. 2014-40, 40 NJPER 285 (¶109 2013) for the proposition that the status quo cannot include the

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<sup>8/</sup> Recent federal appeals court decisions interpreting the NLRA standards analogous to our Act and applying the NLRB v. Katz doctrine incorporated into our jurisprudence in Galloway have held that regular salary guide increments define the status quo post-contract expiration unless the parties have clearly agreed otherwise. They establish that neither a contract's silence on whether the increments must continue to be paid, nor a standard durational clause, are enough to establish clear waiver of the statutory obligation to maintain that status quo. See, e.g., Wilkes-Barre Hospital Co. v. NLRB, 857 F.3d 364, 375 (D.C. Cir. 2017) ("Without more, such a general durational clause cannot defeat the unilateral change doctrine"); Honeywell International Inc. v. NLRB, 253 F.3d 125, 132-133 (D.C. Cir. 2001) ("Under Katz and Litton, however, an expiration date in a standard contract duration clause without more, cannot defeat the unilateral change doctrine").

continuation of salary guide increments during post-contract negotiations. However, that case was reversed by the Appellate Division, County of Atlantic, 445 N.J. Super. 1 (App. Div. 2016) (hereinafter referred to as Atlantic Cty. (App. Div.)), which was, in turn, affirmed by the Supreme Court of New Jersey, on other grounds. Atlantic Cty., supra, 230 N.J. 237.

The State excepts to the Hearing Examiner's finding that Atlantic Cty. (App. Div.) remains good law. We need not reach that issue as our decision rests soundly on the Supreme Court's decisions in Atlantic Cty. and Galloway, and the multitude of Commission and judicial precedent in the decades between those Supreme Court decisions, independent of Atlantic Cty. (App. Div.). Those precedents focus on what the status quo is regarding salary increments post-contract expiration.

Because we have held that the State was required under the Act and the facts of this case to maintain the status quo of regular salary guide increments post-contract expiration, it is also unnecessary for us to consider the issue of whether the State violated Civil Service laws and regulations incorporated into the CNAs, and the applicability of the Commission's decision in William Toolen, et al., P.E.R.C. No. 2018-29, 44 NJPER 300 (¶83 2018) to this dispute.

Next, we are unpersuaded by the State's contention that compliance with our Act by continuing a status quo of regular

salary guide increments violates the Appropriations Act or the Appropriations Clause of the New Jersey Constitution. We adopt the Hearing Examiner's analysis rejecting this argument. H.E. at 100-101. The Governor's Office, not the Legislature, is the public employer within the meaning of the Act. The Governor's office has the discretion to enter into binding CNAs with representatives of State employees and can be ordered to request appropriations for the payment of increments. See State of New Jersey, P.E.R.C. No. 91-107, 17 NJPER 310, 313 (¶22137 1991); and New Jersey Turnpike Authority; P.E.R.C. No. 2010-68, 36 NJPER 68, 70 (¶32 2010).

We next reject the State's exception to the Hearing Examiner's finding that this case is not moot because the withholding of increments is a legally cognizable injury that may be remedied by awarding prejudgment interest. H.E. at 23-30. However, we partially grant the State's exception to the awarding of prejudgment interest for NJLESA by reducing the period for calculating prejudgment interest. The payment of prejudgment interest for the period of time increments were wrongly withheld is part of an appropriate remedy for failure to pay salary increments in violation of the Act. See, e.g., Scotch Plains-Fanwood Bd. of Ed., supra, P.E.R.C. No. 91-114; Camden Housing Authority, supra, P.E.R.C. No. 88-5; Howell Tp. Bd. of Ed., supra, P.E.R.C. No. 86-44, 11 NJPER 634 (¶16223 1985); and West

Paterson Bor., P.E.R.C. No. 92-18, 17 NJPER 413 (¶22198 1991).

