P.E.R.C. NO. 2024-30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

NEW JERSEY PINELANDS COMMISSION,

Respondent,

-and- Docket No. CO-2024-029

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies the New Jersey Pinelands Commission's (NJPC) motion for reconsideration of a Commission Designee's decision granting the CWA's application for interim relief on its unfair practice charge alleging that the NJPC violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act) by unilaterally discontinuing merit pay increases to CWA unit employees during negotiations for a successor collective agreement. The Commission finds that the parties' CNA required merit salary increases for unit employees who achieved certain annual performance ratings and that the CNA contained no language explicitly discontinuing this term and condition of employment. Therefore, the Commission holds that, under both N.J.S.A. 34:13A-59(f) of the Responsible Collective Negotiations Act and Commission case law, the NJPC was required to maintain the status quo of paying the merit salary increases to qualified employees. The Commission finds that the NJPC's unilateral change to that term of employment caused irreparable harm to the collective negotiations process during successor contract negotiations.

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, Matthew J. Platkin, Attorney General of New Jersey (Kathryn B. Moynihan, Deputy Attorney General, on the brief)

For the Charging Party, Weissman & Mintz LLC, attorneys (Rosemarie Cipparulo, of counsel)

DECISION

On November 20, 2023, the New Jersey Pinelands Commission (NJPC) moved for reconsideration of I.R. No. 2024-2, 50 NJPER 221 (¶49 2023). In that decision, a Commission Designee granted an application for interim relief filed by the Communications Workers of America, AFL-CIO (CWA) along with its unfair practice charge against the NJPC. The CWA's September 12, 2023 charge alleges that the NJPC violated section 5.4a(5) and, derivatively, 5.4a(1)[1/] of the New Jersey Employer-Employee Relations Act,

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act"; and "(5) Refusing to (continued...)

N.J.S.A. 34:13A-1 et seq. (Act), by unilaterally discontinuing merit pay increases to CWA unit employees during negotiations for a successor collective agreement.

The Designee's October 20, 2023 decision found that the CWA demonstrated a substantial likelihood of success in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if interim relief is not granted. See Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982). The Designee ordered the NJPC to, pursuant to Articles 4 and 31 of the parties' 2019-2023 collective negotiations agreement (CNA), pay merit salary increases to all CWA unit employees who met or exceeded performance expectations for the 2023 evaluation period. The Designee also ordered the NJPC to cease and desist from unilaterally changing the status quo and refusing to negotiate in good faith with the CWA over negotiable terms and conditions of employment such as the CNA's merit pay provisions.

SUMMARY OF FACTS

We adopt and incorporate the Designee's findings of fact and summarize them as follows. The CWA is the exclusive majority representative of three negotiations units of NJPC employees: a

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1/ (...continued)
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."

Professionals Unit, a Supervisory Unit, and Non-Supervisory unit. With the exception of their recognition clauses, all three units are governed by identically worded collective negotiations agreements effective from July 1, 2019 through June 30, 2023 (collectively referred to as "CNA"). The parties are currently in negotiations for a successor agreement. Historically, the three CWA units jointly negotiate with the NJPC.

Article 4(B) of the CNA is entitled "Merit Increases" and provides (emphasis added):

> B. Merit Increases
>
> Beginning as of 2019, each employee with at least one year of service who is not at the maximum of his or her salary range and whose overall performance in the most recent evaluation meets or exceeds expectations will receive an annual merit increase in salary effective July 1 of each year. The amount of the merit increase will be equal to the lesser of (a) 2.25% of the employee's base salary or (b) the amount needed to reach the maximum of the range.

NJPC Personnel Policies also provide for merit salary increases where the evaluated employee meets or exceeds expectations.

Article 31 of the CNA, entitled "Performance Evaluations," sets forth procedures for conducting evaluations of unit employees. Article 31(A) provides that "written evaluations shall be conducted at least once a year for employees except provisional employees." It also sets forth three categories of ratings for performance evaluations: exceeds expectations;

satisfactory; and unsatisfactory. Article 31(B) provides for employee review of performance evaluations and Article 31(C) provides that performance evaluations and merit increases are grievable, but not arbitrable.

