

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERSITY OF MEDICINE AND  
DENTISTRY OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-H-97-389

UNIVERSITY OF MEDICINE AND DENTISTRY  
OF NEW JERSEY COUNCIL OF AMERICAN  
ASSOCIATION OF UNIVERSITY PROFESSORS  
CHAPTERS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint which was based on an unfair practice charge filed by the University of Medicine and Dentistry of New Jersey Council of American Association of University Professors Chapters against the University of Medicine and Dentistry of New Jersey. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act when it unilaterally reduced the patient service component of Dr. Stanley Weiss's salary. Under the circumstances, including the fact that the employer acted in accordance with the way it had acted in the past and the AAUP did not offer any evidence that it sought negotiations once it was notified of the reduction in Weiss's salary, the Commission concludes that the AAUP failed to meet its burden of proving that the employer acted in bad faith.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

P.E.R.C. NO. 2002-53

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERSITY OF MEDICINE AND  
DENTISTRY OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-H-97-389

UNIVERSITY OF MEDICINE AND  
DENTISTRY OF NEW JERSEY  
COUNCIL OF AMERICAN ASSOCIATION  
OF UNIVERSITY PROFESSORS CHAPTERS,

Charging Party.

Appearances:

For the Respondent, David Samson, Attorney General of  
New Jersey (Anne Marie Kelly, Deputy Attorney General)

For the Charging Party, Sterns & Weinroth, attorneys  
(Mark D. Schorr, of counsel)

DECISION

On May 19 and October 20, 1997, the University of  
Medicine and Dentistry of New Jersey Council of American  
Association of University Professors Chapters (AAUP) filed an  
unfair practice charge and amended charge against the University  
of Medicine and Dentistry of New Jersey. The charge alleges that  
the employer violated the New Jersey Employer-Employee Relations  
Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3) and

(5),<sup>1/</sup> when it unilaterally reduced the patient service component of Dr. Stanley Weiss's salary.

On December 15, 1997, a Complaint and Notice of Hearing issued. On December 29, UMDNJ filed its Answer. The employer asserts that it has a longstanding practice of discussing salary supplements with individual faculty members when they are appointed, and then modifying or terminating such salary supplements as needed; and that the AAUP waived its right to negotiate supplemental salaries.

On February 3, 1998, Hearing Examiner Regina A. Muccifori denied the AAUP's motion for summary judgment. When she later took a leave of absence, the case was reassigned to Hearing Examiner Susan Wood Osborn. N.J.A.C. 19:14-6.4.

On July 29 and September 14 and 16, 1998, Hearing Examiner Osborn conducted a hearing. At the first day of hearing, the AAUP withdrew the 5.4a(3) allegation. The parties then examined witnesses, introduced exhibits, and filed post-hearing briefs.

---

<sup>1/</sup> These provisions 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. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage 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...."

On June 23, 2000, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 2000-13, 26 NJPER 377 (131151 2000). She found that UMDNJ had followed its practice of at least 15 years of unilaterally increasing, decreasing or eliminating faculty stipends. She further found that although the union was routinely informed of these stipend modifications, it never sought to negotiate over them so the employer had a reasonable expectation that it did not have to negotiate before changing Weiss's salary. She concluded that it would be unfair, under all the circumstances of the case, to find that UMDNJ had an obligation to negotiate in good faith before it reduced Weiss's patient service component. She also found that AAUP had waived its right to negotiate changes in non-contractual stipends by its long-time acquiescence to a system where patient care stipends were established and changed outside the sphere of collective negotiations.

On August 14, 2000, the AAUP filed exceptions. It does not contest the Hearing Examiner's factual findings. Asserting that patient service components are mandatorily negotiable, it argues that it did not waive its right to negotiate over those components of compensation. It further argues that the Hearing Examiner erred in concluding that UMDNJ did not illegally modify an established term and condition of employment.

On August 18, 2000, UMDNJ filed an answering brief. It does not concede that patient service components are a mandatorily

negotiable term and condition of employment. In any event, it argues that there is a longstanding practice at UMDNJ not to negotiate patient service components or any modifications of those components with the AAUP, and that the AAUP has acquiesced to that practice.

This case was held in abeyance because we were informed that the parties were engaged in settlement discussions. On January 24, 2002, we were notified that the matter was not going to settle and resumed processing the case.

While the case was held in abeyance, we decided a scope of negotiations case in which we declined to restrain binding arbitration over a grievance contesting reductions in supplemental salaries at UMDNJ. UMDNJ, P.E.R.C. No. 2001-31, 27 NJPER 38 (132015 2000). We held that the compensation issues presented were mandatorily negotiable and thus UMDNJ did not have a managerial prerogative to reduce salaries unilaterally. That decision was not appealed.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 3-24) with one minor modification. Joyce Orenstein is the AAUP's Executive Director (1T47).

The employer had a longstanding practice of supplementing many faculty members' academic base salaries with patient and/or faculty service components. Those components varied widely from one unit member to another. The AAUP was aware of these

components and it never sought to negotiate over the initial setting of these components of total salary.

The employer also periodically changed the faculty service components. As reflected in sheets summarizing personnel actions, patient service components were increased on at least 99 occasions between 1974 and 1993. UMDNJ also identified 13 instances over the years where a faculty member's patient service component was reduced or eliminated.

Joyce Orenstein, AAUP's Executive Director, first became familiar with patient service components in 1988 when certain unit members complained that negotiated increases were not applied to those components. As a result of those complaints, during negotiations for a 1989-1991 agreement, AAUP proposed that across-the-board increases be applied to the components. UMDNJ did not agree and the demand was dropped. The parties agreed that employees would be notified that across-the-board increases did not apply to the supplements.

Before 1997, Orenstein believed that patient service components were established upon appointment and that, once fixed, they remained relatively constant over a faculty member's career. The Hearing Examiner credited Orenstein's testimony in part because Robert D'Augustine, UMDNJ's Associate Vice President for Academic Administration, testified that he told another member of the AAUP's negotiations team that patient service components were infrequently changed.

Personnel summary sheets have been sent to the AAUP office since at least 1981. Orenstein's assistant reviews the sheets to determine who has been added to the unit and who has left, and to ascertain changes in base salary. Orenstein does not routinely review the sheets and she has never asked her assistant to track changes in patient service components because it was Orenstein's understanding that the components did not change.

In January 1997, UMDNJ cut Weiss's \$15,000 patient service component by half to \$7500. The AAUP filed this charge in May 1997.

