

TO PAY OR NOT TO PAY... THAT IS THE QUESTION*

Every summer, as boards begin to plan the opening of a school year without a new negotiated agreement in place, NJSBA's Labor Relations Department receives a number of questions regarding boards' obligation to pay increments at the expiration of a contract. In the last few years, an unprecedented number of questions have been raised as a result of a 1996 Supreme Court decision in *Board of Education of the Township of Neptune*, 144 N.J. 16. In an important modification of long-standing case law, this decision held that school law prohibited boards of education from paying increments to teaching staff members upon the expiration of a three-year contract.

The *Neptune* decision presented welcomed relief to many boards of education who were expecting to deal with a built-in cost of increment that sometimes exceeded their desired salary increases. Yet, the narrowness of the Court's decision also raised a number of questions regarding the definition of increments, and boards' new obligations towards other negotiated contracts and other bargaining units. Many of these post-*Neptune* questions have now been addressed in two 1999 Public Employment Relations Commission (PERC) decisions: *East Hanover Board of Education*, PERC No. 99-71, 25 NJPER 30052 and *Middletown Township Board of Education*, PERC No. 99-72, 25 NJPER 30053. These decisions, which clarify and redefine boards' post-*Neptune* obligations, provide some new answers to questions most frequently asked by boards who are facing the expiration of a negotiated agreement.

Q. Our three-year contract with our administrators' association expires June 30. Do we have an obligation to pay increments to our 12-month administrators as of July 1?

A. No. Not only do you not have an obligation to pay those increments, but the *Neptune* decision holds that school law actually *prohibits* a board of education from paying increments upon the expiration of a three-year contract with teaching staff members. Since teaching staff members include all certificated staff, including nurses, guidance counselors, supervisors, assistant principals and principals, your board cannot legally pay increments to your administrators under this expired contract.

Q. Last time our teachers' three-year contract expired without a new agreement in place, the association threatened us with an unfair practice if we did not pay increments. Upon advice of counsel, we then paid increments. Does this past practice make a difference to our obligation when the current three-year contract expires?

A. No. The *Neptune* decision supersedes your past practice and the case law that was in effect the last time your contract expired. Now, the Court is holding that school law (N.J.S.A. 18A:29-4.1) authorizes boards of education to adopt binding salary schedules for teaching staff members for periods of one, two or three years only. Since tenure statutes prohibit boards from reducing the compensation of tenured staff, the Court found that increments paid in accordance with an expired three-year contract are "beyond recall" and thus result in a salary schedule that would bind boards to a four-year salary policy, in excess of the duration permitted by law. Therefore, the Court concluded that boards are without the statutory authority to pay increments to teaching staff members pursuant to an expired three-year agreement. This ruling now controls your district's current responsibility towards the payment of increment to teaching staff members upon the expiration of a three-year agreement.

Q. Our secretaries and aides are in the same bargaining unit as our teachers. That three-year contract is expiring in June and we are not expecting that we will reach a settlement before then. We understand that we cannot pay increments to our teachers, but do we have an obligation to pay increments to our secretaries and our aides?

A. No. In its *East Hanover* decision, PERC held that the *Neptune* prohibition against paying increments to teaching staff members at the end of a three-year contract should be extended to all members of the teachers' bargaining unit. PERC reasoned that the *Neptune* holding found that school law governed boards' ability to pay increments to teaching staff members, but that contracts with other employees were controlled by labor law. Applying the principles of labor law, PERC held that it would be unwise, as a matter of labor relations policy, to have separate rules

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for increment payments for different types of employees within a single, broad-based bargaining unit. PERC found that it would be inappropriate for some unit members to have automatic incremental raises while other employees in the same bargaining unit would have to negotiate for those raises. Accordingly, PERC extended *Neptune*'s prohibition to all employees included in a three-year contract with teaching staff members.

Q. Our three-year contract with our custodians and bus drivers is also expiring this June. Does the PERC decision also mean that we are relieved of our obligation to pay increments to these employees?

A. No. PERC's holding in *East Hanover* is applicable only to noncertificated staff who are in a bargaining unit with teaching staff members. Remember that the *Neptune* prohibition applied only to teaching staff members and that PERC's decision was designed to provide uniformity among various classifications of employees included in a teachers' bargaining unit.

Q. I understand that we cannot credit our teachers with vertical advancement on our expired three-year guide. But, in our district, we have an off-guide longevity pay. Can teachers receive new longevity payments?

A. No. In its *Middletown* decision, PERC held that the Commissioner of Education considers longevity payments to be increments. Therefore, a new or higher longevity payment based on an expired contract falls under *Neptune*'s prohibition. Since you cannot reduce tenured teachers' compensation, you are obligated to maintain longevity paid to teachers during the expired agreement, but you are not permitted to provide new or additional longevity payments that employees would have earned under the expired contract. To do so would result in an impermissible extension of a three-year salary policy.

Q. Our three-year contract expired last June. In accordance with Neptune, we have not paid increments. But now our union is insisting that we move teachers who have attained their MA during this year to the appropriate column on the expired guide. Is that permitted under Neptune?