The NJPC made merit salary increases to eligible employees in 2019, 2020, 2021, and 2022. However, the NJPC has not paid merit salary increases to CWA unit employees for 2023 despite conducting several satisfactory performance evaluations. The NJPC considers the merit salary increases to be "not automatic" because Article 4 provides that they are "dependent on [the employee's] annual evaluation and that certain performance ratings must be met to qualify for a merit increase."

Prior to the parties' 2019-2023 CNA, merit salary increases were provided for in their 2007-11 agreement, but not in their 2011-2015 and 2015-2019 agreements. The NJPC's Executive Director certifies that it never paid merit salary increases during the period between the expiration of a CNA and the conclusion of negotiations for a new CNA. There is no language in the CNA providing for the discontinuation of merit salary increases during negotiations for a successor agreement.

ARGUMENTS

The NJPC asserts that reconsideration is warranted because the Designee misunderstood the facts concerning the merit salary increases. The NJPC argues that the merit salary increases are

not automatic every July 1st because the employees must first receive a sufficiently favorable evaluation to qualify. It contends that the status quo doctrine is not supported by the New Jersey Supreme Court and the Designee relied on two federal court cases that are not binding. The NJPC further asserts that the Designee erred by finding that the nonpayment of merit salary increases during negotiations constitutes irreparable harm. Finally, the NJPC argues that the merit salary increases should not continue past the CNA's expiration because there is no language explicitly providing for the continuation.

The CWA asserts that the NJPC has not demonstrated extraordinary circumstances warranting reconsideration. The CWA argues that the merit salary increases are automatic because the CNA provides for their regular payment subject to achieving certain performance evaluation ratings. The CWA contends that the NJPC is required to continue the merit salary increases post-contract expiration because the expired 2019-2023 CNA determines the status quo during negotiations for a successor contract. The CWA asserts that the Commission and courts have upheld the status quo doctrine holding that unilateral changes to negotiable terms and conditions of employment cause irreparable harm to the collective negotiations process.

STANDARD OF REVIEW

N.J.A.C. 19:14-8.4 provides that a motion for reconsideration may be granted only where the moving party has established "extraordinary circumstances." In City of Passaic, P.E.R.C. No. 2004-50, 30 NJPER 67 (¶21 2004), we explained that we will grant reconsideration of a Commission Designee's interim relief decision only in cases of "exceptional importance":

> In rare circumstances, a designee might have misunderstood the facts presented or a party's argument. That situation might warrant the designee's granting a motion for reconsideration of his or her own decision. However, only in cases of exceptional importance will we intrude into the regular interim relief process by granting a motion for reconsideration by the full Commission. A designee's interim relief decision should rarely be a springboard for continued interim relief litigation.
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> [Ibid.]

Thus, a motion for reconsideration of an interim relief decision must involve both extraordinary circumstances and be a case of exceptional importance. Applying these standards here, we find that the NJPC has not met the standards for reconsideration of the Designee's decision.

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. 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.

The Supreme Court has thus 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., 166 N.J. 112 (2000), aff'g 334 N.J. Super. 512 (App. Div. 1999); 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). "[U]nilateral imposition of working conditions is the antithesis of [the Legislature's] goal that the terms and conditions of public employment be established through bilateral negotiation." Atlantic Cty., 230 N.J. at 252.

