

P.E.R.C. NO. 87-113

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX,

Petitioner,

-and-

Docket Nos. SN-84-127
SN-85-8, SN-85-14

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO, LOCAL 1081,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines a request by the County of Essex to restrain binding arbitration of several grievances which the Communications Workers of America, AFL-CIO, Local 1081 had filed. The grievances allege that the County violated its collective negotiations agreement when it denied merit pay to several employees. The Commission finds that the grievances may be submitted to binding arbitration because they pertain to the mandatorily negotiable subject of compensation.

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COMMUNICATIONS WORKERS OF
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Respondent.

Appearances:

For the Petitioner, Audrey B. Little, Assistant County
Counsel

For the Respondent, Christina Norum, Esq.

DECISION AND ORDER

On June 12, August 22, and September 14, 1984, the County of Essex ("County") filed Petitions for Scope of Negotiations Determination. The County seeks restraints of binding arbitration of several grievances which the Communications Workers of America, AFL-CIO, Local 1081 ("CWA") has filed. The grievances allege that the County violated its collective negotiations agreement when it denied merit pay to several employees.

On September 26, 1984, the petitions were consolidated and a notice of hearing was issued.

On March 23, 1986, Hearing Examiner David F. Corrigan conducted a hearing.^{1/} The parties examined witnesses, introduced exhibits and filed post-hearing briefs.

On November 12, 1986, the Hearing Examiner issued his report and recommended decision. H.E. No. 87-33, 12 NJPER 872 (¶17372 1986) (copy attached). Applying County of Essex, P.E.R.C. No. 86-149, 12 NJPER 536 (¶17201 1986), appeal pending App. Div. Dkt. No. A-5803-85T7 ("Essex I"), he concluded that the County could legally honor its agreement to submit merit pay disputes to binding arbitration.

On December 2, 1986, the County filed exceptions. It asserts that the merit pay program here is a pure merit plan, especially for employees at the maximum of the salary range, while the Essex I program was predominantly an increment plan for advancement on the salary guide. It requests the Commission find, at least with respect to employees at the maximum step of the salary guide, that a merit payment is not "compensation," but a bonus for above average work performance.

On December 15, 1986, having received an extension of time, CWA filed a response urging adoption of the Hearing Examiner's report. It asserts that the payments are a form of compensation, negotiated as part of the overall wage package.

^{1/} The start of the hearing was delayed by motions to strike or exclude evidence, motions for summary judgment and litigation over interrogatories.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-15) are unchallenged and accurate. We incorporate them here, with a summary of the contractual provisions on merit pay and a few additional facts.

Article XIV of the 1981-83 contract is entitled Merit Payments, Anniversary Dates, and Promotional Adjustments.

Part I is entitled Introduction. It states that to foster productivity and development, the County will use a performance appraisal system to evaluate employees consistently and equitably and to inform employees of their strengths and weaknesses and the employer's expectations. The program is designed to reward employees whose overall work is considered meritorious.

Part II is entitled Interview Procedures. Before the work year, agency management sets the basic performance standards and employees and supervisors mutually formulate performance objectives at one initial interview. Employees are also informed of how they are supposed to perform their duties by setting projected goals for the evaluation period; an employee may grieve these goals and obtain a reconsultation. During the work year, the employees have two interviews at which their supervisors review and evaluate their work.

Part III is entitled Evaluation. It provides that performance evaluations will be based on goals set at the performance meetings six months before. Evaluations for merit payment will be conducted at the formal interview held once a year.

Part IV is entitled Criteria for Evaluation. It states that "[t]he criteria for evaluation will be determined at the initial interview, where objectives are established based on the basic standards set by management." The employee may grieve the objectives.

Part V is entitled Eligibility. It provides for two categories of performance evaluations:

- 1) Meritorious - eligible for merit payment. Employees in this group have consistently met all required minimum standards and have exceeded at least one area of essential performance.
- 2) Non-Meritorious - not eligible for a merit payment. Employees in this group have not consistently met all required minimum standards or have not exceeded in at least one area of essential performance.^{2/}

Meritorious employees below the maximum step of the salary range receive payments in the form of a step increase; meritorious employees at the maximum step receive payments in the form of a lump sum bonus, equal to an increment, outside base salary.

^{2/} There is a difference between this definition and the performance evaluation form used to implement the system. This definition presumably contemplates one of three ratings in each area of performance: exceeds minimum standards, meets minimum standards, and does not meet minimum standards. The definition then calls for an overall rating of meritorious or non-meritorious. The performance evaluation form, by contrast, requires the supervisor to check meritorious or non-meritorious after each employee objective. Some supervisors wrote "satisfactory" or "good" in the comment box after checking "non-meritorious."

