P.E.R.C. No. 89-118

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BAYONNE BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-88-84

BAYONNE TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses as moot an unfair practice charge filed by the Bayonne Teachers Association against the Bayonne Board of Education. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act when it did not pay salary increments during collective negotiations for a successor agreement. It would not serve the Act's purposes to decide a past dispute where the only issue outstanding is the payment of minute amounts of interest.

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Appearances:

For the Respondent, Apruzzese, McDermott, Mastro & Murphy, Esqs. (Robert T. Clark, of counsel)

For the Charging Party, Bucceri & Pincus, Esqs. (Gregory T. Syrek, of counsel)

DECISION AND ORDER

On September 23, 1987, the Bayonne Teachers Association ("Association") filed an unfair practice charge against the Bayonne Board of Education ("Board"). The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4 (a)(1) and (5)[1/] when it did not pay salary increments during collective negotiations for a successor agreement. It also applied for interim relief, but there was no hearing on this. On

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1/ These subsections 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."

October 8, 1987, the Board advised the Commission that it would voluntarily pay the increments in the next paycheck.

On October 16, 1987, a Complaint and Notice of Hearing issued. On October 23, the Board filed its Answer. It admits not paying increments for the first two pay periods after the contract's expiration, but reaffirms that it paid those increments retroactively. It denies an obligation to pay increments during collective negotiations, but contends the matter is moot because it is paying increments and will continue to do so during negotiations.

On January 30, 1988, Hearing Examiner Richard C. Gwin conducted a hearing. The parties entered into stipulations, examined witnesses and introduced exhibits. They also filed post-hearing briefs by April 5, 1988.2/

On April 12, 1988, the Hearing Examiner issued his report and recommended decision. H.E. No. 88-50, 14 NJPER 308 (¶19110 1988). Relying on Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978), he found that the Board violated the Act when it did not pay increments for the first two pay periods.

On May 26, 1988, after receiving an extension of time, the Board filed exceptions. Citing Belleville Bd. of Ed., P.E.R.C. No. 88-66, 14 NJPER 128 (19049 1988), aff'd App. Div. Dkt. No. A-3021-87T7; Rutgers Univ., P.E.R.C. No. 88-1, 13 NJPER 631 (18235 1987); State of New Jersey, P.E.R.C. No. 88-2, 12 NJPER 634 (18276 1987) and Livingston Tp. Bd. of Ed., P.E.R.C. No. 86-135, 12 NJPER

2/ The Board filed a reply brief after the Hearing Examiner's decision.

451 (¶17170 1986), it contends that the case is moot because increments have been paid. It argues that it acted in good faith when it requested that the Association agree that increments not be paid until negotiations were completed and that it immediately paid the increments after this charge was filed.

On May 31, 1988, the Association responded. It disputes the Board's asserted "good faith" since the Board had before refused to pay increments.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-5) are accurate. We adopt and incorporate them.

Galloway requires that increment systems be continued during successor contract negotiations. If a school board flouts that obligation, immediate interim relief can be obtained. As in Belleville, however, it would not serve the Act's purposes here to decide this past dispute where the only issue outstanding is the payment of minute amounts of interest. The underlying dispute is moot.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained.

DATED: Trenton, New Jersey
April 28, 1989
ISSUED: May 1, 1989

H.E. NO. 88-50

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BAYONNE BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-88-84

BAYONNE TEACHERS ASSOCIATION,

Charging Party.

SYPNOSIS

The Hearing Examiner finds that the Board violated subsections 5.4(a)(1) and (5) by refusing to pay automatic increments during negotiations for a successor agreement. The Board's voluntary resumption and reimbursement of increments did not make the matter moot because the parties are still at impasse, the Board withheld increments during its last round of negotiations, and the Commission has not issued an enforceable order against the Board.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 88-50

STATE OF NEW JERSEY
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Appearances:

For the Respondent,
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(Robert T. Clarke, Esq.)

For the Charging Party,
Bucceri & Pincus, Esqs.
(Gregory T. Syrek, Esq.)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On September 23, 1987, the Bayonne Teachers Association ("Association") filed an unfair practice charge and an application for interim relief alleging that the Bayonne Board of Education ("Board") violated subsections 5.4(a)(1) and (5)[1/] of the New

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1/ These subsections 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."

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by refusing to pay salary increments during negotiations for a successor agreement.

On October 16, 1987, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On October 23, 1987, the Board filed an Answer asserting that it was not obligated to pay the increments and that, because it had resumed paying them, the issue was moot.

On January 20, 1988, I conducted a hearing. The parties stipulated facts, examined witnesses and introduced exhibits. They waived oral argument and filed briefs by April 5, 1988. Based on the entire record, I make the following:

FINDINGS OF FACT

The parties stipulate:

1) The Board is a public employer and the Association an employee organization within the meaning of the Act.

