

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PERTH AMBOY FEDERATION OF TEACHERS,

Charging Party,

-and-

Docket No. CO-2019-038

PERTH AMBOY BOARD OF EDUCATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Perth Amboy Federation of Teachers' motion for summary judgment on its unfair practice charge alleging that the Perth Amboy Board of Education 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 Federation employees upon the expiration of their 2015-2018 CNA and during negotiations for a successor agreement. The Commission finds that the parties' CNA did not contain language explicitly continuing or ceasing increments post-contract expiration and that the CNA's general "duration clause" does not establish the parties' intent to freeze the salary guides' usual annual progression during negotiations for a successor CNA. The Commission further finds that post-judgment interest is not warranted due to mitigating factors specific to this case.

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.

P.E.R.C. NO. 2021-9

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PERTH AMBOY FEDERATION OF TEACHERS,

Charging Party,

-and-

Docket No. CO-2019-038

PERTH AMBOY BOARD OF EDUCATION,

Respondent.

Appearances:

For the Charging Party, Weissman & Mintz, attorneys
(Ira W. Mintz, of counsel and on the brief)

For the Respondent, Machado Law Group, LLC, attorneys
(Isabel Machado, of counsel and on the brief)

DECISION

On July 31, 2018 the Perth Amboy Federation of Teachers (Federation) filed an unfair practice charge (UPC) against the Perth Amboy Board of Education (Board) alleging that the Board 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 the July 1, 2015 through June 30, 2018 collective negotiations agreement (CNA) and during negotiations for a successor CNA. On January 28, 2019, the Director of Unfair Practices issued a Complaint and Notice of Pre-Hearing on the Federation's allegations that the State violated sections 5.4a(1) and (5) of

the Act by ceasing the payment of increments.^{1/} On February, 7 2019, the Board filed Answers to the Complaint.

The Federation filed a motion for summary judgment dated May 3, 2019 supported by a brief and the certification of Donna Tartza, Federation District Representative. On May 20, 2019, the Board filed opposition to the Federation's motion for summary judgment, which was supported by a brief and exhibits.^{2/} The Federation filed a reply brief dated May 28, 2019 to the Board's opposition brief. The Board filed a sur-reply brief dated May 30, 2019 in response to the Federation's reply brief.

By letter dated June 17, 2019, the Board notified the Commission that the parties had entered into a memorandum of agreement (MOA) on June 14, 2019 in which they agreed to enter into a new CNA covering the period of July 1, 2018 through June 30, 2021. The Board represented that upon ratification and approval of the new CNA the payment of increments that were at

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/ N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge. The Board did not file a certification in support of its opposition brief or disputing the facts set forth in Tartza's certification.

issue in the UPC would be paid to all impacted Federation members and that the salary increases would be retroactive to July 1, 2018. Thus, the Board argued that the Commission should dismiss the UPC as moot. By letters dated June 19 and July 2, 2019, the Federation opposed the Board's request that the Commission dismiss the UPC as moot, and it represented that the parties' new CNA is a "tentative contract settlement". The parties represent that on May 7, 2020 the MOA was fully ratified and that retroactive increments based on the 2019-2020 salary guides were paid on May 31, retroactive increments based on the 2018-2019 salary guides were paid on June 24, and all retroactive increments for the technicians were paid on July 15.

We have reviewed the record, and we summarize the undisputed material facts as follows.

SUMMARY OF FACTS

- The Federation is the exclusive majority representative of all certificated and non-certificated personnel, secretarial personnel, custodial, and paraprofessionals, employed by the Board, excluding substitute teachers, administrative and confidential employees.
- The Board and Federation were parties to a CNA with a term of July 1, 2015 through June 30, 2018.
- Section 2 Article I of the 2015-2018 CNA, entitled "Certificated Staff Salary Guide and Notes" sets forth a 15-step salary guide for certificated staff with columns for bachelors, masters, and doctoral degrees.

