

P.E.R.C. NO. 90-42

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PATERSON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-89-289

PATERSON SCHOOL CUSTODIAL
AND MAINTENANCE ASSOCIATION,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission finds that the Paterson Board of Education violated the New Jersey Employer-Employee Relations Act when it did not implement the terms of the salary agreement set forth in Exhibit C of the collective negotiations agreement between the Board and the Paterson School Custodial and Maintenance Association.

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Appearances:

For the Respondent, Robert G. Rosenberg, Esq.

For the Charging Party, Bucceri & Pincus, Esqs.
(Sheldon H. Pincus, of counsel)

DECISION AND ORDER

On April 3, 1989, the Paterson School Custodial and Maintenance Association ("Association") filed an unfair practice charge against the Paterson Board of Education ("Board"). It alleges the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5), when it allegedly repudiated a collective negotiations agreement.^{1/} In particular, the Association alleges that the Board has unilaterally implemented salary guides with amounts less than what the Board had proposed, agreed to, and ratified. In response, the Board denies the Association's allegations and contends that it has implemented the agreement which the parties entered into. It contends that it erred when it

^{1/} At the hearing on April 13, 1989, the Association amended the charge to allege violations of subsection 5.4(a)(6) as well.

incorporated a salary guide into the contract which did not reflect its proposal.

At the time the Association filed its charge, it sought an order that the Board show cause why, among other things, it should not be directed to pay all unit employees the monetary difference between the amount they would have received had their salaries been paid in accordance with the ratified collective negotiations agreement and the amount they have in fact been paid since the commencement of the contract term, plus interest. I executed the Order to Show Cause, and pursuant to the Order, hearings were held on April 13 and April 17 and June 14 and June 29, 1989. At the hearings, the parties examined and cross-examined witnesses, introduced exhibits and argued orally. Since the parties agreed that no further evidence or argument needed to be presented beyond that already in the record, I accepted a stipulation that the matter proceed to a final administrative decision.^{2/}

Much of the evidence presented is not in dispute. The Board and Association were parties to an agreement which expired on June 30, 1988. The last year of the salary portion of the expired agreement was 1987-88. At the hearing the parties stipulated to the facts in the first eight paragraphs which the Association set forth in the unfair practice charge. These paragraphs are as follows:

1. The Paterson School Custodial and Maintenance Association-NJEA-NEA (hereafter the "Association") is the exclusive collective

^{2/} The Commission, in light of this stipulation, has specifically delegated to me the authority to issue a final administrative decision on its behalf.

negotiations representative for the following personnel employed by the Paterson Board of Education (hereinafter the "Board"): (1) Chief Custodians; (2) Custodians; (3) Matrons; (4) Maintenance; and (5) Upkeep of Grounds Personnel.

2. In or about October, 1988, negotiating teams designated by the Association and the Board commenced collective negotiations to arrive at a successor agreement to that which had expired on June 30, 1988.
3. The Association proposed salary guides which are annexed hereto as Exhibit "A."
4. The Board rejected the salary guides proposed by the Association and, instead, proposed the adoption of the salary guides annexed hereto as Exhibit "B."
5. The Association accepted the salary guides offered by the Board when the parties reached tentative agreement on February 7, 1989. The Board's salary guides were incorporated directly, and without any modification, into a form agreement which was then to be reviewed and ratified by the parties' principals.
6. The Association ratified the agreement on February 11, 1989.
7. The Board met, reviewed, ratified, and signed the agreement on February 16, 1989. A copy of its resolution of approval and the approved, signed, Contract is annexed hereto as Exhibit "C."
8. Subsequent to the Board having reviewed, approved, ratified and signed the Agreement, the Association was advised on March 9, 1989 that the Board was refusing to implement and was further repudiating the agreement, and, in particular, the salary guides the Board itself had proposed. In fact and to date, the Board has refused to implement the salary guides and is continuing to refuse to do so. It has instead advised the Association that it intends to promulgate and unilaterally implement different salary guides at amounts less than that it proposed, previously agreed; and ratified.

During the course of negotiations, the parties made salary proposals to cover 1988-89, 1989-90 and 1990-91. The Board

submitted the following offer to the Association (see Commission Exhibit #1, Exhibit B):^{3/}

EXHIBIT B

Paterson Board of Education
Custodians
10.5% Step 0-13

<u>1987-88</u>		<u>1988-89</u>		<u>1989-90</u>		<u>1990-91</u>	
0	10,249						
1	10,941	0	11,325				
2	11,633	1	12,090	0	12,514		
3	12,325	2	12,854	1	13,359	0	13,828
4	13,017	3	13,619	2	14,204	1	14,762
5	13,842	4	14,384	3	15,049	2	15,695
6	14,668	5	15,295	4	15,894	3	16,629
7	15,493	6	16,208	5	16,901	4	17,563
8	16,318	7	17,120	6	17,910	5	18,676
9	17,413	8	18,031	7	18,918	6	19,791
10	17,969	9	19,241	8	19,924	7	20,904
11	18,794	10	19,856	9	21,261	8	22,016
12	19,619	11	20,767	10	21,941	9	23,493
13	19,952	12	21,679	11	22,948	10	24,245
		13	22,047	12	23,955	11	25,358
				13	24,362	12	26,470
						13	26,920

^{3/} I have chosen the custodians' guide by way of example. The remaining guides are structurally similar and need not be displayed since whatever analysis is made with respect to the custodians' guide is applicable to all other classifications.