The Hearing Examiner concluded that it would be unfair, under all the circumstances of this case, to find that UMDNJ had an obligation to seek negotiations with the AAUP before it reduced Weiss's patient service component. We agree. As we said in Monmouth Cty. Sheriff, P.E.R.C No. 93-16, 18 NJPER 447, 449 (¶23201 1992), it would be unfair to find that an employer violated the Act where it had every reason to believe, based on a representative's response to past actions of which it was notified, that it would not object to similar actions. Although the AAUP may not have actually known that patient service components had been unilaterally reduced in the past, we nevertheless are convinced that UMDNJ acted in accordance with the way it had acted in the past. Under these circumstances, including the fact that the AAUP did not offer any evidence that it sought negotiations once it was notified of the reduction in

Weiss's salary, we conclude that the AAUP failed to meet its burden of proving that the employer acted in bad faith.

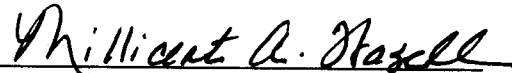
Accordingly, we dismiss the Complaint.

We need not reach whether or not the AAUP knowingly waived its right to negotiate over the reduction in Weiss's salary. Ruling on that issue does not influence our ultimate decision that this Complaint should be dismissed. The AAUP is now in a position to seek prospective negotiations over Weiss's salary and future reductions in patient service components.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, Katz, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: March 27, 2002  
Trenton, New Jersey  
ISSUED: March 28, 2002



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

In the Matter of

UNIVERSITY OF MEDICINE AND  
DENTISTRY OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-H-97-389

UNIVERSITY OF MEDICINE AND DENTISTRY  
OF NEW JERSEY COUNCIL OF AMERICAN ASSOCIATION  
OF UNIVERSITY PROFESSORS CHAPTERS,

Charging Party.

SYNOPSIS

The Hearing Examiner recommends that the Commission dismiss a charge alleging the employer decreased an associate professor's patient service stipend without first negotiating with the faculty union. The Hearing Examiner finds that the union waived its right to negotiate the non-contractual stipends by its long-time acquiescence to similar changes in faculty stipends. The employer acted consistently with its practice of at least fifteen years of unilaterally increasing, decreasing or eliminating faculty stipends; although the union was routinely informed of these stipend modifications, it never sought to negotiate over them.

However, the union's waiver of negotiations in the past does not prevent it from seeking to negotiate over the stipends in future negotiations.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 2000-13

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

In the Matter of

UNIVERSITY OF MEDICINE AND  
DENTISTRY OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-H-97-389

UNIVERSITY OF MEDICINE AND DENTISTRY  
OF NEW JERSEY COUNCIL OF AMERICAN ASSOCIATION  
OF UNIVERSITY PROFESSORS CHAPTERS,

Charging Party.

Appearances:

For the Respondent, John J. Farmer, Jr., Attorney General  
(Ann Marie Kelly, Deputy Attorney General)

For the Charging Party, Sterns & Weinroth, attorneys  
(Mark D. Schorr, of counsel)

**HEARING EXAMINER'S REPORT  
AND RECOMMENDED DECISION**

On May 19, 1997 and October 20, 1997, the University of  
Medicine and Dentistry of New Jersey Council of American Association  
of University Professors Chapters (AAUP) filed an unfair practice  
charge and amended charge against the University of Medicine and  
Dentistry of New Jersey (University or UMDNJ). The amended charge  
alleges that UMDNJ violated the New Jersey Employer-Employee  
Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3),

and (5)<sup>1/</sup> when during negotiations for a successor agreement, it unilaterally reduced the patient service component of Dr. Stanley Weiss's salary. The AAUP alleges that, as a matter of practice, unit members' patient service components have not been reduced absent a change in contractual status. The AAUP further contends that Weiss's patient service component was reduced in order to discourage it from exercising rights guaranteed under the Act. Finally, it maintains that the reduction constituted coercion in connection with ongoing negotiations.

On December 15, 1997, a Complaint and Notice of Hearing issued. On December 29 UMDNJ filed an Answer denying that it had violated the Act. It asserts that the AAUP has never sought to negotiate either the establishment of or changes in such supplements and has waived its right to do so now. UMDNJ maintains that it has a longstanding practice of discussing the salary supplements with individual faculty members when they are appointed, and then modifying or terminating such salary supplements as needed. The University alleges that Weiss was advised that he should generate

---

<sup>1/</sup> These provisions 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. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage 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."

income from grants or patient consultations to offset the patient service component, and that the component was reduced when he did not do so.

On December 18, 1997, the AAUP filed a Motion for Summary Judgment with the Commission. The Commission referred the Motion to Hearing Examiner Regina A. Muccifori, who denied the Motion on February 3, 1998. H.E. No. 98-23, 24 NJPER 70 (¶29039 1998). This matter was reassigned to me when the original hearing examiner took a leave of absence. N.J.A.C. 19:14-6.4.

On July 29 and September 14 and 16, 1998, I conducted a hearing.<sup>2/</sup> At the first day of hearing, AAUP withdrew that part of the charge alleging a violation of 5.4a(3) (1T118-1T119). The parties examined witnesses, introduced exhibits, and filed post-hearing briefs. Based on the entire record, I make the following:

#### FINDINGS OF FACT

1. UMDNJ is comprised of eight individual schools, including the Robert Wood Johnson Medical School, the New Jersey Medical School (NJMS) and the New Jersey Dental School (NJDS) (2T39).

---

<sup>2/</sup> "1T" refers to the July 29 hearing transcript; "2T" refers to the September 14 hearing transcript, and "3T" refers to the September 16 hearing transcript.

2. AAUP represents approximately 1200 full-time faculty members and librarians at seven of UMDNJ's eight schools (C-1; C-2; R-8, p. 3; 2T39-2T40).<sup>3/</sup>

At the time of the January 1997 events in this matter, the AAUP's most recent collective agreement with UMDNJ covered the period July 1, 1992 through June 30, 1995 (R-8; 1T84-1T85; 3T142). The parties had begun negotiations for a successor contract in April 1995, and negotiations were continuing. In March 1998, the parties signed a memorandum of agreement for a successor contract covering the period July 1, 1995 to June 30, 2000 (1T84-1T85; 3T142).

3. Stanley Weiss, M.D., a member of the AAUP unit, is a tenured Associate Professor of Preventive Medicine and Community Health at NJMS (1T115). His duties include research, teaching, writing scientific papers, and preparing grant and contract proposals seeking funding for research projects (1T123; 1T135-1T136). He has been employed at UMDNJ since 1987 and has a background in epidemiology (1T121-1T122). He has not had a patient practice since he joined the faculty and did not have one in his previous position at the National Cancer Institute (1T122; 1T126-1T127). From 1987 until January 1997, Dr. Weiss's academic base salary was supplemented by a patient service or "dean's faculty practice" component of \$15,000 (CP-14; CP-16; CP-18).