- Section 3, Article II of the 2015-2018 CNA, entitled "Custodial Salaries and Other Benefits", sets forth a 12-step salary guide for custodians.
- Section 4, Article V of the 2015-2018 CNA, entitled "Salary Provisions", sets forth a 10-step salary guide for secretarial staff.
- Section 5, Article III of the 2015-2018 CNA, entitled "Salary Provisions 2015-2018 School-Related Personnel", sets forth the salary guides for various school-related personnel, including bus drivers and cafeteria workers.
- Section 6, Article III, entitled "Paraprofessional Salary Provisions", sets forth a 6-step salary guide for paraprofessional.
- During the term of the 2015-2018 CNA, certificated staff moved one step on their respective salary guides every September 1st, and non-certificated staff moved one step on their respective salary guides every July 1st.
- Section I, Article XV of the 2015-2018 CNA, entitled "Duration", provides, "The period covered by this agreement is from July 1, 2015 to June 30, 2018."
- The Board refused to pay increments pursuant to the CNA's salary guides following the CNA's expiration on July 1, 2018. Non-payment of the increments continued until the parties fully ratified the June 13, 2019 MOA on May 7, 2020 and paid all retroactive increments owed as of July 15, 2020.
- Tartza certifies that from September 1, 1969 to June 30, 2018, the parties have not entered into a collective negotiations agreement with a term greater than three years.

STANDARD OF REVIEW

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 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).

Here, the Board argues that the payment of increments following the expiration of the 2015-2018 CNA is mandatorily negotiable subject which is governed by the specific terms of the CNA. The Board asserts that unlike the provisions found in

Atlantic Cty., which clearly required the continuation of increment payments following contract expiration, Article XV of the CNA, which is a Duration Clause, clearly expresses the intent for the terms of the CNA to end upon expiration. Moreover, the Board argues that even if the clear and unambiguous language of the Duration Clause did not express the intent to cease increase payments upon contract expiration, the undisputed past practice of the parties was to not pay increments following contract expiration in accordance with Neptune Bd. of Educ. v. Neptune Twp. Educ. Ass'n, 144 N.J. 16 (1996). Lastly, in the alternative, the Board argues that the Federation's motion for summary judgment must be denied because there are genuine issues of material fact as to the meaning of the Duration Clause and the parties' past practice regarding payment of increments following contract expiration which requires a factual hearing.

The Federation argues that payment of increments following contract expiration is consistent with decades of labor law and a unilateral change to that status quo has been consistently found to be an unfair practice under the Act. The Federation further argues that the parties' CNA does not contain any express "sunset" provision as the examples discussed in Altantic Cty., which clearly states that payment of increments will cease upon contract expiration. See Altantic Cty. at 255. The Federation argues that the CNA's Duration Clause was not intended to nor

does it act as such a "sunset" provision. Moreover, the Federation argues that the Board's compliance with Neptune's prohibition against the payment of increments after the expiration of prior three-year agreements did not create a past practice which established non-payment of increments as the status quo. The Federation emphasizes that the Board was prohibited from paying increments by operation of N.J.S.A. 18A:29-4.1, which was amended in 2014 to lift that prohibition.^{3/} Thus, the Federation argues that the Board's compliance with the old law did not create a past practice under the new law.

Here, we find the undisputed facts are clear, namely that:

1. The parties' CNA provided for payment of yearly increments on the salary guide;
2. The parties' CNA contains neither a sunset or continuation clause, such as those discussed in Atlantic Cty., but contains a duration clause;
3. The Board was prohibited from paying increments following the expiration of previous CNAs due to operation of law;
4. The Board refused to pay increments following the CNA's expiration on July 1, 2018 even though it was no longer prohibited from doing so by operation of law;

^{3/} It appears that the 2015-2018 CNA is the first CNA following the 2014 amendment to N.J.S.A. 18A:29-4.1 that would allow for the Board to pay for increments following contract expiration. The record does not show when the 2015-2018 CNA was ratified following the expiration of the previous CNA.

5. On June 14, 2019 the parties entered into an MOA in which they agreed to enter into a successor CNA covering July 1, 2018 to June 30, 2019, and in which the Board agreed to pay increments retroactive to July 1, 2018; and

6. Increments were actually paid by the Board shortly following ratification and approval of the successor CNA on May 7, 2020.