Part VI is entitled Appeal Mechanism and permits employees to contest their performance reviews through negotiated grievance procedures. Section B states:

In those cases where no merit payment is awarded by the County, the matter may be appealed by the Union and only the Union to final and binding arbitration. There shall be a tripartite panel consisting of:

1. A Personnel Specialist from the County.
2. The International Representative of the Union.
3. A neutral arbitrator chosen on a rotating basis from a permanent panel of three (3) to five (5) arbitrators mutually selected.

When the 1981-83 contract was executed, the law required the Director of the Division of Public Welfare, Department of Human Services to review collective negotiations agreements covering County welfare employees. The Director approved and signed the 1981-83 contract.

The employer had sought a merit pay program during reopener negotiations under the predecessor contract, but disputes over compensation issues including merit pay led to a strike. According to a CWA witness, the strike ended when the parties agreed to retain the previous increment plan and to include a merit pay program in the next contract. This program was to be based on certain concepts concerning eligibility, bonuses for employees at the maximum step and binding arbitration of denials. A County witness did not recall whether representations about arbitration were made then.

During 1983, 570 employees were eligible for merit payments and 529 employees received them. For 1984, 579 employees were eligible and 489 received payments.

Twenty-one employees who did not receive merit payments filed grievances. The Hearing Examiner's report (pp. 7-14) digests these grievances and the County's responses. Each grievance alleges certain procedural violations, for example no initial interview or six-month evaluation, and certain substantive violations, for example unjust denial of payments despite supervisors' favorable recommendations. The County agreed that there were some procedural violations,^{3/} but upheld all denials of merit payments.^{4/}

3/ For example, the County admits some performance agreements were untimely, but claims that the employees' failure to have these defects cured indicates that the employees were not meritorious.

4/ The Hearing Examiner omitted three employees' claims. Gusta Robinson claims that the County violated her procedural rights by evaluating her on only the last part of the work year under a new supervisor and ignoring a previous supervisor's meritorious evaluation during the first part of the work year. She claims it violated her substantive rights by not fairly applying the performance standards for completing assignments. The County responds that the new supervisor had sufficient time to evaluate Robinson and that she did not exceed the minimum standards in at least one area of essential performance. Josephine Barbee claims that there was confusion in the field offices concerning the meaning of essential, necessary and desirable and that these notations were not on her final evaluation. The County responds that she signed a mid-year agreement specifying the essential, necessary and desirable objectives. Minnie Allen claims that there was no six-month review; the performance agreement was untimely; the memoranda submitted with her evaluation were unsigned and her work met the definition of meritorious. The County admits the procedural violations, but asserts she was fairly and properly evaluated. We correct a finding concerning Lillian Platt's

CWA also seeks to arbitrate four class action grievances described in the Hearing Examiner's report (pp. 14-15). They allege, essentially, that the County violated the contract when it changed evaluation standards and increased production standards in the middle of the evaluation period. The County responds that it had a contractual right to do so.

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts. [Id. at 154]

Thus, we do not decide the contractual merits of the grievances or any defenses the County may have. At issue here is simply whether

4/ Footnote Continued From Previous Page

claims: she alleges that her evaluation was unfairly based on incorrect production reports, not that favorable evaluations were ignored. Wilda Barringer alleged that the employer ignored commendations.

the County may legally honor its agreement, as part of the overall merit pay program, to submit disputes concerning merit pay denials to binding arbitration.

The New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., requires employers and majority representatives to negotiate in good faith over terms and conditions of employment. N.J.S.A. 34:13A-5.3. Such negotiations promote the State's declared policy by enhancing efficiency and stability in public employment. N.J.S.A. 34:13A-2; Woodstown-Pilesgrove Reg. High Sch. Bd. of Ed. v. Woodstown-Pilesgrove Reg. H.S. Ed. Ass'n, 81 N.J. 582, 591 (1980). Rates of pay and working hours surely fall within the category of terms and conditions of employment. Id. at 589; Englewood Bd. of Ed. v. Englewood Teacher Ass'n, 64 N.J. 1, 6-7 (1973). When the Legislature's recognition of the need for a viable bargaining process is the preeminent aspect of a negotiability dispute, then a negotiations obligation is appropriate. Id. at 591.

