

March 24, 2011

Steve Young, Executive Director
Council of New Jersey State College Locals
1435 Morris Avenue – 3rd Floor
Union, N.J. 07083

Re: Recent PERC Case law – Automatic Step Movement

Dear Mr. Young:

On March 7, 2011, the Chairperson of the Public Employment Relations Commission, P. Kelly Hatfield, issued a decision in the case of County of Atlantic –and- PBA Local 243, I.R. No. 2011-35 (March 7, 2011). The case, which is attached to this letter, may have a significant impact on the right of an employee to move through a salary step guide after the expiration of the controlling collective bargaining agreement.

In County of Atlantic, a police union moved for interim relief after being notified in December 2010 that officers would not be moved to the next step of the salary guide contained in an expired contract. The contract had expired on December 31, 2009, and the parties were in the midst of binding interest arbitration. The union presented evidence that since at least 1993, officers had been moved to the next step of the guide even after the union contract had expired. The County acknowledged that practice, but alleged that the 2% cap on increases to the tax levy prevented it from following that practice, since the average increase associated with the step move was approximately 3.5%, which is over the cap.

In an unusual procedural move, the case was taken away from the PERC designee assigned to hear it, and was instead decided by the Governor's appointed Chairperson, P. Kelly Hatfield. (See page 2). The PERC Chairperson decided that the fourth prong of the legal test for interim relief – relative hardship to the parties – was controlling in the case. Based on that prong of the test, she concluded that requiring the Township to pay the increased salaries resulting from movement through the step guide outweighed the harm to employees in not receiving an increase. She specifically found that if the County was able to negotiate an increase of 2% or less, officers who received a step increase could be required to pay the money back to the employer, which would constitute a hardship to them. The Chair also observed that changes in

the interest arbitration law limited salary increases to 2%, and although she recognized that the statutory amendment did not apply to this particular contract, she noted that an interest arbitrator would be likely to take this change into consideration. As a result of her analysis, the Chairperson denied interim relief.

The decision in County of Atlantic is significant because it reverses decades-old PERC precedent holding that an employer is required to move employees through the salary guide in an expired contract if such movement has historically been deemed “automatic”. Indeed, the Chairperson recognized in a footnote that the police union had cited case law to support its position on irreparable harm and substantial likelihood of success (two other prongs of the legal standard), but she disregarded that case law because she decided the matter based on alternate grounds (the “relative hardship” prong). In this regard, it is noteworthy that there is no PERC case law cited anywhere in the Chairperson’s decision. It is also noteworthy that the PERC Chairperson is not a labor lawyer, had never worked at PERC prior to her appointment, and has no background or experience in the field of public sector labor law in this or any other state.

The impact of this decision to our membership is clear. Under County of Atlantic, a public employer can now freeze employees within the step guide under an expired agreement where it can show that the fiscal harm to the employer outweighs the fiscal harm to the employees. As you know, our members receive increments under both the contract and the State compensation system. Therefore, it is possible if not likely that the State of New Jersey will refuse to move our members through that system after our contract expires on June 30, 2011, and that PERC will permit this result upon a showing that such payment would create a “hardship” on the State. Having said that, there are some significant differences between our unit and the PBA local in County of Atlantic to warrant a different outcome.

First, the 2% cap that the PERC Chairperson relied upon in that case does not apply to State government. To the extent that her decision was based on that statutory change, her rationale would not apply to our members. Second, the change in the interest arbitration statute limiting increases to 2% or less also does not apply to our members, as it pertains only to police and fire employees. Therefore, that rationale for her decision also disappears with respect to our contract. Finally, although we would need to analyze the cost of a step move for all of our members so entitled, I feel very confident that the cost would be far less than 2% of the overall State budget. Therefore, I believe it would be very difficult for the State to show a “hardship” resulting from the movement of our members through the guide, given the enormity of the State budget and its ability to raise revenue without a cap.

I hope this letter has been informative. Should you have any questions, or require additional information, please feel free to contact our office.

Very truly yours,

METS SCHIRO & MCGOVERN, LLP



Kevin P. McGovern