Here, the NJLESA's increments were frozen for more than four years.<sup>9/</sup> While an order requiring the State to pay prejudgment interest to NJLESA employees is likewise appropriate in this case, we will reduce the time period for which prejudgment interest is awarded based on the following mitigating circumstances. First, at the time the State froze the increments, on July 1, 2015, the Commission's Atlantic Cty. decision, P.E.R.C. No. 2014-40, which held that failure to continue to pay increments post-contract expiration was not an unfair practice, had not yet been reversed. The decision reversing it, Atlantic Cty. (App. Div.), was issued on March 9, 2016. However, following Atlantic City. (App Div.), NJLESA requested that its charge be held in abeyance until the Supreme Court's decision in Atlantic Cty. (issued on August 2, 2017) and pending the Commission's decision in Toolen (decided on January 25, 2018; with the motion for reconsideration denied on February 22, 2018). We find that because NJLESA requested these delays, the State should not be held responsible for prejudgment interest for that period. See, e.g., Mehta v. Johns-Manville Products Corp., 163 N.J. Super. 1, 6-7 (App. Div. 1978), (finding that the

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<sup>9/</sup> The Hearing Examiner did not recommend prejudgment interest for the NJSOA because the NJSOA seeks only a cease and desist order and a posting. The NJSOA did not file exceptions to the Hearing Examiner's report.



payment of interest should be controlled by equitable considerations to accomplish justice in each particular case). Therefore, we modify the Hearing Examiner's recommended remedy of prejudgment interest to NJLESA employees to begin on February 22, 2018 and end on August 30, 2019 when the State retroactively paid the increments.

As to mootness generally, the State's eventual payment of retroactive increments following settlement of MOAs for the successor contracts does not make the initial and prolonged failure to pay increments moot. The Supreme Court has held that the Commission's broad remedial authority pursuant to N.J.S.A. 34:13A-5.4(c) and (f) includes "the authority under that statute to adjudicate and remedy past violations of the Act if, in its expert discretion, it determines that course of action to be appropriate under the circumstances of the particular case." Galloway, 78 N.J. at 39. The Supreme Court recognized the value of issuing such orders even after an employer has voluntarily ceased the wrongful conduct. Id. at 46. Here, a financial remedy in the form of prejudgment interest for NJLESA employees is appropriate to address delayed increment payments, and the cease and desist order and unfair practice posting serve a deterrent purpose should a similar dispute arise following expiration of current and future contracts. We therefore find that NJLESA's and NJSOA's charges are not moot and we adopt the

Hearing Examiner's cease and desist order because it is consistent with the Commissions' remedial powers to deter future unfair practices.

ORDER

The State of New Jersey 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 this Act, particularly by unilaterally discontinuing the payment of salary guide step increments to NJSOA and NJLESA unit employees during negotiations for a successor collective negotiations agreement and upon expiration of the NJSOA and NJLESA 2011-2015 CNAs.

2. Refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by unilaterally discontinuing the payment of salary guide step increments to NJSOA and NJLESA unit employees during collective negotiations for a successor agreement and upon expiration of the 2011-2015 CNA.

B. Take the following action:

1. Within thirty (30) days of this decision, pay eligible NJLESA unit employees pre-judgment interest in accordance with the rates established under R. 4:42-11, on the

amount of salary increments withheld from NJLESA unit employees from February 22, 2018 through August 30, 2019.

2. Negotiate in good faith with the NJSOA and NJLESA over any proposed changes to the salary guide increment systems set forth in the parties' CNAs and maintain the status quo regarding salary guide movement during those negotiations by paying salary increments to eligible NJLESA and NJSOA unit employees.

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 Respondent's authorized representative, be posted immediately and 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.

4. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this ORDER.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Jones and Voos voted in favor of this decision. None opposed. Commissioner Papero recused himself.

ISSUED: April 30, 2020

Trenton, New Jersey



RECOMMENDED



# 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 this Act, particularly by unilaterally discontinuing the payment of salary guide step increments to NJSOA and NJLESA unit employees during negotiations for a successor collective negotiations agreement and upon expiration of the NJSOA and NJLESA 2011-2015 CNAs.

**WE WILL** cease and desist from refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by unilaterally discontinuing the payment of salary guide step increments to NJSOA and NJLESA unit employees during collective negotiations for a successor agreement and upon expiration of the 2011-2015 CNA.

**WE WILL**, within thirty (30) days of this decision, pay eligible NJLESA unit employees pre-judgment interest in accordance with the rates established under R. 4:42-11, on the amount of salary increments withheld from NJLESA unit employees from February 22, 2018 through August 30, 2019.

**WE WILL** negotiate in good faith with the NJSOA and NJLESA over any proposed changes to the salary guide increment systems set forth in the parties' CNAs and maintain the status quo regarding salary guide movement during those negotiations by paying salary increments to eligible NJLESA and NJSOA unit employees.

Docket No. CO-2016-107  
CO-2016-118

STATE OF NEW JERSEY (CORRECTIONS)  
(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