We have twice held that Essex County may legally honor its agreements to arbitrate disputes over merit pay denials. In Essex I, we considered a negotiated "merit/increment" program which conditioned salary guide step movement on usually meeting job standards. In Essex County, P.E.R.C. No. 87-48, 12 NJPER 835 (¶17321 1986), appeal pending App. Div. Dkt. No. A-1458-86T7 ("Essex II"), we considered a negotiated merit pay program conditioning salary guide step movement and \$300 bonuses for employees at the

maximum step on achieving all projected goals and standards. We held that these merit pay programs were part of the overall compensation structure and that the perverse effect of precluding independent review of merit pay denials would be to discourage negotiations over such programs. Compensation is a term and condition of employment and a bargaining process will not be viable if the employer need not negotiate and honor agreements over the compensation received by good as well as poor employees.^{5/} Lullo v. IAFF, 55 N.J. 409 (1970); Manalapan-Englishtown Reg. Bd. of Ed., P.E.R.C. No. 87-49, 12 NJPER 838 (¶17322 1986); National Treasury Employees Union v FLRA, No. 84-1292 (D.C. Cir. June 20, 1986).

This case is similar to Essex I and II. Unless the negotiated definition of "meritorious" is met, employees below the maximum step cannot advance on the salary guide (Essex I) and employees at the maximum step will not receive additional amounts equal to increments (Essex II). As in Essex I and II, the record demonstrates that the merit pay program was part of the overall compensation structure and that each aspect of that program, including the promise to arbitrate, was the subject of careful and detailed negotiations. Finally, the Director of the Division on Public Welfare approved this merit pay program, including the negotiated grievance procedure. Under these circumstances and

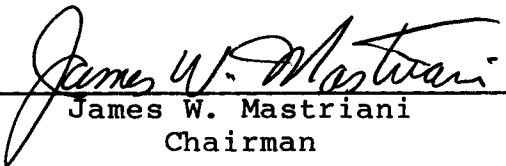
^{5/} Of course, parties may negotiate a plan providing for total employer discretion to determine merit pay recipients.

consistent with Essex I and II, we hold that the County may legally honor its agreement to arbitrate these grievances.^{6/}

ORDER

The County's requests for restraints of binding arbitration are denied.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Smith and Wenzler voted in favor of this decision. Commissioner Reid was opposed.

DATED: Trenton, New Jersey
March 23, 1987
ISSUED: March 24, 1987

^{6/} Independent of this reasoning, we note that the grievances raise questions about the procedures used to implement this program and the lack of notice about changes in production standards. Those questions may be submitted to binding arbitration. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982); State v. State Troopers NCO Ass'n, 179 N.J. Super. 80 (App. Div. 1981).

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COUNTY OF ESSEX,

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Docket Nos. SN-84-127,
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COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO, LOCAL 1081

Respondent.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission decline a request of the County of Essex to restrain binding arbitration of several grievances which the Communications Workers of America, AFL-CIO, Local 1081 has filed. The grievances allege the County violated its agreement with CWA when it denied merit pay to several employees and unilaterally altered the standards required for receipt of such payment. The Hearing Examiner, applying the Commission's decision in County of Essex, P.E.R.C. No. 86-149, 12 NJPER 536 (¶17201 1986) appeal pending App. Div. Dkt. No. A-5803-85T7, finds that the grievances pertain to the mandatorily negotiable issue of compensation and therefore may be submitted to binding arbitration.

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.

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Respondent.

Appearances:

For the Petitioner, David B. Ben-Asher, Essex County Counsel
(Elaine K. Hyman, Assistant County Counsel)

For the Respondent, Christine Norum, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On June 12 (SN-84-127), August 22 (SN-85-8) and September 14, 1984, as amended (SN-85-14), the County of Essex ("County") filed scope of negotiations petitions with the Public Employment Relations Commission. The County seeks restraints of binding arbitration of several grievances which the Communications Workers of America, AFL-CIO, Local 1081 ("CWA") seeks to submit to binding arbitration. The grievances allege the County violated its agreement with CWA when it denied "merit pay" to several employees and unilaterally altered the standards required for receipt of such payments.

On September 26, 1984, a notice of hearing and order consolidating the three scope petitions issued. I was assigned Hearing Examiner.^{1/}

On November 26, 1984, I denied the County's motion to strike evidence and brief submitted by CWA at the interim relief hearing. I also denied the County's motion to exclude evidence of negotiations history, prior agreements and past practices that might be submitted at a pending scope of negotiations hearing.

On October 21, 1985, I denied both parties' motions for summary judgment.

On February 21, 1986, I ordered CWA to submit answers to interrogatories submitted by the County.