---

<sup>3/</sup> "C-" refers to Commission exhibits; "CP-" refers to Charging Party exhibits; and "R-" refers to Respondent exhibits.

Background -- Faculty Salaries at NJMS

4. Faculty members at NJMS include basic scientists and clinicians; the latter are usually medical doctors who have a patient practice (1T26). Faculty salaries at NJMS are potentially comprised of three primary parts: the academic base, the faculty practice component, and the patient services component (2T40). The academic base salary part is taken from the negotiated salary range for that faculty member's title, as set forth in the AAUP contract Article VIII, "Salary Scales and Salary Adjustments" (R-8, at 14; 1T91; 2T144). The faculty practice and patient service components of a faculty member's salary, if any, are initially established through discussions between the University and the individual faculty member at the time the employee is appointed (2T41-2T42).

5. A faculty practice component is the compensation which clinical staff receive through their mandatory participation in the faculty practice plan (CP-28). The plan collects all income earned by physicians for patient care, some of which is used to support NJMS and some of which is distributed to physicians through faculty practice components (CP-28). Payments are made from a separate corporation rather than the University payroll (2T135).

6. Patient service components are used at NJMS and Robert Wood Johnson and were first instituted between 1972 and 1974 (1T32;

2T41-2T42; 2T74).<sup>4/</sup> Historically, the primary purpose of patient service components was to compensate clinical staff for services they provided to uninsured patients (2T40). They still serve that function (2T40). They are also used to compensate faculty for performing administrative duties or to make faculty members' salaries competitive with those of their medical counterparts outside the University (2T41-2T42; see, e.g. R-13 through R-17; R-19). Patient service components range from \$3,000 per year to nearly \$100,000 per year (2T139; R-9 through R-44; R-54).

While patient service components were initially instituted for clinical staff, they are now also part of the compensation of some non-clinical faculty, such as Dr. Weiss (2T72). Robert D'Augustine, UMDNJ's Associate Vice President for Academic Administration, estimated that roughly 300 to 500 of the 1200 AAUP unit members receive patient service components (2T135).

7. While the faculty practice and patient service components are the most frequent stipends that may be added to a faculty member's base salary, there are other stipends as well (2T40). One example is a "dean's faculty practice component" which Weiss received for the first several years of his employment (CP-16;

---

<sup>4/</sup> Faculty members at NJDS may also receive patient service components. However, their use at NJDS is more akin to a "guaranteed" faculty practice component in that it is offered in the first years of employment to help members build up a practice but is then phased out (2T134-2T135). On occasion, however, patient service components at NJDS may be paid indefinitely (2T135).

CP-17). Although the term was not defined at the hearing, in Weiss's case it was a salary supplement which was arranged by the NJMS dean and which was not connected with patient care (1T134-1T135; 1T127; 3T35).

8. Patient service components are often set when a faculty member is first appointed (2T42). A total salary is negotiated with the faculty candidate and then broken down into components based on the negotiated academic base salary permitted for various ranks and titles (2T42). A patient service component may also be added to a faculty member's salary after his or her initial appointment (2T42; R-27).

Once set, a patient service component may remain at the same level for many years, since negotiated across-the-board increases are not applied to the supplemental components (2T6; R-8, December 9, 1994 side letter). However, between 1977 and 1996, UMDNJ increased individual's patient service components on approximately 135 occasions; decreased them in 11 instances and eliminated them twice (R-54; R-9 through R-44).

#### The Negotiations Process and Faculty Practice and Patient Service Components

9. AAUP was certified as the faculty majority representative in June 1972 (CP-1; CP-2). Early in 1972, UMDNJ expressed its concern that the AAUP might try to "negate or reduce the faculty practice efforts" of the clinical faculty (1T29). In response, AAUP's president advised the Faculty Practice Board of NJMS by letter of May 16, 1972, that it recognized that there



would be faculty practice programs at NJMS, Robert Wood Johnson and NJDS. He then stated:

[T]he incomes generated through these programs, used to supplement the basic pay scale of the clinical faculties, will not be the concern of the AAUP. However, if the Faculty Organizations of each campus request our help in these programs we would stand ready to aid them. (CP-1).

AAUP sent a newsletter to faculty members including the same statements (1T30; CP-2).

10. Patient service components were instituted in around 1974 (1T32; 2T42; 2T74). Joyce Orenstein, executive vice-president of AAUP, first became familiar with patient service components in 1988 (1T51). At that time, 31 members of the NJMS clinical faculty wrote to AAUP and expressed dissatisfaction with the fact that negotiated increases had not been applied to clinical or patient service components, and that they had not been so apprised of this practice when they were hired (CP-3).<sup>5/</sup> The faculty members asked the AAUP to address these issues in upcoming negotiations (CP-2).

Accordingly, during negotiations for a 1989-1991 agreement, AAUP did propose across-the-board increases that would apply to base salary as well as to clinical and patient service components (CP-5; 1T62). UMDNJ did not agree to across-the-board increases for the clinical and patient service components, and eventually AAUP dropped its demand. The parties entered into a side letter of agreement,

---

<sup>5/</sup> "Clinical component" appears to be another term for faculty practice component.

appended to the 1989-1991 contract, which stated:

The University agrees that in letters of appointment to faculty who will receive patient care supplements as part of their salaries, the amount of the patient care supplement will be specified along with information that such supplements are not subject to the across-the-board salary increases specified in Article VIII, Section 1 of the agreement<sup>6/</sup> (CP-7; R-7, April 5, 1990 side letter).

An identical letter was appended to the 1992-1995 contract (R-8, December 9, 1994 side letter).

11. Aside from its 1989 proposal to apply across-the-board increases to patient service components, AAUP has never attempted to negotiate any other aspect of patient service components (1T77-1T78; 1T91). It presented no proposals related to patient service components during negotiations for the 1992-1995 agreement, nor did it make any proposals for the 1995-2000 contract (1T91; 3T87-3T88). Even after January 1997, when Weiss was notified that his component would be reduced, the AAUP did not ask to negotiate over patient service component alterations.

12. While there are no provisions in the parties' 1992-1995 agreement governing patient service components, two clauses address adjustments to academic base salary. Article VIII, section 12, sets forth procedures by which department chairs may seek approval for payments for additional services (R-8, p. 21). That section permits AAUP to grieve such an adjustment, but

---

<sup>6/</sup> It appears that the parties intended the term "patient care supplements" to mean both patient service and faculty practice components.

specifies that it "does not apply to the faculty practice or patient care component of salary or to responsibilities attributable to faculty practice or patient care activities of bargaining unit members" (R-8, p. 21).<sup>7/</sup>

13. Article VIII, paragraph 11 of the parties' agreement, titled "Salary Matching", permits UMDNJ to increase a unit member's salary in response to a bona fide outside employment offer (R-8, p. 21). This paragraph, like all of Article VIII, applies only to the academic base, not patient service or faculty practice components (2T118-2T119).