In Galloway, supra, the New Jersey Supreme Court explained: "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." Id. The Court found that if a regular 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)." Id. at 49-50.[2/]

Following Galloway, this Commission has regularly held that a unilateral change to an existing employment term or working condition concerning compensation is an unfair practice under the Act. See, e.g., Scotch Plains-Fanwood Bd. of Ed., P.E.R.C. No. 91-114, 17 NJPER 336 (¶22149 1991); Camden Housing Auth., P.E.R.C. No. 88-5, 13 NJPER 639 (¶18239 1987); State of New Jersey, P.E.R.C. No. 87-21, 12 NJPER 744 (¶17279 1986); Howell Tp. Bd. of Ed., P.E.R.C. No. 86-44, 11 NJPER 634 (¶16223 1985); and Hudson Cty., 1979 N.J. Super. Unpub. LEXIS 4 (App. Div. 1979), aff'g P.E.R.C. No. 78-48, 4 NJPER 87 (¶4041 1978).

More recently, in Atlantic Cty., supra, the Supreme Court held that the employer's freezing of salary increments post-

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2/ 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.

contract expiration for its PBA and FOP units violated the Act because the status quo as determined by parties' expired contracts required the continuation of salary increments. The Court held:

> 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).
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> [Atlantic Cty., 230 N.J. at 253-254, 256.]

While the PBA's contract explicitly provided that its terms "will continue in effect until a successor Agreement is negotiated," the FOP's contract provided only a general continuation of benefits clause.[3/] 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.

Subsequent to Atlantic Cty., the New Jersey Legislature enacted the "Responsible Collective Negotiations Act," P.L.2021,

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3/ FOP Lodge 34's contract provided: "[a]ll terms and conditions of employment, including any past or present benefits, practices or privileges which are enjoyed by the employees covered by this Agreement that have not been included in this Agreement shall not be reduced or eliminated and shall be continued in full force and effect." Atlantic Cty., 230 N.J. at 244-245.

c.11, (RCNA) effective January 18, 2022 and incorporated into our Act at N.J.S.A. 34:13A-56 through -64. The RCNA is applicable to certain public employers in the State of New Jersey, including State agencies and commissions such as the NJPC. N.J.S.A. 34:13A-58(b). Section 4 of the RCNA,[4/] codified as N.J.S.A. 34:13A-59(f), provides (emphasis added):

> f. Notwithstanding the expiration of a collective negotiations agreement, an impasse in negotiations, an exhaustion of the commission's impasse procedures, or the utilization or completion of the procedures required by P.L.2021, c.411 (C.34:13A-56 et al.) to resolve disputes involving collective negotiations, and notwithstanding any law or regulation to the contrary, no public employer, its representatives, or its agents shall unilaterally impose, modify, amend, delete, or alter any mandatorily negotiable terms and conditions of employment as set forth in the expired or expiring collective negotiations agreement, or unilaterally impose, modify, amend, delete, or alter any other mandatorily negotiable terms and conditions of employment that are not set forth in a collective negotiations agreement, without the specific written agreement of the majority representative. Following contract expiration, and notwithstanding any law or regulation to the contrary, absent express language in a collective negotiations agreement providing that a specific term of the agreement will not continue after the expiration of the collective negotiations agreement, all terms and conditions of the agreement, including, but not limited to, the

4/ While some county and municipal entities, as well as colleges and universities, are excluded from sections 4 and 5 of the RCNA, State commissions and agencies such as the NJPC are not excluded from the requirements of N.J.S.A. 34:13A-59 and -60. See N.J.S.A. 34:13A-60.1.

> payment of salary increments, shall remain in effect following the agreement's expiration until the parties reach agreement on a successor collective negotiations agreement.

Here, Article 4(B) of the parties' expired CNA provides for merit-based salary increases for employees who meet certain performance expectations. The NJPC contends that because the CNA contains no language explicitly mandating the continuation of merit salary increases post-contract expiration, then it was not obligated to continue paying them. However, the Commission has held that the status quo during collective negotiations is a continuation of the prevailing terms and conditions of employment, whether established through the expired CNA, past practice, or otherwise. State of New Jersey (Corrections), P.E.R.C. No. 2020-49, 46 NJPER 509, 514 (¶113 2020); see also, Perth Amboy Bd. of Ed., P.E.R.C. No. 2021-9, 47 NJPER 193 (¶42 2020) (contract's silence on whether merit pay continues post-contract expiration did not constitute waiver of status quo during successor contract negotiations). Thus, the status quo is defined by the expired CNA, which in this case explicitly included merit-based salary increases. This is consistent with previous Commission cases in which qualification for annual salary increments was premised on satisfactory performance or achievement of certain criteria. See, e.g., State of N.J. (Corrections) (eligibility for increments predicated on satisfactory job performance); Rutgers University, P.E.R.C. No.