On March 23, 1986, I held a hearing. Both parties examined and cross-examined witnesses, introduced evidence and argued orally. They filed post-hearing briefs by June 29, 1986.

Findings of Fact

1. Essex County is a public employer.
2. Communications Workers of America, AFL-CIO, Local 1081 is a public employee representative.

^{1/} On August 22, 1984, the County applied for interim relief seeking a temporary restraint of arbitration pending the Commission's determination. On August 27, 1984, following a hearing, Commission designee Edmund G. Gerber denied the application. The County appealed this denial to the Appellate Division. On September 4, 1984, Hon. Thomas S. O'Brien, J.A.D., ordered that "further arbitration proceedings...are stayed until a full part of this court acts upon the application." The parties then agreed to stay arbitration hearings pending the Commission's final determination of the scope of negotiations petitions.

3. CWA is the exclusive negotiations representative for employees employed by the County of Essex, Division of Welfare, in the following classifications: Social Worker; Income Maintenance Technician; Investigator, County Welfare Agency; Rent and Housing Coordinator, Welfare; Social Service Aide; and Home Economist.

4. Each of the employee's job classifications contains a salary range with a minimum and a maximum. The salary range contains eight steps: the first step is the minimum -- the eighth step is the maximum. Employees progress from step one to the maximum in annual increments.

5. Prior to January 1, 1978, the Essex County Welfare Board was the employer of the employees represented by the CWA (T34).^{2/} Under the contracts between the Board and CWA, employees with satisfactory service received annual salary increments. These increments were not automatic, but almost everyone received them (T42). Sometime after 1978,^{3/} the County became the employer. They were parties to a collective negotiations agreement from 1978-1981 with CWA in which the satisfactory service requirement for receipt of increments was retained. The County was not satisfied with this system, however, and therefore proposed, in 1981 negotiations, a merit increment program (T92). It proposed similar programs with the other collective negotiations units. It did so to

2/ T refers to transcript of March 23, 1986.

3/ The record is not clear as to exactly when.

reflect their philosophy that government should be more productive and that merit increments, for above satisfactory performance as opposed to automatic payments of salary increases, would encourage exceptional performance. With respect to the Division of Welfare, the County believed that such a program would eliminate or reduce backlogs and eligibility errors (T92-99).

6. The negotiations in 1981 were difficult, but ultimately an agreement was reached for July 1, 1981 through June 30, 1983 (J-1). The agreement includes a merit pay plan, which is at Article XIV. In short, incremental salary payments are no longer based on satisfactory service. Rather, they are conditioned upon receiving a "meritorious" evaluation. There are several components to this plan. First, at the commencement of the employee evaluation period, the manager and the employee meet to discuss standards that the employee would be required to meet (T103-104). As a result of this meeting, a "performance interview form" (P-7) would be completed which would list the "employee's objectives" ("listing the major jobs, tasks, actions or responsibilities of the employee") and describing the "objective standards," including "quality, quantity and timeliness" by which the employee would be judged (T104-105). After that form was completed, interviews would be held twice a year to review and evaluate the employee's job performance based upon the standards set forth in the performance interview form (T105). The employee would then be found to be either "meritorious" or "non-meritorious" in each "employee objective" category. Employees

found to be "meritorious" under the contract's definition receives a merit payment; conversely, those found "non-meritorious" would not receive a merit payment.

The contract defines the two terms:

- 1) Meritorious - eligible for merit payment. Employees in this group have consistently met all required minimum standards and have exceeded at least one area of essential performance.
- 2) Non-Meritorious - not eligible for a merit payment. Employees in this group have not consistently met all required minimum standards or have not exceeded in at least one area of essential performance.

Employees receive, in addition to merit increments, across-the-board salary and longevity payments which are not conditioned on meritorious service (T85-86). Employees who do not receive merit payments may nevertheless still have performed satisfactorily and such employees would not be subject to formal adverse action by the County.

The ranges and steps for Article XIV are contained in the "Ruling 11" document promulgated by the State of New Jersey, Division of Public Welfare.^{4/} Employees at the maximum step do not receive increments under Ruling 11, but under the parties 1981-1983 negotiated agreement they do receive "bonus" payments in the event they meet the requisite standards under Article XIV

^{4/} Ruling 11 has since been abolished but the parties have continued their reliance on it for the duration of the contract (T30).

(T57-58). Approximately 42-47% of the negotiations unit was at the maximum step during this period of time (T148). Prior to this agreement, the employees at the maximum received no bonus payments (T67).

7. Payments under this plan take two forms: employees not at the maximum step receive a salary adjustment to the next step in the range; those at the maximum step receive a lump sum bonus equivalent to the merit step payment.