The Association accepted Exhibit B and conformed the document into Exhibit C on February 7, 1989. The Association ratified Exhibit C and forwarded it to the Board for its review and ratification. On February 16, 1989, the Board ratified Exhibit C and incorporated it into the parties' collective negotiations agreement. Exhibit C and the contract set forth the salary guide as follows:

EXHIBIT C

<u>Steps</u>	<u>1988-89</u>	<u>1989-90</u>	<u>1990-91</u>
0	11,325	12,514	13,828
1	12,090	13,359	14,762
2	12,854	14,204	15,695
3	13,619	15,049	16,629
4	14,384	15,894	17,563
5	15,295	16,901	18,676
6	16,208	17,910	19,791
7	17,120	18,918	20,904
8	18,031	19,924	22,016
9	19,241	21,261	23,493
10	19,856	21,941	24,245
11	20,767	22,948	25,358
12	21,679	23,955	26,470
13	22,047	24,362	26,920

After the new salaries were implemented, the Association alleged the Board was not complying with the terms of Exhibit C, and, therefore, was repudiating the agreement. The Board believes it has implemented Exhibit C consistent with the salary proposal previously referred to as Exhibit B.

The difference in the parties' positions is crystal clear. The Association contends that the Board's proposal and the subsequent contract reflect an agreement to provide for a 10.5% increase exclusive of increments. The Board, however, contends it is implementing an agreement which reflects an intent to compensate each custodian an additional 10.5% per year inclusive of increment. Incremental costs are worth approximately 2.5% to 3%.

In support of its position, the Association submits there is a longstanding practice for an employee to receive an increment and an across-the-board increase unless that employee is at the maximum step. Thus, according to the contract (Exhibit C), a custodian on Step 0 in 1988-89 would move to Step 1 in 1989-1990, or from \$11,325 to \$13,359. This would reflect an increase of 10.5% plus an increment.

The Association recognizes that there is a difference between Exhibits B and C; namely, that the steps in Exhibit B are "on a slant" while the steps in Exhibit C are straight across. But in each case the steps are numbered in relation to length of service. The Association contends that the intent of the negotiations was to provide a 10.5% increase plus an increment since the actual salary received by an employee must reflect an additional

step for an additional year of service. In support of this contention, Barbara Hughes, its chief negotiator, and Ben Clanton, a member of its negotiating team, each testified that, after receiving Exhibit B, they asked the Board's negotiator if the Board's proposal represented a 10.5% increase plus the increment and he said yes.

Thereafter, the Association submitted a salary guide, Exhibit C, which each side ratified and incorporated into the contract. When the Board implemented the contract, it paid each custodian the "across" figure since it represented 10.5%. Each custodian was kept on the same longevity step. The Association then filed the instant unfair practice charge alleging a repudiation of the agreement since each custodian did not go "down" the guide as well as "across," and therefore did not receive the value of an increment plus an across-the-board raise.

The Board disagrees with the Association's version of the negotiations. It agrees that its proposal, Exhibit B, represents the agreement, but it asserts that its intent was only to provide a 10.5% increase inclusive of increment. According to the chief negotiator, Charles J. Riley, a custodian on Step 0 in 1988-89 earning \$11,325 would receive \$12,515 in 1989-90, reflecting a 10.5% increase including increment. According to Exhibit B, the custodian would remain on Step 0 and not move to Step 1. The "slant" represents the "across and down" movement. Exhibit C, which the Board ratified, has removed the slant, but according to Riley, each custodian should only move across, but not down.

Riley denies telling the Association's representative that the settlement was 10.5% plus increment. Rather, he claims to have said that it was 10.5% "total" and that the Association could devise a guide which the Board would approve "as long as you stay within ten and one-half percent of the salary guide."

The Board further supports its position through the testimony of Anthony Tudda, its Internal Auditor, and Edward Migliaccio, the Board Secretary. Tudda drafted Exhibit B and claims that its intent was to provide a 10.5% increase inclusive of increments. Tudda acknowledges that there always has been a step system with a custodian moving across and down. He testified that this was the reason for the slant in Exhibit B although the step numbers did not reflect an additional year of service.

Migliaccio testified that the Board had budgeted for a 10.5% increase inclusive of increments. He also denies hearing Riley state to Association representatives that the 10.5% was to be exclusive of the increments. Migliaccio testified that once the Board became aware that Exhibit C was being construed by the Association as requiring the payment of 10.5% plus increment, the Board's intention was to repeal Exhibit C and adopt a salary guide different from the one it had ratified.^{4/}

Analysis

Exhibit C, on its face, is a standard salary guide reflecting a minimum, a maximum and longevity steps. Neither

^{4/} At the hearing, the Board agreed to withhold such action during the hearings.

side disputes that a custodian normally receives an increment for an additional year of service. An "across" and "down" movement is a longstanding practice in the operation of the salary guide. The Board, in fact, is aware that Exhibit C, if administered in accordance with the parties' standard practice, would yield the salary amounts which the Association contends were agreed upon. But it now seeks to rescind the guide it ratified and incorporated into the contract since it contends that Exhibit C does not accurately reflect the agreement the parties intended to reach.