14. Article XXIV of the parties' 1992-1995 agreement provides:

**Rules Governing Working Conditions**

This Agreement incorporates the entire understanding of the parties on all matters which were the subject of negotiations. Except as otherwise provided, during the term of this Agreement neither party shall be required to negotiate with respect to any such matter except that proposed new rules or modifications of existing rulings involving terms and conditions of employment, whether in the Bylaws or elsewhere, shall be presented to the Association and negotiated upon the request of the Association as may be required pursuant to the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

---

<sup>7/</sup> The clause was negotiated in connection with the settlement of an unfair practice charge that AAUP filed when a unit member, Marvin Schwab, Ph.D., received payments in excess of his negotiated salary for performing additional services (1T73; 2T101-2T102).

15. Prior to 1997, Orenstein believed that patient service components were established upon appointment and that, once fixed, they remained relatively constant over a faculty member's career (1T76).<sup>8/</sup> Orenstein's view was based on discussions with faculty members and on D'Augustine's explanation of the components during the 1989-1992 negotiations (1T76). Orenstein's notes from a March 20, 1989 negotiations session summarize D'Augustine's explanation as stating that patient service components were designed:

[T]o compensate clinical faculty at University Hospital who treat medically indigent. Varies little from year to year. Mostly paid for by the hospital. It is supposed to equal what hospital gets paid for servicing the indigent. It does not increase because hospital finds itself in tighter straights [sic] as years go by. Same [sic] faculty who don't provide care to indigent patients also get this supplement. This is compensation to the hospital for uncompensated care. They can negotiate but can't be very accommodating about it. They don't have the funds to increase patient care components. They have a contract with the faculty members to pay the patient care component. The patient care component varies considerably from faculty member to faculty member. Faculty are given a breakdown of salary when they enter [CP-6].

---

<sup>8/</sup> I credit Orenstein's testimony that she believed most faculty members' supplements would not vary, and that any variations would be slight. Her testimony is also corroborated by D'Augustine, who testified that he told another member of the AAUP negotiating team that patient service components were infrequently changed, that most were paid for out of the hospital's funds, which were not increasing, and that UMDNJ was not in a position to offer regular increases (2T115).

The University's Notice to AAUP  
of Changes in Faculty Patient  
Service Components

16. Despite Orenstein's belief that faculty members' patient service components varied little, UMDNJ changed these components on many occasions between 1974 and 1996. D'Augustine's office processes all paperwork related to changes in faculty compensation. The process is ordinarily initiated when a faculty member's department chair makes a request to the school dean to change a patient service component (2T39; 2T57; 2T96). If the dean agrees, the dean submits a "faculty personnel action approval form" to D'Augustine (2T57). These forms show the recommended personnel action (reappointment, salary increase, etc.), and the apportionment of the salary between the academic base and any patient service or faculty practice components (R-9 through R-44). These forms may be accompanied by memoranda explaining the basis for the proposed personnel action (R-9; R-11; R-14). AAUP does not receive these materials (2T60).

17. After a personnel action form is received, D'Augustine's office prepares "summary sheets" describing the proposed personnel action (2T57). These sheets are presented to the University's Board of Trustees, which acts on the proposed changes (2T43-2T44). The Board meets ten months a year, and final Board action on a proposed change is recorded in the minutes of the pertinent Board meeting (2T47-2T48). All of the recommended changes listed in the summary sheets (R-54) were approved without alteration by the Board of Trustees (2T48; 2T63).

18. Since at least 1981, D'Augustine's office has an on-going practice of sending AAUP the Board summary sheets a few weeks after each Board meeting (1T86-1T87; 2T44).<sup>9/</sup>

19. The summary sheets show the faculty member's name, title and school assignment; the type of personnel action proposed; the effective date of the proposed change; whether the employee is employed full-time; and the current and recommended salary for the staff member, each broken down into components (R-54). A recommended change in a patient service component is listed, along with other proposed changes of the same type, under a heading such as "Change of Salary -- Patient Service Component"; "Change in Salary"; "Change in Status"; or "Increase in Patient Service Component" (R-54).

20. Between the period 1974 to 1996, D'Augustine forwarded to AAUP "many hundreds" of summary sheets indicating Board personnel actions; only a "handful" of the summary sheets AAUP received involved changes in the patient services supplement (2T120). The relevant summary sheets from 1974 to 1978<sup>10/</sup> and from 1985 to 1993

---

<sup>9/</sup> That practice was in place when Orenstein joined AAUP in late 1981 and when D'Augustine began to prepare the summary sheets in 1983 (1T87; 2T50-2T51).

<sup>10/</sup> Only three sheets from 1979 to 1984 are included because Board of Trustees records from this period are missing, although D'Augustine believed a comparable number of personnel actions were effected and summary sheets were forwarded to AAUP during those years as well (2T52). Also not part of the record are summary sheets which show only proposed changes in patient service components attributable only to a change in full-time or part-time status (2T52).

show that the Board acted to change faculty patient service components with some frequency and regularity (R-54; 2T48). Seven such supplements were approved in 1996 and in 1995, and three in 1994 (R-9 through R-44).<sup>11/</sup> For 1993, sixteen changes were approved over at least three meetings; in 1992, five changes were made at four meetings; in 1991, three changes at two meetings; in 1990, five changes at three meetings; in 1989, eight changes at four meetings; in 1988, nine changes were presented at three meetings; in 1987, eight changes at five meetings; in 1986, five changes at three meetings; in 1985, ten changes at four meetings; and in 1982 four changes at two meetings (R-54). One change was approved in 1981 (R-54).

21. The record also includes faculty personnel action forms, but not Board summary sheets, for recommended changes in patient service components from 1994 through 1996 (R-9 through R-44). Although the AAUP was not provided with the personnel action forms at the time, the actions described in R-9 through R-44 correspond to summary sheets the AAUP did receive for 29 of the 34

---

<sup>11/</sup> Because the record does not include Board summary sheets for 1994 to 1996, I am not able to ascertain the number of meetings at which the Board considered changes in patient service components during this period.

patient service component changes which are detailed in R-9 through R-54 (1T87; 2T58; 2T63; 3T90).<sup>12/</sup>

22. All of the Board summary sheets in R-54, CP-37, and CP-38 show a faculty member's current and proposed salary, each broken down into components. Therefore, I find that an individual reviewing a Board summary sheet would be able to ascertain those instances where the Board had been asked to approve a change in a patient service component. With respect to some of the sheets in R-54, that fact also could be gleaned by reviewing the headings on the sheet, without examining the actual proposed and current salaries of any faculty member (R-54, sheets for July 26, 1990, and June 10 and July 22, 1993).