8. The parties specifically agreed that denials of merit pay under this program could be contested at binding arbitration. Section VI(B) of Article XIV provides:

In those cases where no merit payment is awarded by the County, the matter may be appealed by the Union and only the Union to final and binding arbitration. There shall be a tripartite panel consisting of:

1. A Personnel Specialist from the County
2. The International Representative of the Union.
3. A neutral arbitrator chosen on a rotating basis from a permanent panel of three (3) to five (5) arbitrators mutually selected.

9. Under the merit evaluation plan, most people receive their increment. Less than 10% have had it withheld (P-8 and 9). This number has, however, increased in 1984 (P-9) and is significantly more than prior to the plan's institution (P-10).

10. CWA sought to submit to arbitration, pursuant to Section VI (B) of Article XIV, 19 grievances which allege that the County violated the contract when it denied merit payments to

certain employees it represents. The following are synopses of the claims CWA seeks to submit to arbitration and the County's position on the merits of the grievance.

(1) Leatrice Allen -- Income Maintenance Worker

Procedural Claims

The County did not conduct an initial interview; the performance agreement was reached late; there was no six-month evaluation; and Allen was evaluated on the basis of documents she was not shown.

Substantive Claims

Allen was unable to meet the caseload requirement because she was not assigned a full caseload; she was meritorious in one area of performance.

The County has agreed that certain procedural violations occurred, but asserts that her work performance did not meet the level required for merit pay.

(2) Wilda Barringer -- Income Maintenance Worker

Procedural Claim

The County did not conduct an initial interview.

Substantive Claim

The employee exceeded one area of essential performance and the evaluation erroneously attributes to her errors that she was not responsible for.

The County agrees that she exceeded one area of performance, but was below the minimum standard in other areas.

(3) Katie Brown -- Income Maintenance Worker

Procedural Claims

The County did not conduct a six-month evaluation; altered her required standard of performance without notifying her and evaluated her before the completion of the evaluation period.

Substantive Claims

She was not assigned enough cases to meet her required standard of performance.

The County's position is that she did not meet the production standards and was assigned a sufficient number of cases.

(4) Anthony Coscarello -- Social Worker

Procedural Claims

The County did not conduct an initial interview; the performance agreement was reached late; there was no six-month evaluation and the employee's grievance was sustained at step one of the grievance procedure.

Substantive Claim

Coscarello's job performance was meritorious and the County wrongfully denied his increment based upon a standard which was only in effect for a portion of the evaluation period.

The County contends that Coscarello did not meet the minimum standard in all areas of performance.

(5) Harold Drechsel -- Social Worker

Procedural Claims

The County did not conduct an initial interview; no performance agreement was reached and there was no six month evaluation.

Substantive Claims

The employee received meritorious evaluations from his supervisor in all areas, but was nevertheless denied his merit increment.

The County's position is that Drechsel had a responsibility to enter into a performance agreement and that his duties are being performed in a satisfactory manner, but he is not meritorious, notwithstanding his supervisor's evaluation to the contrary.

(6) Joseph Fornurato -- Rent & Housing Coordinator

Procedural Claims

There was no performance agreement implemented and no six-month evaluation.

Substantive Claims

Fornurato exceeded one area of essential performance, but was denied a merit increment for disciplinary reasons.

The County agrees that there were procedural violations, but submits that Fornurato's performance was only satisfactory and it was appropriate to consider his disciplinary record.

(7) Emil Herrmann -- Income Maintenance Worker

Procedural Claims

There was no initial interview; no six month evaluation; performance agreement was agreed to late; employee was not evaluated

over a twelve month period and employee was evaluated on the wrong standards.

Substantive Claims

Herrmann was initially evaluated as meritorious and his performance exceeded the required performance standard.

The County's position is that Herrmann did not consistently meet the minimum required standards.

(8) Samuel Jones -- Income Maintenance Worker

Procedural Claims

The County did not implement a performance agreement to correspond to the evaluation period; there was no six-month evaluation and the County modified the standards during the evaluation period.

Substantive Claims

Jones relied on his supervisor's instructions and was wrongfully evaluated as not meeting performance standards.

The County found that Jones did not meet all the required standards and did not excel in an essential area of performance.

(9) Suzanne Kelly -- Income Maintenance Worker

Procedural Claims

There was no performance agreement and no six month evaluation.

Substantive Claims

The employee's supervisor rated Kelly as meritorious. The employee was not able to meet production standards because the County did not assign her enough cases.