Atlantic Cty. provided clear direction to bargaining parties as to what type of contract language would continue or cease payment of increments during the hiatus period between contracts. We find that the parties' CNA did not contain language explicitly continuing or ceasing increments post-contract expiration. However, the Board urges that the CNA's Duration Clause should operate as a "sunset" clause. We find that the CNA's general duration clause does not establish the parties' intent to freeze the salary guides' usual annual progression during negotiations for a successor CNA. See State of New Jersey (Corrections), P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020).^{4/} Per N.J.S.A.

^{4/} 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. (continued...)

34:13A-5.3, the terms and conditions 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. Ibid. Moreover, no other facts support the Board's proffered interpretation of the CNA's Duration Clause nor does its interpretation require a factual hearing as the effect of such general duration clauses. Accordingly, we grant the Federation's motion for summary judgment and find that the Board 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 Federation employees upon the expiration of their 2015-2018 CNA.

As such, we find that this case is not moot. In Union Cty. Reg. H.S. Bd. of Ed., P.E.R.C. No. 79-90, 5 NJPER 229 (¶10126 1979), the Commission noted:

The Supreme Court in the Galloway case held, as indicated by the Association, that this Commission was correct that the mere cessation of conduct violative of this Act, and even the payment of monies necessary to remedy the unfair practice, does not automatically render moot a proceeding

4/ (...continued)
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").

concerning such conduct. Rather, given the on-going nature of the parties' relationships in labor relations and the public purpose behind the rights established by this Act, it may be appropriate for PERC to adjudicate unfair practices even where the offending conduct has ceased. However, the Court explicitly stated that it is a matter within this Commission's discretion, not the charging party's, to determine whether the circumstances of the particular case warrant such a course of action.

However, we also find that there are mitigating factors which dissuade us from awarding the payment of post-judgment interest by the Board. Those mitigating factors are the Board's payment of retroactive increments shortly following ratification and approval of the MOA for the successor contract. An additional mitigating factor is the absence of a past practice between the parties regarding the payment of increments in the hiatus period between CNAs due to the holding in Neptune. In that case, the Court analyzed N.J.S.A. 18A:29-4.1, an education law statute. At the time that Neptune was issued, N.J.S.A. 18A:29-4.1 stated that CNAs shall be binding for a maximum of three years. The Court held that N.J.S.A. 18A:29-4.1 prohibited the Board from paying increments on expired CNAs beyond three years because it made the contract binding for a fourth year, beyond the permitted statutory term. In 2014, N.J.S.A. 18A:29-4.1 was amended to allow CNAs with a maximum term of five years, thereby removing Neptune's prohibition on increment payments after the expiration of a three-year agreement. The

record shows that the 2015-2018 CNA is the first CNA following the 2014 amendment to N.J.S.A. 18A:29-4.1 that would allow for the Board to pay for increments following contract expiration.

We are confident that going forward the parties will be guided by Atlantic Cty., State of New Jersey (Corrections), and this decision in their future negotiations regarding the payment of increments in the hiatus periods between CNAs.

ORDER

The Perth Amboy Board of Education 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 Federation unit employees during negotiations for a successor collective negotiations agreement and upon expiration of the parties' 2015-2018 CNA.

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 Federation unit employees during collective negotiations for a successor agreement and upon expiration of the 2015-2018 CNA.

B. Take the following action:

1. Negotiate in good faith with the Federation 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 Federation unit employees.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice 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, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: October 15, 2020

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 this Act, particularly by unilaterally discontinuing the payment of salary guide step increments to Federation unit employees during negotiations for a successor collective negotiations agreement and upon expiration of the parties' 2015-2018 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 Federation unit employees during collective negotiations for a successor agreement and upon expiration of the 2015-2018 CNA.

WE WILL negotiate in good faith with the Federation 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 Federation unit employees.

Docket No. CO-2019-038

PERTH AMBOY 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