2) The Board and Association are parties to a collective agreement that expired August 31, 1987 (J-1). They began negotiations for a successor agreement in March 1987 and, after thirteen negotiations sessions, reached impasse in August 1987. The Board did not pay salary increments until the third pay period of the 1987-88 school year (T5, T6).

I find:

3. Sometime before March 1987 the Board met to prepare for negotiations and establish its goals. Its primary goal was to

reduce the variation between steps on the teachers' salary guide, which ranged from $4,131 between steps 15 and 16, to $123 between steps 3 and 4 (J-1, p. 45; T15, T22).

4. The parties first met in March 1987 and discussed ground rules for negotiations. They met again later that month and the Board told the Association that it wanted to "level" the increments in the salary guide. The Board's first salary proposal was to increase all teachers' salaries by the same dollar amount (T16, T17).

5. The parties met eleven times between April and August 1987. The Board reiterated its desire to adjust the salary guide and the Association rejected the Board's salary proposals. In August, the parties reached impasse (T18-T20).

6. At some unspecified time during negotiations, the Board sought the Association's agreement that increments not be paid until negotiations were completed. In early September, Lisa Cerbone, the Association's President, called Clifford Doll, the Business Administrator and Board negotiator, and asked about the Board's position on the increments. Doll told Cerbone that he did not consider it in the parties' best interest for the Board to pay the increments. A few days after his conversation with Cerbone, Doll met with Alan D'Angelo, the Association's chief negotiator. D'Angelo told Doll that the Association would not agree to give up the increments. On September 14, 1987, Doll wrote to D'Angelo, asking the Association to support the Board's decision not to pay

increments until a successor agreement was negotiated. The Association, however, did not agree. (T25-T27; R-1).

7. On September 15 the Board issued its first pay checks for the 1987-88 school year. Neither they nor the next checks issued on September 30 contained the increments (T12, T13).

8. The Board had two reasons for not paying the increments. First, it wanted to use the money to restructure the salary guide. The Board had recently lost a substantial amount of State funding. The cost of the increment was approximately 2.5 percent of its employees' base salaries. The Teacher Quality Education Act ("TQEA") had effectively compressed the first seven steps on the teacher salary guide and a large group of teachers (148) would reach the first "bubble" step on the guide in three years. The Board believed that if it did not adjust the salary guide, the cost of the increment alone would eventually exceed the money available for salary increases in future contracts (T23-T25). The Board's second reason for not paying the increments was its belief that the TQEA relieved it of the obligation to pay them. (T30, T35, T36)

9. Shortly after the Association filed its application for interim relief, the Board decided to pay the increments. No interim relief hearing was held; no Commission order was issued. The Board began paying the increments when it issued paychecks on October 15. The Board also reimbursed its employees for the increments it withheld from the first two paychecks. By October 30,

1987, the withheld increments were repaid (T13). Doll said the reason the Board decided to pay the increments was that the issue was diverting attention from negotiations.

10. The Board previously refused to pay increments when the parties were negotiating their current (now expired) agreement (J-1). The Association filed an application for interim relief and the Commission ordered the Board to pay the increments. (T34, T35) Bayonne Bd. of Ed., I.R. No. 85-6, 10 NJPER 611 (¶15287 1984).

11. The salary guides in the parties' expired contract contain automatic step increases based on years of experience (J-1).

12. The parties are still at impasse. (T12)

ANALYSIS

The case presents two questions: 1) Did the Board unlawfully refuse to pay automatic salary increments during negotiations for a successor agreement? and 2) Even if it did, does the Board's voluntary reimbursement and resumption of increment payments make the matter moot?

An employer's refusal to pay automatic salary increments contained in a recently expired contract (before exhausting the Commission's impasse resolution procedures) is a unilateral change of the status quo and an unfair practice. In Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978), the Court held that the employer violated subsection 5.4(a)(1) and (5) of the Act when, prior to fact-finding, it refused to pay teachers the salary step increment they would have received normally at the start of a

new school year to reflect an additional year of teaching experience. The Court also concluded that the fact that the parties eventually negotiated a successor agreement requiring the retroactive payment of increments based on a new salary guide did not warrant the dismissal of the Association's unfair practice charge as moot. Finally, the Court held that the Commission acted within its statutory authority by adjudicating the unfair practice proceeding after the parties' negotiated a successor agreement, and when it sought enforcement of a cease and desist order requiring the employer to post a notice to all employees indicating the employer's willingness to abide by the Act and comply with the Commission's decision in the future.