The County agreed that there was no performance agreement, but states that "Kelly had low monthly production...She did not excel in this essential area...."

(10) Rachel Matthews -- Social Worker

Procedural Claims

There was no initial interview; no performance agreement and no six month evaluation.

The County's position is that "although improprieties in the procedure of the merit agreement and evaluation [exist], there is no evidence of Matthews being meritorious...."

(11) Linda Moore -- Income Maintenance Worker

Procedural Claims

The performance agreement was not initiated until four months after the evaluation period began and there was no six month evaluation.

Substantive Claims

The employee was meritorious in all categories except attendance and this was caused by her physical handicap.

The County finds the evaluation submitted by its supervisor to be "questionable and unsupported." There is no evidence that Moore excelled in any one area and her incapacity does not mean that her absentee record is meritorious.

(12) Gwendolyn Morrison -- Income Maintenance Technician

Procedural Claims

Employee did not receive a timely performance agreement; a six-month evaluation or timely notification of her merit increment denial.

Substantive Grounds

Attendance should not have been the sole basis to deny merit payment.

The County contends her grievance is untimely.

(13) Abdul Muhammed -- Income Maintenance Worker

Procedural Claims

There was no six month evaluation and no performance agreement at the beginning of the evaluation period.

Substantive Claims

The employee's supervisor rated the employee meritorious, but payment was denied because of alleged misconduct.

The County contends the employee's performance is only satisfactory and therefore merit payment is not appropriate.

(15) Mary Nelson -- Income Maintenance Worker

Procedural Claim

The employee was found to be meritorious by her supervisor, but was denied her merit increment.

The County contends that Nelson's performance was satisfactory, but not meritorious.

(16) Lillian Platt -- Income Maintenance Worker/Social Worker
Procedural Claim

Performance Agreement was issued late; employee was not evaluated over twelve month period; no six month evaluation and employee was recommended for merit increment for Social Work performance.

Substantive Claim

The performance standards were not fairly applied because favorable evaluations were not considered.

The County's position is that Robinson performed her duties satisfactorily, but not meritoriously.

(17) Shirley Sanders -- Income Maintenance Worker

Procedural Claims

The employee did not receive a Performance Agreement at the beginning of the evaluation period and did not receive a six month evaluation.

Substantive Claims

The employee should have been rated meritorious because she completed all her work assignments.

The County's position is that Sanders' work is satisfactory, but not meritorious.

(18) Judith Schlegel -- Social Worker

Procedural Claims

There was no initial interview; no performance agreement; evaluation standards were changed without notice and the employee was evaluated as meritorious, but did not receive her merit increment.

The County's position is that a performance agreement is required for a merit payment and that "the Union did not provide documentation to substantiate that Schlegel performed meritoriously.

(19) Calvin Wong -- Income Maintenance Specialist

Procedural Claims

The performance agreement was not implemented at the beginning of the evaluation period; evaluation standards were changed without notice and the employee was not given a six month evaluation.

Substantive Claims

The employee's performance was meritorious and he should have received a merit increment.

The County's position is that Wong's work performance is not meritorious.

11. The CWA has also sought to submit four grievances to arbitration which challenge certain actions taken by the County with respect to the merit pay plan. The four grievances ("Boiler Plate Standards," "Food Stamp Class Action," "Gulfrey Hairston" and "MSR Class Action") allege the County violated the contract when it issued new evaluation standards after the beginning of the evaluation period and stated that employees would not receive merit increments unless they complied with the new standards allegedly contrary to the agreement that standards are to be implemented at the beginning of the evaluation period. The grievance further alleges that the County stated that employees would not receive merit increments unless they complied with the new standards

allegedly contrary to the agreement that standards are to be implemented at the beginning of the evaluation period.

The County contends that the new standards are in accordance with "Essex County standard operating policies and procedures" and within its rights under the collective negotiations agreement.

POSITIONS OF THE PARTIES

County of Essex

The County's position is that the grievances filed may not be submitted to arbitration because they pertain to the County's "management prerogative to set performance standards, modify performance standards and apply those performance standards to determine which employees are eligible for merit pay." It denies that employees who do not receive merit pay are "disciplined" within the meaning of the amendments to N.J.S.A. 34:13A-5.3 because the denial means only that such employees have not excelled -- their performance is merely "satisfactory."

CWA

CWA contends that the grievances may be submitted to binding arbitration because the denial of merit pay constitutes "discipline" within the amendments to N.J.S.A. 34:13A-5.3. It relies on East Brunswick Bd. of Ed., P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984), aff'd App. Div. Dkt No. A-5596-83T6 (3/19/85), certif. den. 101 N.J. 280 (1985). It further contends that even the dispute does not involve "discipline", it nevertheless is arbitrable

because the merit payments involve compensation, which is a mandatory subject of negotiations.