A. No. In its *Middletown* decision, PERC also held that while payments linked to educational attainment are not "increments" under school law, those additional payments are part of a district's salary policy. PERC cited the *Neptune* Court's analysis that tenure rules would make irreversible any increases in salary granted in accordance with an expired three-year salary schedule. Therefore, PERC concluded that crediting teachers with additional education attained after the expiration of a three-year contract would result in an impermissible extension of a three-year policy.

Q. Our teachers' two-year contract expires next year. Does Neptune address this issue?

A. The Court very clearly limited its ruling to the facts

of the case involving the *Neptune Township Board of Education* and, as such, its decision is specifically directed only to three-year contracts. The Court's analysis of school law and its conclusion that those statutes prohibit payment of increment, is focused exclusively on three-year agreements with teaching staff members. Thus, under *Neptune*, it is crystal clear that boards cannot pay increments to teaching staff members upon the expiration of a three-year agreement. However, *Neptune* does not dispose of the issue of teaching staff members' increments following the expiration of a one or two-year salary policy—and that issue continues to be the subject of differing interpretations.

Some boards have interpreted the *Neptune* Court's rationale and its discussion of the negative aspects of increments and have not paid increments at the end of a one or two-year contract covering their teaching staff members. Some of these unions have initiated unfair practice proceedings and sought interim relief — that is, they have filed for a PERC directive ordering the board to pay increment pending the processing of the unfair practice charges. In these cases, the Commission designee found that there was nothing in *Neptune* to suggest its applicability to the expiration of one or two-year agreements. One of these boards petitioned PERC to reconsider the interim relief order. PERC refused to grant the Board's request as it also found that *Neptune*'s prohibition applied only to a three-year agreement. *Mahwah Board of Education*, PERC No. 98-105, 24 NJPER 29067.

So, at this time, it would appear that the most prudent interpretation of *Neptune* is to limit its applicability to the expiration of a three-year agreement with a bargaining unit that includes teaching staff members. Any other interpretation is likely to lead to union challenges and possibly protracted, and expensive, litigation.

Q. Does that mean that we are obligated to pay increments at the end of our two-year teachers' contract?

A. Not necessarily. *Neptune* does not prohibit payment of those increments; however, that does not mean that *Neptune* therefore automatically requires all boards to pay increments at the end of a one or two-year contract with their teachers. Similarly, *Neptune* should not be read to automatically require boards to pay increments to their support staff units at the expiration of their contracts. Under the circumstances that are not addressed by *Neptune*, the requirement to pay can be a contractual obligation.

Q. What establishes a contractual obligation to pay increments?

A. A contractual obligation to pay increments is intricately linked to labor law's requirement that employers must maintain negotiated terms and conditions of an expired contract until a new agreement is reached. This requirement, known as the obligation to maintain the *status quo*, precludes a school board from changing existing terms

of an expired agreement.

In New Jersey, the Public Employment Relations Commission (PERC) has held that public employers' obligation to maintain the *status quo* can sometimes include a requirement to pay increments on an expired guide. When the parties' contractual provisions, including the structure of the salary guide, reflect an understanding that one additional year of service automatically results in incremental advancement on the guide, PERC has found that an employer is required to pay increments at the expiration of a contract. Conversely, PERC has ruled that an employer does not have an obligation to pay increments when the parties' agreement specifically indicates that incremental advancement is not the automatic result of an additional year of experience. This principle has been applied to deny unions' requested interim relief: when contract language clearly establishes the absence of automatic movement; when years of experience clearly were not intended to correspond to steps on the guide; and when incremental movement did not occur in any year of the contract. (See, for example, *Hamilton Township Board of Education*, I.R. 96-9, 21 NJPER 26230.)

Therefore, each board's contractual obligation to pay increments depends upon the district's contracts. Examine your contractual provisions and your salary guides and consult with your legal and labor resources, to determine if your contract with your support staff, or a one or two-year contract with teaching staff members, holds a labor law obligation to pay increments upon its expiration.

Q. But isn't this a Catch 22? Aren't we legally required to recognize each year of teaching experience with advancement on the guide?

A. No. In 1985, the legislature repealed the section of school law that used to require annual incremental advancement on a teaching staff members' salary guide. Since that time, the issue of incremental movement on the guide has been a negotiable topic. While many school boards have retained the pattern once required by school law, many others have negotiated a different type of guide movement, such as remaining on the same step of the guide for a number of years. Other boards have negotiated specific contractual provisions that establish that no incremental movement will occur at the expiration of the contract.

Q. How do we negotiate a change in annual guide movement?

A. A board's desire to change any aspect of the contract, including its pattern of annual incremental movement and its obligation to pay increments, begins with the board's introduction of negotiations proposals. Thus, a board that wishes to eliminate its obligation to pay increments must include this issue in its package of proposals in negotiations over all contracts with support staff and in its negotiations with teaching staff members over contracts of less than three years' duration. A new type of movement on the guide that breaks the traditional pattern can also result from the parties' negotiations over the new contract's salary guides. Yet, even under those circum-

stances, it is advantageous to clearly establish that the alternative movement modifies the entitlement to incremental advancement at the expiration of the contract. Achieving these negotiated changes can provide negotiated relief from boards' obligation to pay increments upon the expiration of future contracts that have remained unaffected by the *Neptune* decision.