The Commission has applied Galloway in several cases. It is now well settled that, where the parties' contract provides for the automatic payment of increments based on years of experience, the refusal to do so, due to its chilling effect on negotiations, is an unfair practice. Hudson Cty., P.E.R.C. No. 78-48, 4 NJPER 87 (¶14041 1978); aff'd App. Div. Dkt. No. A-2444-77 (4/10/79); Belleville Bd. of Ed., I.R. No. 87-5, 12 NJPER 692 (¶17262 1986); Carteret Bd. of Ed., I.R. No. 85-2, 10 NJPER 492 (¶15223 1984); Alexandria Tp. Bd. of Ed., I.R. No. 84-5, 10 NJPER 1 (¶15000 1983); Jersey City Bd. of Ed., I.R. No. 83-6, 8 NJPER 593 (¶13277 1982); State of New Jersey, I.R. No. 82-2, 7 NJPER 532 (¶12235 1981); and City of Vineland, I.R. No. 81-1, 7 NJPER 324 (¶12142 1981).

Here the parties' expired contract provides for the payment of increments to unit employees based on their years of experience. At impasse, the Board refused to pay the increments. That the Board considered it necessary to apply the cost of the increments to restructuring the salary guides is not a defense. The Board raised a similar argument when it refused to pay increments during its last round of negotiations with the Association. In granting the Association's application for interim relief, the Commission designee dismissed the Board's assertion that "its bargaining posture would be harmed by the payment of increments," as follows:

> The arguments raised by the Board here are not persuasive. Although the good faith nature of the bargaining position of the Board is not questioned, if an employer could avoid paying increments by simply [making an offer that would reduce salaries] the very intent of this body of law would be defeated. Bayonne Bd. of Ed., 10 NJPER at 612.

I conclude the Board violated subsections 5.4(a)(1) and (5) when it refused to pay increments during negotiations for a successor agreement. I also conclude that the Board's reimbursement and resumption of increment payments does not make the issue moot.

The Commission has occasionally refused to consider whether an employer's refusal to pay salary increments was unlawful. Recently, in Belleville Bd. of Ed., P.E.R.C. No. 88-66, 14 NJPER 128 (¶19049 1988), app. pending App. Div. Dkt. No. A-3021-87T7, the Commission dismissed as moot a complaint seeking interest on increments withheld during negotiations. Noting that the Board had complied with an interim relief order to repay withheld increments

and that the parties had signed a memorandum for a successor agreement the day the unfair practice charge was filed and before a Complaint issued, the Commission concluded:

> It would not serve the Act's purposes to decide the only issue that remains in dispute: the payment of interest. The underlying dispute is resolved. The contract is settled and all increments have been paid. Whether the Board violated the Act by refusing to pay increments is academic at this point. Id. at 129.

The Commission reached a similar result in State of New Jersey, P.E.R.C. No. 88-2, 13 NJPER 634 (¶18236 1987). Council of New Jersey State College Locals, AFT/AFL-CIO, had filed an unfair practice charge on July 23, 1986, alleging the State refused to pay salary increments during negotiations. The Council sought interim relief and on August 29, 1986, a Commission designee ordered the State to resume and reimburse increment payments. On September 29, 1986, the parties completed negotiations. On March 2, 1987 the Director of Unfair Practices issued a Complaint and Notice of Hearing and the parties subsequently submitted a stipulated record and briefs to the Commission. The Council maintained that the State committed an unfair practice when it refused to pay the increments and that the subsequent negotiation of a collective agreement did not make the unfair practice moot. The Council argued that "there remains a need...to conclusively mandate that the State cease and desist from the practice of illegally withholding normal increments pending conclusion of successor agreement negotiations." The Council sought an order prohibiting the withholding of normal

increments "during the pendency of any and all future collective bargaining." Id. at 635. Relying on Galloway the Commission dismissed the Complaint, stating:

> Galloway does not hold that the subsequent consummation of a collective negotiations agreement never moots an unfair practice charge concerning a prior refusal to negotiate. Rather, the question is one of a proper exercise of discretion. In Union Cty. Reg. H.S. Bd. of Ed., P.E.R.C. No. 79-90, 5 NJPER 229 (¶10126 1979) we said:
>
> > 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 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.
>
> We must consider all the case's circumstances in determining whether ending or continuing litigation over allegedly moot charges will best serve the Act's main purpose: the prevention and prompt settlement of labor disputes. N.J.S.A. 34:13A-2. In Galloway, the concern was "that there was a sufficient potential for recurrence of the Board's conduct in the course of future negotiations." Galloway at 47. We do not believe such considerations are present here. There is now substantial case law concerning an employer's obligation to pay increments during contract negotiations and normal increments have now been paid to unit employees. Finally, the compelling fact is that the parties have now settled their differences and we believe it would be contrary to our mandate to permit this

> academic dispute to be litigated. See also Tp. of Rockaway, P.E.R.C. No. 82-72, 8 NJPER 117 (¶13050 1982). [13 NJPER at 635]

The facts in this case implicate more than the propriety of awarding interest based on a finding that an employer unlawfully refused to pay salary increments before completing negotiations. State of New Jersey, Belleville, Union Cty. Reg. H.S. Bd. of Ed., and Tp. of Rockaway are distinguishable because the parties are still at impasse, the Board has a history of refusing to pay increments and the Commission has not issued an enforceable order requiring the Board to make the payments.