Legal Discussion and Analysis

My task is to determine whether the grievances submitted by CWA are within the scope of negotiations. In making this determination, I believe it appropriate to point out the narrow boundaries of the Commission's scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts. [Id. at 154]

Thus, I do not decide the contractual merits of the grievance or any defenses the County may have. For example, I do not decide whether the employees who had their increments withheld performed meritoriously as that term is defined in the parties' contract. The purpose for soliciting the filed grievances was not to explore the merits of the union's claims and the County's defenses -- rather, it was to aid in the determination of what the "matter in dispute" is so the Commission can make the appropriate determination whether it is within the scope of negotiations. N.J.S.A. 34:13A-5.4(d).

In making my determination, I must apply the principles set forth in County of Essex, P.E.R.C. No. 86-149, 12 NJPER 536 (¶17201 1986), appeal pending App. Div. Dkt. No. A-5803-85T7, which also involves the arbitrability of grievances contesting the denial of merit increment payments. In that case, the parties negotiated a compensation plan which rewarded meritorious employees with increments for doing a "good" job and in other respects punished a few employees by withholding increments for not "usually" meeting job standards. The Commission declined to decide whether such a dispute is disciplinary under section 5.3, but found that "under the circumstances of this case, the grievance still predominantly involves the mandatorily negotiable subject of compensation and is arbitrable." 12 NJPER at 538. The Commission explained why:

Lullo and its progeny reflect well-established management-labor relations case law holding compensation issues, including merit pay, mandatorily negotiable. In NLRB v. Katz, 369 U.S. 736 (1962), the Supreme Court confirmed that criteria and procedures for merit increases are mandatory subjects of bargaining, citing J. H. Allison & Co., 70 NLRB 377, 18 LRRM 1369 (1946), enforced 165 F.2d 766, 21 LRRM 2238 (6th Cir. 1948) cert. den. 335 U.S. 814 (1948). In J. H. Allison, the National Labor Relations Board held merit increases to be an integral part of the wage structure and a mandatory subject of bargaining. The rationale for holding merit increases to be a mandatory subject was spelled out in NLRB v. Berkley Machine Works, 189 F.2d 904, 28 LRRM 2176 (4th Cir. 1951). There the court said "[c]ollective bargaining with respect to wages might well be disrupted or become a mere empty form if the control over the wages of individual employees were thus removed from the bargaining area. Id. at 907. The County does not question that, standing alone, compensation is a mandatory subject of

negotiation. It contends, however, that this grievance is not arbitrable because it would require an arbitrator to review the evaluations behind its determinations that certain employees should not receive merit/increments.

We agree that public employers have a managerial prerogative to evaluate employees, choose evaluators and determine evaluation criteria for the purpose of implementing decisions on matters outside the scope of negotiations. Numerous court cases and Commission decisions have so held, drawing a distinction between these non-negotiable issues and generally negotiable evaluation procedures. In all these evaluation cases, the underlying decision the employer seeks to make is outside the scope of negotiations. Therefore, evaluation criteria used to implement these non-negotiable decisions are also non-negotiable.

This case, however, involves different facts and a different application of evaluation criteria. Unlike all the cases cited above, the underlying issue here is what compensation an employee will receive. The entire series of analyses concerning evaluation criteria in the above-cited cases dealt with evaluations to determine non-negotiable employer decisions. In this case, that premise of the evaluation analysis is missing.

In Willingboro Bd. of Ed., P.E.R.C. No. 80-46, 5 NJPER 553 (¶10240 1979), aff'd App. Div. Docket No. A-1756-79 (12/8/80), certif. den, 87 N.J. 320 (1981), we made the same distinction between evaluations to determine the receipt of mandatorily negotiable benefits and evaluations to determine non-negotiable personnel decisions. There we held arbitrable a grievance contesting the denial of a sabbatical leave, a mandatorily negotiable subject, and rejected the employer's claim that it had a managerial prerogative to determine criteria and assess applicants unilaterally. We approved this reasoning from a decision of the Special Assistant to the Chairman denying interim relief.

The Board refers to particular judicial decisions that it maintains support its

contention that "criteria" type decisions relating, for example, to an evaluation of the qualifications and abilities of particular applicants are neither negotiable nor arbitrable. However, the "procedures-criteria" dichotomy referred to by the Board has been consistently applied only in the context of negotiations and arbitrations relating to managerial prerogatives such as promotions, transfers, reductions in force (RIFs) and the like, not in the context of negotiations and arbitration concerning required subjects for collective negotiations such as sabbatical leave policies.