This Commission has expressed a reluctance to set aside an agreement which is clear on its face. A party seeking such relief must establish by "clear, satisfactory, specific and convincing evidence that the written agreement does not accurately reflect what the parties had intended." Hillside Bd. of Ed., P.E.R.C. No. 89-57, 15 NJPER 13, 14 (¶20004 1989). While the Commission has recognized that "harmonious labor relations would not be served by enforcing contract language that conflicts with both parties' intent," it has warned that a party may not be excused from the "unintended consequences of a negotiated agreement. A party cannot expect relief merely because it did not realize the consequences of its assent." Ibid. (emphasis added).

After applying these principles to this record, I conclude that Exhibit C must be enforced pursuant to its precise terms. On its face, it represents what the Association claims. In order for the salary guide to operate in accordance with the Board's contention, individual custodians must be "frozen" on each step.

Since such a procedure would conflict with the parties' longstanding practice, Exhibit C would have to clearly reflect such an intent. It simply does not do so.

The essence of the Board's argument is that it erred when it adopted Exhibit C; that it does not reflect the mutual intent of the parties. The Board may have intended to negotiate a salary increase of 10.5% inclusive of increment. But, since Exhibit C is clear on its face, the Board must demonstrate that Exhibit C represents a mutual mistake contrary to the intentions of both parties. The Board has not met this burden.

The Board did submit Exhibit B which the parties mutually agree formed the basis of a salary agreement. The document reflects a 10.5% increase, but is silent on increments. The Board claims the pattern of this guide, which is on a slant, represents an inclusion of increments within the 10.5%. While this is a plausible explanation, the numbered steps on the guide representing additional years of service do not advance in relation to the slant. This gives rise to an ambiguity.

The record shows that the parties were aware of this ambiguity. Hughes telephoned Tudda and informed him that Exhibit B represented 10.5% plus increments. Hughes further explained that the only way the salary guide could be 10.5% inclusive of increments was for each employee to stay on the employees' current step throughout the contract; Tudda said he understood that. Tudda did not deny this conversation. A week later, at a meeting between the parties' negotiating teams, Hughes raised the issue again and

testified that Riley stated that the salary guide reflected 10.5% plus increments. Her version of this discussion is confirmed by Clanton. Riley denies that he said this and instead testified that he said 10.5% "total." But no other Board representative testified hearing that.

Approximately ten days after this meeting, Clanton had two discussions with the Board President concerning the salary guides. By this time, it was apparent that there was some confusion over the amount of the increase. Clanton testified that in each conversation the Board President confirmed her understanding that the settlement was 10.5% plus increments. That testimony was uncontradicted.

I conclude, based upon the entire record of this proceeding, that the Board is bound by the terms of Exhibit C. The Board has not met the burden of proving that Exhibit C must be set aside as a mutual mistake or a fraud.

On this record, the ambiguities which arose subsequent to agreement on Exhibit B must be resolved in favor of the Association. At the joint meeting to confirm agreement, its version of what occurred is more credible based not only upon the testimony concerning the meeting itself, but also the post meeting discussions which support its belief that it had secured a 10.5% increase plus increments. The Association converted its understanding of the agreement into Exhibit C. While the Board's negotiating team may, in good faith, believe that its intentions were otherwise, it had an opportunity to dispute Exhibit C prior to ratification. Had Exhibit C been reviewed and found to be inconsistent with the Board's

intent, further negotiations would have been the forum for such disagreement. Accordingly, I find that the Board violated N.J.S.A. 34:13A-5.4(a)(5), when it did not implement the terms of the salary agreement set forth in Exhibit C.

ORDER


The Public Employment Relations Commission orders the Paterson Board of Education to:

Place each unit employee on his or her appropriate step on Exhibit C according to length of service and, for those employees affected, to provide retroactive payment of salaries not received, plus interest pursuant to R. 4:42-11(a).

Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least thirty (30) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

Notify the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

DATED: Trenton, New Jersey
November 8, 1989

NOTICE TO ALL 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:

The Paterson Board of Education violated N.J.S.A. 34:13A-5.4(a)(5) of the New Jersey Employer-Employee Relations Act when it did not implement the terms of the salary agreement set forth in Exhibit C of the collective negotiations agreement between the Board and the Paterson School Custodial and Maintenance Association.

WE WILL place each unit employee on his or her appropriate step on Exhibit C according to length of service and, for those employees affected, provide retroactive payment of salaries not received, plus interest pursuant to R. 4:42-11(a).

Docket No. CO-89-289

PATERSON BOARD OF EDUCATION

(Public Employer)

Dated: _____

By: _____

This Notice must remain posted for 30 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, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"