In addition, boards have been able to use ongoing negotiations to achieve a change in their current obligation to pay increments under an expiring contract. Under these circumstances, a board can propose either a waiver of the current contract's obligation to pay increments or a delay of advancement on the expiring guide until a new agreement is reached. This can be a most beneficial and productive approach for boards who are facing expiring contracts with their support staff or the expiration of one or two-year contracts with their teaching staff members.

Q. What are the disadvantages to a board of education of paying increments?

A. The obligation to pay increments holds a number of significant disadvantages for boards. For example, the cost of increments on an expired guide becomes an expected minimum salary increase. High increment costs, therefore, complicate boards' ability to reach a settlement that reflects current economic trends. Employee expectations and unions' need to deliver benefits to their membership establish a predictable resistance to boards' desires to reduce increases in their costs of employment. This leads to difficult negotiations particularly when the cost of increment approaches, or in some circumstances even exceeds, the trend of recently negotiated increases and the board's ability to pay.

In addition, once an increment is paid to a tenured employee, a board cannot legally agree to a subsequent negotiated increase that is less than the increment received by the tenured staff member. Therefore, payment of increments has a significant impact on boards' ability to achieve their goals of restructuring their salary guides and/or negotiating relatively equitable increases in salaries for all members of the bargaining unit.

And finally, a salary increase during ongoing negotiations relieves a union from much of the pressure to reach a settlement. This is particularly true when the increase approaches the "going rate" of negotiated settlements and the board is seeking to obtain other negotiated cost containments in the successor contract. Under those circumstances, the automatic salary increase and the beneficial terms of the expired contract actually serve as a disincentive to the union to reach a new agreement; the pressure to concede on difficult issues to conclude negotiations is squarely and unevenly placed on the board. All of these factors complicate boards' ability to achieve a protective and affordable settlement.

Q. Why would any union agree to suspend guide movement at the expiration of a contract?

A. Frequently, the payment of increments under an expired contract can also be a problem for a local union.

For example, with recent teachers' average settlements, inclusive of increments, hovering near 4 percent, a board's payment of a 3 percent cost of increment to staff members moving through the guide leaves very little increases for staff at maximum. This situation can be most troublesome for an association, particularly if a large number of staff is at the maximum step and thus not eligible for an incremental increase. In addition, an expensive balloon on the guide can divert a large proportion of the cost of increments to only a few staff members. Under these circumstances, an association is likely to find that an agreement to suspend the payment of increments can ultimately assist it to negotiate equitable increases for all its members.

Take the time to assess how the union leadership and all members of the bargaining unit will be affected by the payment of increments on both your expiring guide and the last year's guide of your contemplated new agreements. Be prepared to seek the union's agreement to change your practice of automatic movement at the expiration of the contract. Don't be dismayed by the union's initial negative reaction. Communicate early, clearly and frequently your board's commitment to adopt a new approach to guide movement. Be persistent and eventually, when the time is right, the union may well acknowledge the mutuality of the problem and agree to your proposal.

Q. *Would it not be easier to simply negotiate a three-year contract with our teachers?*

A. After *Neptune*, a three-year contract may appear to be the most advantageous arrangement for a board of education. And, in fact, virtually all boards have negotiated three-year contracts. NJSBA data indicates that 92% of all 1998-99 teachers' contracts are of three years' duration. Nevertheless, before automatically seeking a three-year contract, boards must analyze the implications of such agreement.

Teachers' unions may express great reluctance to agree to a contract that automatically precludes payment

of increments at its expiration. Unions' stated objections may be real or they may be a bargaining tactic designed to elicit additional board concessions as a trade-off for a three-year agreement. Obtaining the union's agreement to a three-year contract may thus require additional board concessions in the areas of salaries, benefits and work time. In the face of uncertain funding, can a board agree to additional economic concessions that will impose further costs on future boards? Will an inflexible work schedule or other limitations on workdays and work hours permit a board to respond to expected changes in the district's instructional needs? Each board will need to weigh the implications of a three-year agreement on its district's operations and each board will need to keep in mind that it can negotiate changes in its obligation to pay increments under a one or two-year contract with its teaching staff members.

Q. *Is this the final word on the obligation to pay increments?*

A. No. The issue of the obligation to pay increments is still in a state of flux. For example, PERC's *East Hanover* decision has been appealed to the Appellate Division. Future court deliberations may provide additional clarifications or changed interpretations. In addition, pending as well as new unfair practice charges that may come before PERC could also result in additional clarification. And finally, the legislature may enact new laws that redefine or modify boards' obligation. Therefore, your obligation to pay increments remains subject to change. We will keep you posted of future developments through *School Board Notes* and case law developments posted on the NJSBA Web site at www.njsba.org.

Do you have any additional questions or concerns? Each district has a different history and circumstances. Check out your specific questions and the latest interpretations of your obligation to pay increments with your legal counsel, your professional negotiator or NJSBA's Labor Relations Department at 609-278-5218.