80-66, 5 NJPER 539 (¶10278 1979), aff'd as mod., 1981 N.J. Super. Unpub. LEXIS 13 (App. Div. 1981) (salary increases for adjutant professors based on several conditions, including teaching six credits in the previous year).[5/]

Furthermore, we concur with the Designee's determination that a past practice of not continuing the merit salary increases during collective negotiations does not supersede the terms of the 2019-2023 CNA, which explicitly provides for merit-based salary increases. See Sussex Cty., I.R. No. 91-15, supra (merit salary increases required to continue post-contract expiration despite past practice of not continuing them); and Perth Amboy, 47 NJPER at 196-197 (no past practice of continuing increments). The Supreme Court held that parties who intend to cease salary payments until a successor agreement is reached can negotiate clear contract language stating such. Atlantic Cty., 230 N.J. at 256. The parties' 2019-2023 CNA contains no such language.[6/]

Moreover, under the RCNA, the NJPC was statutorily required to maintain "any mandatorily negotiable conditions of employment

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5/ See also Fanwood Bor., I.R. No. 85-5, 10 NJPER 606 (¶15284 1984) (salary increment conditioned on satisfactory work performance defined the status quo, but designee denied interim relief due to employer's assertion that increments were denied based on unsatisfactory performance; however, he retained jurisdiction to ensure that increments were paid to employees with satisfactory job performance).

6/ We also note that the parties negotiated this CNA after Atlantic Cty. was issued.

as set forth in the expired or expiring collective negotiations agreement." N.J.S.A. 34:13A-59(f).[7/8/] More specifically, N.J.S.A. 34:13A-59(f) mandates that "absent express language in a collective negotiations agreement providing that a specific term of the agreement will not continue after the expiration of the collective negotiations agreement, all terms and conditions of the agreement, including, but not limited to, the payment of salary increments, shall remain in effect following the agreement's expiration until the parties reach agreement on a successor collective negotiations agreement." As discussed above, the CNA did not contain any express language setting forth the parties' intention to cease the merit salary increases upon contract expiration; therefore the NJPC was obligated to maintain that term of employment for qualified employees.

Based on the above, we find that the NJPC's cessation of contractual merit-based salary increases for employees who have achieved the requisite performance ratings changed the prevailing

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7/ The RCNA was in effect in 2022 and applicable upon the expiration of the parties' CNA on June 30, 2023. Section 14 of the RCNA provides: "This act shall take effect immediately; provided, however, that subsection a., and subsections c. through i., of section 4 of P.L.2021, c.411 (C.34:13A-59) shall be applicable upon the expiration of any binding collective negotiations agreements or contracts of employment in force on the date of enactment."

8/ We note that the CWA relied on N.J.S.A. 34:13A-59(f) in its interim relief brief before the Designee and the Designee's decision cited to it, but the NJPC did not provide its position on this statute.

term and condition of employment during contract negotiations in violation of both subsection 5.4a(5) of the Act and N.J.S.A. 34:13A-59(f). Preserving the status quo of merit-based salary increases upholds the CWA's rights under the Act to not have its negotiated salary terms unilaterally abrogated during the sensitive period when the parties are in negotiations for a successor agreement. Galloway, 78 N.J. at 48.