In Galloway, the Court emphasized the importance of the sanction of an order as a deterrent to the resumption of the unlawful conduct. After reviewing private sector precedent, the Court noted that:

> The purpose of the authorization for the NLRB to obtain judicial enforcement of its order in an unfair labor practice case in §10(e) of the LMRA, 29 U.S.C. §160(e), the federal analogue of N.J.S.A. 34:13A-5.4(f), was to make... "immediately available to the (NLRB) an existing court decree to serve as a basis for contempt proceedings" in the event a renewal of the unfair practice occurs after the enforcement order. NLRB v Mexia Textile Mills, Inc. [339 U.S. 563, 569, 70 S. Ct. 826, 830]. The federal courts have recognized the salutatory effect an enforcement decree will have on a party found to have committed an unfair labor practice:
>
> > Even if the (respondent) has substantially complied with the (NLRB's) order without a judicial mandate to do so, enforcement of the order provides an incentive for continual compliance through the possible sanction of contempt proceedings for violations. (NLRB v. Southern Household Products Co., [440 F. 2d 749, 750 (5 Cir. 1971)].
>
> [78 N.J. 45, 46]

The Court construed N.J.S.A. 34:13A-5.4(f)[2/] to have a similar purpose:

> ...The judicial enforcement of PERC's non-self-executing orders directed by that statute will serve as a pointed deterrent against resumption of the practices PERC found to be violative of the Act. There can be no guarantee that a party charged with an unfair practice, having voluntarily ceased its unlawful conduct, will not at some future time disavow its adherence to the Act's requirements. The imposition of a continuing obligation on that party to conform its conduct to law is the best means of diminishing the likelihood that it will repeat its demonstrated disdain for employee rights and statutory mandate. As we have noted, the determination of the need for an enforcement decree in a particular case is entrusted to PERC's expert discretion by N.J.S.A. 34:13A-5(f). [78 N.J. 46]

The need for an enforceable order is demonstrated by the Board's indifference to ten years of Commission and Court precedent. It is also demonstrated by the Board's recidivism. Galloway emphasizes deterence. State of New Jersey, 13 NJPER 635. The Board has already repeated its unlawful conduct. The concern of "a sufficient potential for recurrence of the Board's conduct in the course of future negotiations" is not academic. Id., quoting

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2/ N.J.S.A. 34:13A-5.4(f) provides:

> The commission shall have the power to apply to the Appellate Division of the Superior Court for an appropriate order enforcing any order of the commission issued under subsection c. or d. hereof, and its finding of fact, if based upon substantial evidence on the record as a whole, shall not, in such action, be set aside or modified; any order for remedial or affirmative action, if reasonably designed to effectuate the purposes of this act, shall be affirmed and enforced in such proceeding.

Galloway at 47. Thus, even if the parties had negotiated a successor agreement, this case would not be moot. That they have not, merely reinforces the need for an order. I therefore conclude that the matter is not moot and recommend that the Commission find that the Board violated subsections 5.4(a)(1) and (5) by refusing to pay salary increments during successor negotiations. I also recommend that the Commission order the Board to cease and desist from such conduct and post the attached Notice to Employees. Finally, I recommend the Commission order the payment of interest on the withheld increments. Howell Tp. Bd. of Ed., P.E.R.C. No. 86-44, 11 NJPER 634 (¶16223 1985).

Richard C. Gwin
Hearing Examiner

Dated: April 12, 1988
Trenton, New Jersey

Appendix "A"

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:

WE WILL NOT, now or in the future, interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, by withholding salary increments while negotiating with the Bayonne Education Association for a successor agreement.

WE WILL NOT, now or in the future, unilaterally change terms and conditions of employment and alter the status quo by refusing to pay salary increments while negotiating with the Bayonne Education Association for a successor agreement.

WE WILL pay employees represented by the Bayonne Education Association interest at the rate set forth at R. 4:42-11 on increments withheld from the first two paychecks of the 1987-88 school year.

Docket No. CO-H-88-84 BAYONNE BOARD OF EDUCATION
(Public Employer)

Dated _____ By _____
(Title)

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 St., CN 429, Trenton, NJ 08625 (609) 984-7372.