#### AAUP Review of Board Summary Sheets

23. Orenstein's assistant, Amy Reeder, reviews the Board summary sheets in order to determine who has been added to the unit and who has left, as well as to ascertain changes in base salary (1T100-1T101). Orenstein directs this type of review so that AAUP has an accurate list of members and their base salaries (1T100-1T101). In addition to the Board summary sheets from

---

<sup>12/</sup> The AAUP attempted to match up the personnel action forms submitted into the record with corresponding summary sheets recording the Board's actions within two months (3T91-3T92); D'Augustine stated that a proposed change might not be presented to the Board until four to seven months after initially recommended, although the usual time period was two to three months (3T98). Therefore, I do not infer that the AAUP was not informed about all of the patient service supplement changes through receipt of the Board summary sheets.



D'Augustine's office, the University's Director of Labor Relations Howard Pripas sends AAUP a list of faculty members, at least semi-annually; together with their schools and departments, their dates of hire and their salaries (3T71). While AAUP also uses these lists to keep track of unit members and their salaries, the lists do not distinguish between different salary components (3T71; 3T78).

Orenstein herself does not routinely review the Board summary sheets, although they might be brought to her attention if Reeder notices a problem with a change in salary or has a question (1T89). Orenstein has sometimes asked D'Augustine about salary changes reflected on the summary sheets (1T87-1T89; 3T73). Orenstein never asked Reeder to track changes in patient service components because it was Orenstein's understanding that the components did not change (1T101).

#### Increases in Patient Service Components

24. Patient service components were increased on at least 99 occasions between 1974 and 1993 (R-54).<sup>13/</sup> Thirty-nine of the increases occurred before 1981, before AAUP can be deemed to have received the Board summary sheets.

Occasionally, the sheets note that an increase was recommended because of a change in title, an assumption of administrative responsibilities, or an increase in patient care

---

<sup>13/</sup> UMDNJ uses that figure; my review of R-54 indicates that there are increases listed for November 21, 1974 that are not identified in its post-hearing brief.

responsibilities. But in most instances, the reason for the recommended increase is not stated and cannot be inferred from the summary sheet (R-54). Some of the increases were proposed to be effective in July, coinciding with faculty reappointments. However, many of the increases were scheduled to take effect at other times of the year (R-54; 2T94; 2T106-2T107). Between 1993 and 1996, only 11 of the 35 changes coincided with the faculty member's reappointment (R-9 through R-44).

In all but two cases, the increase in the patient service component resulted in an increase in the faculty member's total salary.<sup>14/</sup> On some occasions, the component was increased by a significant amount (R-54, June 10 1993 summary sheet -- component increased from \$19,648 to \$61,167).

25. Patient service components were increased on 32 occasions between 1993 and 1997 (R-9 through R-44). The faculty personnel action forms and memoranda related to these changes indicate that the components were at times increased to compensate faculty members for an increase in indigent patient care (R-18 to R-20; R-22; R-24), and on other occasions to make salaries

---

<sup>14/</sup> Exceptions are Franklin C. Behrle and Leonard Bielory. Behrle's patient service component was increased, but his academic base and total salary were decreased, presumably because he moved from chairman of pediatrics to professor of pediatrics (R-54, summary sheet for July 25, 1985). Similarly, Bielory's patient service component was increased, but his total salary was decreased because a "dean's first year" stipend was eliminated (R-54, summary sheets for July 24, 1986).

competitive with the faculty member's medical counterparts outside the University (R-11 through R-14; R-20; R-21). One increase was tied to a faculty member's assuming administrative responsibilities and thus was connected with his assuming a non-unit title (R-27). On some occasions, a faculty member's patient service component was significantly increased (R-22 -- component increased from \$30,000 to \$45,000; R-17 -- component increased from \$7,535 to \$22,035).

#### Decreases in Patient Service Components

26. UMDNJ has identified 13 instances where a faculty member's patient service component was reduced or eliminated -- ten between 1974 and 1992 and three between 1993 and 1996. In four cases, the record does not disclose the reason for the actions.

Those changes are as follows:

August 12, 1976 -- Elliot Stein, M.D. -- patient service component reduced from \$11,019 to \$4,699 and overall salary reduced from \$38,549 to \$33,508.

July 28, 1977 -- Joseph Adamcik, M.D. -- patient service component reduced from \$7,588 to \$4,525 and total salary reduced from \$40,063 to \$37,000. Jose Iglesias, M.D. -- patient service component of \$9,416 eliminated and total salary reduced from \$50,786 to \$41,370.

April 11, 1985 -- Milford Parker, M.D. -- patient service component reduced from \$14,424 to \$7,424 and overall salary reduced from \$86,312 to \$79,312.

The Board summary sheets for these changes do not indicate the basis for the modifications or reflect any changes in duties or title. Except for Parker, these reductions occurred before AAUP received Board summary sheets.

In three cases, a patient service component was decreased at the same time the academic base was increased due to a promotion. Those changes, which resulted in an increase in total salary, are as follows:

May 14, 1987 -- Kumar Dasmahapatra, M.D. -- reduction in patient service component from \$24,024 to \$16,449, but in connection with an increase in overall salary from \$74,230 to \$76,039 and a promotion from assistant to associate professor. The change is listed as a "salaried promotion."

May 18, 1989 -- Alluru Reddi, M.D. -- patient service component reduced from \$5,317 to \$4,074, but in connection with an increase in total salary from \$67,770 to \$70,274 and a promotion from assistant to associate professor. The change is listed as a "promotion with tenure."

June 11, 1996 -- David Sirois, D.D.S., Ph.D. -- \$20,000 patient services component eliminated in connection with promotion from assistant professor to the director of the division of oral medicine but, due to an increase in the academic base, Sirois' salary increased from \$108,976 to \$112,483.

In four other cases, a patient service component was decreased when the faculty member was "returned to the regular faculty" after serving in an administrative position. Those cases are:

December 12, 1985 -- John Josimovich, M.D. -- patient service component reduced from \$22,157 to \$15,157 and overall salary reduced from \$96,903 to \$92,036 in connection with a change in title from acting chair and chief of services of obstetrics and gynecology to a professor in that department. The Board summary sheet notes that it is a "change in administrative status."

