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TO BE CONTINUED: DO SALARY INCREMENTS CONTINUE DURING PUBLIC EMPLOYER-UNION NEGOTIATIONS?

By Kerri A. Wright and Deborah H. Share

Public employers in New Jersey have long understood the rules regarding continued payment of salary increments after the expiration of a collective bargaining agreement. That is, until recently, when the state Public Employment Relations Commission ("PERC") started a firestorm of controversy with its decision in two matters in which PERC, rejecting its long-held "dynamic status quo doctrine," held that salary increments could not continue after the expiration of a collective bargaining agreement. Previously, PERC had worked under the "dynamic status quo doctrine," which states that even after the expiration of a collective bargaining agreement, salary increments continue. In March, however, the New Jersey Appellate Division returned the collective bargaining world to the proverbial "status quo" by overturning PERC.

In The Matter of County of Atlantic, and PBA Local 243, FOP Lodge 34 and PBA Local 77, DOCKET NO. A-2477-13T4; A-0107-14T1 (App. Div. Mar. 9, 2016), the Appellate Division determined that PERC exceeded its legislative mandate when it attempted to nullify the dynamic status quo doctrine. In reversing PERC, the Appellate Division reinstated the dynamic status quo doctrine and cautioned PERC to stay within its legislative purview, namely, to safeguard the rights of public employees.

Background

Originally, two matters came before PERC by unions alleging unfair labor practices by their public employers. The unions asserted that each employer had unlawfully failed to provide salary increments after the expiration of the prior collective

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bargaining agreement, but during the period of time in which negotiations between the union and employer were ongoing.

In the past, PERC had found that, because a public employer may not alter the status quo while negotiations are ongoing, a public employer may not alter scheduled pay or step increments. In other words, even though the contract has expired, the public employer must continue to pay the salary increments during negotiations. The New Jersey Supreme Court has endorsed the so-called "dynamic status quo doctrine," finding that negotiation is required to make any changes to the current set of rules and conditions of employment.

Reversing prior precedent, PERC dismissed the unions' claims, in effect relieving the public employers of the need to pay salary or step increments after the collective bargaining agreement had expired, and while negotiations were ongoing. In the first matter, it found that salary/step increments were not due by the public employers during negotiations after the expiration of a collective bargaining agreement unless there was a specific provision in the contract providing that the salary increment provision would continue. In the second matter, PERC further said that, given its immediate prior decision, such a grievance was therefore not mandatorily negotiable or arbitrable. In reaching its conclusion that salary increments should cease upon expiration of the contract, PERC relied heavily on the burden imposed on public employers by the two percent property tax levy cap.

The Appellate Division consolidated the two matters for analysis, and reversed both PERC decisions.

The Decision

Although appellate review of agency decisions is deferential, when the issue presented is legal in nature, the review is de novo, or decided anew, by the Appellate Division. Here, the Appellate Division stated that the issue was "whether PERC can summarily reverse the dynamic status quo doctrine in order to advance the legislative goal embodied in the two percent tax levy cap."

The Appellate Division reversed the two PERC decisions because it found that PERC did not have the authority to abandon the dynamic status quo doctrine. The Appellate Division held that PERC was charged with "safeguarding the rights of public employees" through implementation of the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1-39. PERC does not have authority with regard to the implementation and interpretation of laws outside of the public employment laws.

PERC had attempted to reconcile the tax levy cap denoted in another law with the dynamic status quo doctrine born out of the Public Employer-Employee Relations Act. Specifically, the Appellate Division found that such reconciliation was beyond PERC's mandated purview. Additionally, the Appellate Division disagreed with that determination and found that the two may, and thus should, be read harmoniously.

Finally, the Appellate Division did not agree that PERC was permitted to deem this change "mere policymaking." It said that the dynamic status quo doctrine was in fact an interpretation of a statute, and thus PERC was not permitted to change it. Furthermore, the parties involved relied on the dynamic status quo doctrine during the course of their negotiations, and thus expectations had already been set. Finally, the Appellate Division stated that PERC must follow all Supreme Court decisions, which to this point have endorsed the doctrine.

In conclusion, the Appellate Division reminded PERC that it may not make decisions about issues that "are not within PERC's charge," which include the "fiscal health of municipalities and tax rates." This means that the topic of salary, including automatic salary/step increments, is mandatorily negotiable and therefore is arbitrable.

What Impact Will This Decision Have On School Boards?

The question remaining is how, if at all, this decision impacts negotiations between a board of education and its unions, in light of the statutory restriction on the length of salary schedules. *N.J.S.A.* 18A:29-4.1. The preeminent case for school boards on this topic is the Supreme Court decision in *Bd. of Ed. Township of Neptune v. Neptune Township Educ. Ass'n*, 144 N.J. 16 (1996). In *Neptune*, the Court acknowledged PERC's long-standing adherence to the dynamic status quo doctrine. However, it noted that the statute authorizing school boards to adopt salary schedules for full-time teaching staff members limited such salary schedules to one, two, or three years. *Id.* at 30. As a result, the Court found that the statute effectively preempted labor law. Salary increments could not be paid to teachers after the expiration of the salary schedule negotiated because of the statute and because a board could not recoup any overpayment from a tenured public employee. *Id.* at 30-34.

It is important to note for school board employers that this salary schedule limitation does not apply to non-teaching staff members. Therefore, careful consideration should be paid to the contracts of these employees unless they are included in the same bargaining unit as teaching staff members. Public employers will want to bargain for a clause that limits salary increments to only the length of the contract and not post-expiration.

It does not appear that the *County of Atlantic* matter modified the previous decisions with respect to boards of education. Instead, the Appellate Division's decision, while not expressly holding that the *Neptune* rule is not affected by this decision, discussed at length the prior case law in this area as it relates to boards and the statutory restrictions on salary schedules. Therefore, it appears that boards continue to be immune from having to pay increments to teaching staff members post-expiration of their collective bargaining agreements. However, the Appellate Division did not address the recent statutory change, which now allows school boards to adopt salary schedules for one, two, three, four, or five years. *N.J.S.A.* 18A:29-4.1. Therefore, the question remains whether PERC will apply the dynamic status quo doctrine to school boards whose contracts provide for something less than a five-year salary schedule. To be safe, boards should insert language into all of their contracts that no increments or steps will be paid after the expiration of the contract.

Recommendations for All Employers

This case provides important insight into the scope of an agency's authority and the Appellate Division's willingness to rein in an agency when it believes the agency has stepped outside its authority as established by the legislature. This decision may have arisen out of the Public Employee Relations Commission, but its principles apply equally to any state or federal agency overseeing the relationship between employers and their employees, such as the Division of Civil Rights, the Equal Employment Opportunity Commission, or the Wage and Hour Division of the Department of Labor and Workforce Development. If aggrieved by an agency decision, in addition to appealing the agency on the merits, it is often worthwhile to assess whether the agency has strayed from its proper policy-making role.

In addition, while of particular concern for public employers in light of this decision, this case is a good reminder that, when bargaining, careful consideration must be paid to what terms and conditions will apply after the expiration of a collective bargaining agreement (or even an individual agreement) while negotiating a successor agreement. Even in private sector bargaining, the general rule is that the status quo remains during the course of negotiations. Therefore, if an employer does not want a term or condition to continue, it will need to make sure that the agreement contains explicit language to that effect.

For public sector employers, the dynamic status quo doctrine is alive and well. Therefore, regardless of the bargaining unit, it is strongly recommended that these employers include language explicitly disavowing the continuation of any benefits or salary increments that they do not wish to automatically continue after the expiration of the agreement.