I conclude that to extend the "procedures-criteria" analysis to apply to mandatory subjects such as sabbatical leaves and other economic terms and conditions of employment would be to permit a public employer to unilaterally determine which teachers would receive particular economic fringe benefits that had been negotiated. There is no support found for this proposition in either Commission or judicial decisions in this State.
5 NJPER at 476.

The Appellate Division affirmed "essentially for the reasons expressed" in the two Commission decisions.

The Willingboro analysis is compelling. The merit/increments at issue in this case are compensation and compensation is negotiable. Cf. Township of Middletown, P.E.R.C. No. 85-122, 11 NJPER 377 (¶16136 1985)(evaluation system linked to economic benefits is negotiable).

In sum, we recognize that public employers may have an interest in determining economic benefits unilaterally and in improving the quality of employee performance by the carrots and sticks of monetary incentives and withholdings. As stated by the Hearing Examiner:

It would be easier to pay those employees it wants to reward and not pay those it wants to penalize without the constraints

of negotiations and binding arbitration, if it had so agreed.

Sl. Opinion at 19.

But the Legislature has determined that the public interest requires collective negotiations over terms and conditions of employment such as compensation, and these employer interests have not prevailed in the balancing test for negotiability of these kinds of economic benefits. Lullo; UMDNJ.

The employees' interest in negotiating compensation as part of a viable negotiations process outweighs the employer's interest in deciding unilaterally who should receive merit/increments under the circumstances of this case. It is not disputed that the establishment of the merit/increment plan is negotiable. The County points out that both parties agreed to a potential delay in movement along the step guide by agreeing to a merit/increment program. But if an employer has a right to determine unilaterally who will get the merit/increments, the perverse effect will be to discourage negotiations over any merit/increment programs and to discourage employee representatives and employers from working together to improve work performance. Additionally, the suspicion of favoritism and divisiveness stressed in Lullo might be heightened. Collective negotiations with respect to wages might be disrupted if control over wages of individual employees is removed from the negotiations arena. Berkeley. On balance, therefore, we find that the County's agreement to submit disputes over denials of increments under this negotiated merit/increment plan is legal. [Id. at 540-541; citations omitted]

My task is to apply these principles and teachings to the facts of this case. Under the contract, a "meritorious" employee receives an increment (or bonus payment if he is at the maximum step) payment. To be found "meritorious," the employee must consistently meet all required minimum standards and has exceeded at

least one area of essential performance. A "non-meritorious employee," has not consistently met all required minimum standards or has not exceeded in at least one area of essential performance.

The 19 grievances submitted all involve, with some minor variations, applications of these two contractual provisions. In short, the issues in all 19 cases is whether the employees' work performance was of a sufficient level to receive a salary payment. The crux of the dispute is that CWA contends these employees' performance was such that payment was warranted under the contract. The County disagrees and contends, based on their evaluation, that the employees' performance was not meritorious. Given that this is the matter in dispute, Essex controls and the disputes may be submitted to binding arbitration.^{5/}


The four other grievances challenge the County's unilateral alteration of performance standards and the resulting effect that some employees would have their increment denied based upon these new standards. I believe these disputes may be submitted to arbitration since the new standards are tied to the compensation an employee would receive. In Essex, the Commission rejected a similar claim to that raised here by the County:

^{5/} In view of this recommendation, I also believe that the procedural violation claims may also be submitted to arbitration. See also Manalapan-Englishtown Reg. Bd. of Ed., P.E.R.C. No. 87-49, 12 NJPER _____ (¶_____ 1986) and Willingboro Bd. of Ed., P.E.R.C. No. 80-46, 5 NJPER 553 (¶10240 1979), aff'd App. Div. Dkt. No. A-1756-79 (12/8/80), certif. den., 87 N.J. 320 (1981).

The remaining three objections concern alleged changes in and the arbitrary application of the evaluation criteria. The County argues that it has a managerial prerogative to modify and apply unilaterally the standards for merit increments it negotiated. We disagree. Based on our overall negotiability analysis in this case, we deny the County's request to restrain arbitration of these disputes. [Id. at 540]

RECOMMENDED ORDER

I recommend that the Public Employment Relations Commission deny the County of Essex' request to restrain binding arbitration.



David F. Corrigan
Hearing Examiner

DATED: Trenton, New Jersey
November 13, 1986