December 14, 1989 -- Kenneth M. Klein, M.D. -- initial reduction of patient service component

from \$20,599 to \$17,599 and a reduction in total salary from \$104,328 to \$101,328 in connection with change from acting chair of pathology to professor of clinical pathology. Action is listed as a "change in administrative appointment." The same sheet lists a further reduction of the patient service component three months later in connection with a change in title from professor of clinical pathology to assistant dean for student affairs. However, the academic base was increased and Klein's total salary remained at \$101,328.

December 10, 1992 -- Brian Aurori, M.D. --  
reduction in patient services component from \$70,000 to \$65,000 in connection with change in title from assistant professor of othopedics and "acting chief of service" to assistant professor of othopedics. Change is listed as a "return to regular faculty."

December 10, 1992 -- John J. McKeon, M.D. --  
reduction in patient services component from \$69,552 to \$59,552 and reduction in overall salary from \$140,000 to \$130,000 in connection with cessation of service as acting chair of othopedics. Change is listed as a "return to regular faculty."

The specifics of the two other reductions are as follows:

October 7, 1993 -- Joseph Benevenia, M.D. --  
reduction in patient service component from \$76,536 to \$66,536 and reduction in total salary from \$140,000 to \$130,000. Modification is listed on the faculty personnel action approval form as a change in title and source of funding.

The decrease in Benevenia's component occurred at the same time UMDNJ assumed full responsibility for his salary, a significant portion of which had previously been paid by United Hospital (2T104). Also at that time, he was moved from the non-tenure to the tenure track (2T104).

October 11, 1995 -- Salma Ali, M.D. -- \$21,600 reduction in patient service component and decrease in overall salary from \$171,541 to \$149,941. A memorandum accompanying the form indicates that the decrease is attributable to a workload reduction of 36 hours per month.

When Ali's patient service commitment was reduced, she apparently agreed to the stipend reduction (1T93). However, D'Augustine stated that Ali's component would have been reduced whether or not she had agreed to the reduction (3T23). In October 1995, Ali was advised in writing by her department chair that her reduced patient service component would be reviewed annually by her department chair, and the amount would be contingent upon her providing patient care as assigned by the chair (CP-28; 2T138).

#### Weiss's Employment and Salary History

27. The specifics of Weiss's employment and salary history are essentially undisputed. On February 20, 1987, Donald Louria, M.D., chairman of the department of preventive medicine and community health, offered Weiss a position as assistant professor of preventive medicine and community health at an annual salary of \$75,000 comprised of a \$60,000 academic base and \$15,000 "that will come from other sources potentially including faculty practice, grants, reimbursements for supervising or consulting for laboratories, etc." (CP-14). The letter continued that the Dean of NJMS had agreed to guarantee this salary for two years (CP-14).

In July 1987, the Board appointed Weiss to the position, effective July 24, 1987 through June 30, 1991 (CP-16). However, Weiss did not sign his formal appointment letter until May 1988,

because the letter initially submitted for his signature included the wrong salary figures (1T124-1T125). In addition, it set forth rules concerning clinical practice through the faculty practice plan that he did not believe pertained to him (CP-15; 1T125). A revised appointment letter set his salary for the first fiscal year at \$60,000 academic base and a \$15,000 "dean's faculty practice component" that expired on July 23, 1989 (CP-16). The record does not include communications extending the faculty practice component from July 1989 to July 1991, when Weiss was reappointed, but there is no dispute that it did continue. Louria was not aware how the \$15,000 was financed during 1987 through 1991, but he knew it did not come out of his department's budget and believed the Dean of NJMS arranged for the funds (2T35).

28. The \$15,000 salary component was also an issue at the time of Weiss's July 1991 reappointment. In July 1991, Weiss learned that the letter reappointing him from July 1, 1991 through June 30, 1994 set a base salary of \$90,804, and a \$15,000 dean's faculty practice component (1T129-1T131). However, it also specified that the component would expire on December 31, 1991, and that his salary would be reduced unless alternate funding was obtained (CP-17; 1T129). Louria told Weiss he knew nothing about the letter, but that he would work it out and Weiss's salary would not be reduced (1T129-1T130). In a September 1991 memorandum to Weiss, Louria stated that:

[I]t is clear that we have to pick up your faculty practice component of \$7,500 between

now and July 1. We will do that. Starting July 1, the amount needed will be \$15,000 [CP-30].

The memorandum continued that, because the \$15,000 was a lot for the department to absorb, Weiss should, in applying for grants, request as much salary money as possible since half of that amount would be given to the department (CP-30). Louria also directed Weiss to consult with the department of medicine about doing oncology consultations in order to "earn part of that \$15,000 directly through faculty practice as originally planned" [CP-30]. The record does not indicate any further discussions about the need for Weiss to offset the \$15,000 until early 1995 (1T135-1T136).

29. Effective July 1993, Weiss was granted tenure and promoted to associate professor (CP-18). The appointment letter established an annual salary of \$104,017: comprised of an academic base of \$89,017, and what was for the first time referred to as a "patient service component" of \$15,000 (CP-18). Unlike the previous letters, there was no reference to an expiration date for the component and Weiss believed that it was now a permanent part of his salary (1T134).

However, there was no permanent source of funding for the component because UMDNJ rejected Louria's request to add the \$15,000 to the State-funded portion of the department's budget (3T57-3T58). Instead, from 1991 forward, the stipend was funded out of department "soft money" -- i.e., the variable amount of overhead monies that the department receives from grants generated by department members (3T28-3T29).



Louria apparently knew in 1991 or 1993 that Weiss's \$15,000 component would not be funded in the department budget. Louria waited until 1995 to renew his efforts to have Weiss offset the \$15,000 (1T135-1T136). Louria did not seek to discontinue Weiss's stipend earlier in recognition of the fact that Weiss had obtained a very large grant from the National Institute of Health that continued until 1994 (3T29-3T31; 3T57-3T58). However, in a November 1996 memorandum, Louria advised Weiss that he had not thus far offset the \$15,000 patient service component; that the department could no longer afford to do so; and that Louria would "move to have one half of it cut in January 1997 and the other half removed in January 1998" (CP-19). The January 1997 reduction was effected (1T138). AAUP filed this charge in May 1997.

#### ANALYSIS

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over their terms and conditions of employment. Patient service components are part of faculty members' compensation; compensation is a mandatorily negotiable term and condition of employment. See Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989); Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1, 7 (1973). Section 5.3 also defines an employer's duty to negotiate before changing working conditions:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

See also Hunterdon, 116 N.J. at 338 (1989); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 1 (1978). The Act requires negotiations, but not agreement.