We next address the NJPC's assertion that the CWA cannot demonstrate irreparable harm because it seeks a monetary remedy and a chilling effect on negotiations is insufficient harm. The courts have held that unilateral changes to the status quo are destabilizing to the employment relationship and create a chilling effect on successor contract negotiations. See Atlantic County, 230 N.J. at 252; Galloway, 78 N.J. at 49 ("inherent repudiation of and chilling effect" on statutory right to negotiate); see also City of Newark, 2023 N.J. Super. Unpub. LEXIS 1627 (App. Div. 2023), aff'g P.E.R.C. No. 2022-47, 49 NJPER 17 (¶4 2022); and City of East Orange, 2022 N.J. Super. Unpub. LEXIS 733 (App. Div. 2022), aff'g P.E.R.C. No. 2021-50, 47 NJPER 530 (¶124 2021). Accordingly, the Commission has consistently held that the chilling effect on employees' rights under the Act caused by unilateral changes made when the parties are in negotiations for a successor agreement constitutes irreparable harm. See, e.g., City of Paterson, P.E.R.C. No. 2021-38, 47

NJPER 413 (¶98 2021), aff'g I.R. No. 2021-19, 47 NJPER 307 (¶72 2021); Ewing-Lawrence Sewerage Auth., P.E.R.C. No. 2021-29, 47 NJPER 370 (¶86 2021), aff'g I.R. No. 2021-14, 47 NJPER 255 (¶58 2020); Clinton-Glen Gardner School District, I.R. No. 2014-1, 40 NJPER 121, 123 (¶46 2013); Fanwood, I.R. No. 85-5, supra; Sussex Cty., P.E.R.C. No. 84-115, 10 NJPER 260 (¶15125 1984), aff'g I.R. No. 84-7, 10 NJPER 192 (¶15095 1984); and CWA and State, I.R. No. 82-2, 7 NJPER 532, 536-537 (¶12235 1981).

The irreparable harm in these cases is not the monetary loss or delay per se, but rather the disruption to the collective negotiations process. When unilateral changes are made, it creates undue pressure on a majority representative to accede to the employer's negotiation positions. Therefore, the Designee's Order appropriately includes the payment of merit salary increases to eligible employees to return the parties to the status quo. The Order restores the negotiations landscape without delaying financial benefits established by the terms of the expired CNA.

Finally, we address the NJPC's claim that the Designee improperly relied on federal court cases in addition to New Jersey case law. This objection is contrary to the New Jersey Supreme Court's endorsement of utilizing relevant federal jurisprudence to guide interpretation of the Act. The Court has stated that "the experience and adjudications under the federal

act may appropriately guide the interpretation of the provisions of the New Jersey statutory scheme" and that "the Act's federal analogue is particularly appropriate with respect to the interpretation of the unfair practice provisions of N.J.S.A. 34:13A-5.4." Galloway Tp. Bd. of Ed., 78 N.J. 1, 9 (1978).[9/] Although New Jersey judicial and Commission precedent concerning the statutory duty to maintain the status quo during contract negotiations provides ample support for the Designee's determinations, he appropriately cited additional support from pertinent federal court cases.

For all the foregoing reasons, we find that this case is not one of exceptional importance, nor has the NJPC established extraordinary circumstances warranting reconsideration of the interim relief decision.

ORDER

The New Jersey Pinelands Commission's motion for reconsideration is denied. This case is referred back to the Director of Unfair Practices for processing in the normal course.

9/ See also Hunterdon Cty., 116 N.J. at 337 supra (relying on "long-established practice under the National Labor Relations Act"); and Galloway, supra, 78 N.J. 25, 39-50 (using federal unfair labor practice decisions "as a guide in unfair practice cases in the public sector" and relying on U.S. Supreme Court cases, e.g., NLRB v. Katz, 369 U.S. 736 (1962)).

BY ORDER OF THE COMMISSION

Chair Hennessy-Shotter, Commissioners Bolandi, Ford, Higgins and Papero voted in favor of this decision. None opposed. Commissioners Eaton and Kushnir recused themselves.

ISSUED: January 25, 2024

Trenton, New Jersey