There is no dispute that UMDNJ reduced Weiss's patient service component without negotiations. The AAUP contends that this reduction in compensation is a unilateral change in terms and conditions of employment which violated section 5.4a(5) and 5.4a(1) of the Act. UMDNJ counters that it had a longstanding practice of establishing and modifying patient service components, that the AAUP had notice of this practice, and therefore AAUP has waived its right to negotiate over further alterations of faculty patient service components, both by its acquiescence to prior changes and by the "zipper" clause in the parties' collective agreement.

AAUP denies that it acquiesced to any practice of reducing those components. It argues that it had no legally cognizable notice of changes in patient service components. AAUP further maintains that there was an established practice of not unilaterally reducing patient service components without the faculty member's consent and in circumstances not connected with an appointment or reappointment.

An employer may not unilaterally change an existing, negotiable working condition of employment unless the representative has waived its right to negotiate. See, Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1997), aff'd 25 NJPER 357 (¶30151 App. Div. 1999), certif. granted, \_\_\_ N.J. \_\_\_ (2000); Barneгат Tp. Bd. of Ed., P.E.R.C. No. 91-18, 16 NJPER 484

(¶21210 1990), aff'd NJPER Supp.2d 268 (¶221 App. Div. 1992). Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978). A waiver will be found if the employee representative has expressly agreed to a contractual provision authorizing the change, or it impliedly accepted an established past practice permitting similar actions without prior negotiations. In re Maywood Bd. of Ed., 168 N.J. Super. 45, 60 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987). If the employer proves that the employee representative has waived its right to negotiate, it has the right to make the change unilaterally. Middletown, 24 NJPER at 30. A finding that an employer acted lawfully pursuant to an established practice still allows a representative to negotiate for future changes in the practice. State of New Jersey (Stockton State College), P.E.R.C. No. 90-91, 16 NJPER 260 (¶21109 1990); Hamilton Tp. Bd. of Ed., P.E.R.C. No. 90-80, 16 NJPER 176 (¶21075 1990), aff'd NJPER Supp.2d 258 (¶214 App. Div. 1991); Middletown.

First, UMDNJ contends that AAUP waived its right to negotiate over the change by its inclusion of the "zipper" clause in the 1992-1995 contract. A contract waiver of section 5.3 rights will only be found where the contract clearly, unequivocally and specifically authorizes the change. Red Bank; Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985); Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983). Here, there

is no contract provision that addresses setting or modifying the patient services component of salary. Broadly worded "zipper", "management rights", or "fully bargained" clauses alone do not constitute waivers of the right to negotiate over specific subjects. County of Camden, P.E.R.C. No. 94-121, 20 NJPER 282 (¶25143 1994). I find that there is no contractual waiver in this case.

Second, UMDNJ alleges that the AAUP has waived its right to negotiate by its past acquiescence to UMDNJ's changes in the stipend amounts. The Commission has on several occasions considered similar claims. In Stockton State College, the Commission found that the employee representative waived its right to negotiate over compensation for a particular workshop by acquiescing to the employer's unilateral decision to set compensation, or no compensation, for previous workshops.

In Monmouth Cty. Sheriff, P.E.R.C. No. 93-16, 18 NJPER 447 (¶23201 1992), the Commission found that the employer did not violate the Act when it assigned civilians to perform clerical work previously performed by corrections officers; the correction officers' representative had not objected to such assignments in the past. In New Jersey State Colleges, P.E.R.C. No. 89-129, 15 NJPER 343 (¶20152 1989), the Commission found that the employer regularly modified travel regulations and policies without negotiations; therefore, it did have an obligation to negotiate before adopting more such policies. In Phillipsburg Bd. of Ed., P.E.R.C. No. 90-35,

15 NJPER 623 (¶20260 1989), the Board was found not to have violated the Act by unilaterally increasing the number of instructional periods for some teachers. The Board had regularly increased the number of instructional periods without objection by the employee representative. In South River, the Board did not violate the Act when it unilaterally eliminated an assigned duty period and proportionately reduced the teacher's salary. The Board's actions conformed to conduct in prior schedule reductions, which the Association had never sought to negotiate.<sup>15/</sup>

The rationale underlying these waiver cases is that an employer has every reason to believe, based on the employee representative's lack of objection to prior changes, that it would not object to the current changes. Monmouth. Whether a violation is found may depend on whether the current change is found to be similar to past unilateral actions by the employer that went unchallenged. For example, in Rutgers, the Commission found that the university had an established practice of not paying employees when it temporarily closed its facilities. It rejected the union's argument that the practice pertained only to emergency shutdowns, as opposed to the closing for routine maintenance which had triggered the charge. See also South River (no distinction, for purposes of

---

<sup>15/</sup> See also Rutgers, the State Univ., P.E.R.C. No. 82-98, 8 NJPER 300 (¶13132 1982) (employer did not violate the Act when it applied its policy of not paying its employees when it temporarily closed its facilities: policy had been announced ten years earlier and had been applied in several instances without protest).

applying 5.4a(5), between a salary and schedule reduction involving both assigned duty and teaching periods and one involving only an assigned duty period).

I conclude in this matter that it would be unfair, under all the circumstances of this case, to find that UMDNJ had an obligation to negotiate in good faith before it reduced Weiss's patient service component. AAUP was aware that the University had a longstanding practice of supplementing many faculty members' academic base salaries with patient and/or faculty service components. It knew that those components varied widely from one unit member to another, and that they were established by the University. Yet it never sought to negotiate over the amount of the components, how they were established, or the conditions, if any, on which they could be increased, decreased, or eliminated. With the exception of its 1989 proposal to apply percentage increases to the stipends (which was withdrawn), indeed, AAUP made a decision not to negotiate over faculty practice, and later patient service components. Negotiators for both AAUP and UMDNJ viewed patient service components as outside the sphere of negotiations, with negotiations being confined to the academic base. Article VIII of the parties agreement confirms that. Section 11, which mandates procedures for obtaining approval for payments for additional services, specifically excludes patient service (and faculty practice) components from its reach. The salary matching section of Article VIII also pertains only to the academic base.

In addition, I find that AAUP was notified of the changes through the Board summary sheets. Because of that notice, I find that the AAUP, through its inaction, has waived its right to negotiate additional changes in patient service components before they are implemented.

AAUP acknowledges that it might have been remiss in not scrutinizing the Board summary sheets more closely (Charging Party brief at p. 19). But it argues that it cannot be held to have waived the right to negotiate over the reduction in Weiss's component where it had no knowledge of prior changes in patient service components. I disagree.

In the cases summarized earlier, the representative did not dispute that it was aware of the employer's prior unilateral actions. And logically, a representative must have actual or constructive knowledge of an employer's prior conduct before it can be found to have waived its right to negotiate over similar actions. However, a representative can waive the right to negotiate through inaction after notice. See NLRB et al. v. Roll and Hold Warehouse and Distrib. Corp., 162 F.3d 513, 518 (7th Cir. 1998), citing W.W. Grainger v. NLRB, 860 F.2d 244, 248 (7th Cir. 1988); see also Hardin, The Developing Labor Law, 708-709 (3d ed. 1992). Consistent with that principle, a representative's actual knowledge of a pattern of past conduct is not required if the representative had adequate notice of the prior unilateral actions but never objected to them. In that circumstance, the rationale in South

River pertains. It would be unfair to find that an employer violated the Act where it had every reason to believe, based on a representative's response to past actions of which it was notified, that it would not object to similar actions. Compare Ridgefield Bd. of Ed., H.E. No. 80-31, 6 NJPER 96 (¶11050 1980), adopted P.E.R.C. No. 80-143, 6 NJPER 297 (¶11140 1980) (representative charged with knowledge of Board's four-year policy of requiring teacher attendance at PTA meetings where its building representatives knew of and abided by policy); Rutherford Bd. of Ed., H.E. No. 88-30, 14 NJPER 73 (¶19027 1987) (either party may be charged with knowledge of a term and condition of employment, but it must be open and notorious, as in Ridgefield). I thus conclude that AAUP did not have to have actual knowledge of prior changes in patient service components in order to have waived its right to negotiate over the reduction in Weiss's component -- provided it had notice of those changes. I conclude that it did.

AAUP received the Board summary sheets for at least fifteen years; it used the sheets to maintain and update its salary and membership records; and it reviewed the monthly submissions to ascertain changes in base salary. That review should have made AAUP aware that patient service components had been changed over the years. Between 25 percent and 42 percent of the faculty enjoyed such a salary component. For faculty members who had such a component, any change in base salary would be listed along with the current and proposed patient service and/or faculty practice



component. Stated another way, it would be difficult to review the sheets closely enough to ascertain changes in base salary without being aware that patient service components had been changed in well over 100 instances. Further, some of the monthly sheets in R-54 have underscored headings listing a "Change in Salary -- Patient Service Component;" or an "Increase in Patient Service Component."

While AAUP contends that changes to patient service components were buried in a mass of material, the 1997 and 1998 documents it has submitted as representative are not overly voluminous. Those sheets, as well as those in R-54, are not difficult to understand and plainly show changes in patient service components. The changes in patient service components are numerous enough, and appear on enough summary sheets, to find that the sheets provided notice that patient service components had been changed.

Further, UMDNJ was not required to alert AAUP either that the Board summary sheets included changes in patient service components. How and why UMDNJ began to forward the Board sheets was never established, but the practice allowed AAUP to keep track of all personnel actions affecting unit members (and other faculty members). At least with respect to patient service components, which the parties viewed as outside the sphere of negotiations, the burden was on AAUP to review the sheets and raise any issues it believed appropriate.

Finally, it is not significant that the summary sheets did not give AAUP advance notice of prior changes in patient service

components. If Weiss's patient service component had been the first ever changed by UMDNJ, an after-the-fact notice of the reduction would not have met UMDNJ's negotiations obligation under the Act. Where, as here, the employer claims that the representative did not object to, or demand negotiations over, prior similar actions, it is the notification as to those past actions that is significant.

Moreover, the fact that Orenstein's assistant reviewed the summary sheets, but Orenstein herself routinely did not, is of no consequence where the AAUP had delegated that responsibility to Orenstein's assistant. For all these reasons, I conclude that AAUP was notified of numerous instances where patient service components were changed; yet never objected to or demanded negotiations over those changes.

Finally, I believe the pertinent inquiry is whether AAUP had acquiesced to UMDNJ establishing and changing patient service components without AAUP's participation, not whether UMDNJ had an established past practice of reducing components in circumstances precisely like those here. Patient service components were adjusted on more than 100 occasions since 1981 and AAUP was notified through the Board summary sheets of those changes. The record shows that components were adjusted in response to individual circumstances as they arose, not in accordance with any established practice or formula. While most of the prior changes were increases, components were also reduced or eliminated without AAUP's objection, and without AAUP seeking to negotiate parameters or procedures governing

reductions or other adjustments. In this posture, I believe it would be unfair to find that UMDNJ violated the Act when it reduced Weiss's component. Given AAUP's general policy of not seeking negotiations over patient service components, and its lack of objection to numerous unilateral changes in the components, UMDNJ had every reason to believe that AAUP would not object to continuing that practice when it reduced Weiss's component. As with other adjustments to patient service components, the changes in Weiss's component were made after discussions between the individual faculty member and his department chair.<sup>16/</sup>

In this vein, I am not persuaded by AAUP's argument that UMDNJ did not show that it had ever reduced any other faculty member's component involuntarily. Whether or not an individual faculty member agreed with a decision to change his or her patient service component, the relevant inquiry is whether AAUP acquiesced in having one area of faculty compensation established, and changed, outside the negotiations process. See Stockton (representative

---

<sup>16/</sup> I recognize that D'Augustine at one point told AAUP that patient service components did not change very much. But he never said that they could not be changed at all, and both before and after that 1989 statement, AAUP had been notified of many instances where the components of individual faculty members had been changed. In any case, the decision not to seek negotiations over faculty practice components -- which was extended to patient service components -- does not appear to have been based on the assumption that the components did not change, but on a reluctance to interfere, unless requested, with the salary supplements that individual faculty members, usually clinicians, were able to negotiate with the University.

acquiesced in the unilateral setting of compensation or no compensation for workshops).

Further, it is not determinative that Weiss's reduction was not in connection with a reappointment. Many of the changes during the 1981-1992 period were made at times other than July, when faculty members are reappointed. For 1993 through 1996, only 11 of the 35 changes were tied to a reappointment (R-9 through R-44). Thus, UMDNJ's practice of changing patient service components was not confined to reappointments.


Under all the circumstances of this case, I conclude that UMDNJ did not breach its obligation to negotiate in good faith when it reduced Weiss's patient service component without negotiations. However, the AAUP's waiver of negotiations in the past does not preclude it from placing the issue on the negotiations table for the future. Stockton.

#### CONCLUSIONS OF LAW

1. UMDNJ did not violate 5.4a(1) or (5) when it reduced Weiss's patient service component.

#### RECOMMENDED ORDER

I recommend that the Complaint be dismissed.

  
Susan Wood Osborn  
Hearing Examiner

DATED: June 23, 2000  
Trenton, New Jersey