P.E.R.C. NO. 91-63 **UNPUBLISHED DECISION**

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY, ADMINISTRATIVE
OFFICE OF THE COURTS,

Respondent,

-and- Docket No. CO-H-89-241

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.


SYNOPSIS

In a private advisory opinion based on an unfair practice charge filed by the Communications Workers of America, AFL-CIO against the State of New Jersey, Administrative of the Courts, the Public Employment Relations Commission finds that it has not been demonstrated that binding arbitration should not be a lawfully negotiable subject for judiciary employees.

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Appearances:

For the Respondent, Robert J. Del Tufo, Attorney General
(Michael L. Diller, Deputy Attorney General)

For the Charging Party, Steven P. Weissman, CWA District
Counsel

DECISION AND ORDER

On February 21, 1989, the Communications Workers of America, AFL-CIO ("CWA") filed an unfair practice charge against the State of New Jersey, Administrative Office of the Courts ("AOC"). The charge alleges that the AOC violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., subsections 5.4(a)(1) and (5),[1/] when it refused to negotiate with

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1/ These subsections 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; and (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."

CWA over the subject of binding grievance arbitration.[2/]

On June 19, 1989, a Complaint and Notice of Hearing issued. The AOC's Answer admits declining to negotiate over binding grievance arbitration, but denies violating the Act. The AOC asserts that it has adhered to New Jersey Supreme Court policies and to collective negotiations agreements and that it has legitimate reasons for declining to negotiate.

On January 9, 1990, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties introduced joint exhibits and stipulated facts. Waiving a recommended decision, they submitted the case to us. Post-hearing briefs and reply briefs were submitted by August 7, 1990.

## Findings of Fact

1. CWA represents judiciary employees in Burlington, Gloucester, Cumberland and Ocean Counties, and State judiciary employees working at the Hughes Justice Complex in Trenton.

2. In 1969, the Administrative Director of the Courts appointed the AOC's assistant director for probation as negotiator for judges in counties with negotiations units of probation officers. The next year that responsibility was transferred to local trial court managers, but in 1975, it was recentralized under the assistant director to ensure uniform employment conditions.

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2/ The charge also alleged a refusal to negotiate over representation fees. The parties agreed to sever this allegation.

3. The AOC's labor relations unit was established on October 17, 1983. Joan Kane Josephson was appointed its chief. The labor relations unit develops and administers labor and employment policies for all judicial employees at the state and trial court levels. It represents judiciary management in negotiating labor agreements. It negotiates with three units of state-funded judicial employees: two units of administrative and clerical employees represented by CWA and one unit of official court reporters represented by the Certified Shorthand Reporters Association. It also represents trial court assignment judges in negotiating agreements with probation officers who are in the state service, but whose salaries are funded by the counties. There are 33 units of probation officers.

4. The labor relations unit also represents assignment judges in Hudson, Burlington, Bergen, Ocean, Union, Essex, Middlesex, Monmouth, and Passaic Counties in negotiating contracts for court-recognized units that include administrative and clerical judicial support personnel, probation investigators, and court clerks. In other vicinages, the labor relations unit technically assists trial court and management representatives in negotiating and administering contracts covering units containing judicial employees. The labor relations unit supervises the administration of all the labor agreements, including the processing of grievances.

5. Negotiations between the judiciary and employee representatives follow the same procedures followed by all public

employers and employee organizations, except those representing police and firefighter organizations which may invoke binding interest arbitration. The judiciary management team and union representatives negotiate with respect to grievances and other terms and conditions of employment. If agreement is not reached, the parties use our impasse procedures. If asked, we will assign a mediator. If no agreement is reached in mediation, we may appoint a factfinder who will hold a hearing, receive briefs, and issue a recommendation. If the recommendation is rejected, we may appoint a conciliator. Whenever an agreement is reached, it is written and signed. If no agreement is reached through negotiations, mediation, factfinding or conciliation, the employer may implement its last best offer. To Josephson's knowledge, that has happened once since 1969.

6. The 1974-75 contract (J-1) and the 1978-80 contract (J-3) between the Essex County Judiciary and the Essex County Probation Officers Association included grievance procedures with this final step:

> Step 4. If the aggrieved officer is not satisfied with the decision of the Chief Probation Officer, he may choose to utilize one of the following three options for a final determination of the grievance:
>
> a. He may appeal to the Civil Service Commission under the laws and rules governing the operation of that agency;
>
> b. He may appeal to the County Court Judges, in which case the decision of the Judges shall be final and shall be

> rendered with reasonable promptness. The Judges may designate a representative from outside the Probation Department to hear and make recommendations for disposition...;
>
> c. He may request the matter be heard by an impartial arbitrator, to be selected by the Public Employment Relations Commission...in accordance with the conventionally used rules and procedures utilized for this purpose.
>
> (1) The decision of the arbitrator shall be final and binding on both parties.
>
> (2) The cost of arbitration shall be borne equally by the parties to the contract.

7. On January 6, 1981, the AOC's assistant director wrote a letter (J-2) to the president of the Probation Association of New Jersey. The letter stated that _Passaic Cty. Probation Officers Ass'n v. Passaic Cty_., 73 _N.J_. 247 (1977), had been interpreted to "prohibit negotiation of a binding arbitration procedure as the last step in a grievance procedure." Since 1983, judiciary negotiators have maintained that they are not authorized to agree to binding arbitration procedures.

8. The 1981-82 contract (J-4) covering employees of the Essex County Judiciary did not include binding grievance arbitration. The final step provided:

> _Step 5_ In the event Step 4 is bypassed, or if either party is not satisfied with the recommendations of the Board of Mediation, he/she may choose to utilize one of the following two options:

> (a) The officer may appeal to the Civil Service Commission under the laws and rules governing the operation of that agency.
>
> (b) He may appeal to the Assignment Judge, in which case the decision of the Judge shall be final....

9. The 1987-88 contract (J-5) covering Bergen County probation officers did not include binding arbitration. The final step provided:

> Step 4 If either party is not satisfied with the recommendations of the Board of Mediation, he/she may choose to utilize one of the following two options:
>
> a. The officer may appeal to the Civil Service Commission under the laws and rules governing the operation of that agency provided that the Commission agrees to hear the case; or,
>
> b. The party may appeal to the Assignment Judge, or his designee, in which case the decision of the Judge or his designee shall be final....
>
> All grievances and complaints that are related to judiciary policy and/or the authority of the Chief Justice, Supreme Court, Administrative Director of the Courts or the Assignment Judge under R. 1:33-4 and any other applicable Statute or Court Rule shall be limited to Step 4(b)....

10. The 1988-90 contract (J-6) between the Cape May County Judiciary and the International Brotherhood of Painters covered clerical employees. The grievance procedure's last step provided:

> Step 4 In the event either party is dissatisfied with the decision of the Trial Court Administrator, either party may appeal the matter...to the Assignment Judge.... The Assignment Judge shall review the record, and may

> hear oral argument.... The Assignment Judge shall render a written final decision which shall be binding upon all parties.

11. The grievance procedure of the 1988-89 contract (J-7) covering Monmouth County judiciary employees had this final step:

> Step 3 If the employee is not satisfied with the decision of the Department Director, he/she may choose to utilize one of the following two options:
>
> a. The employee may appeal to the New Jersey Department of Personnel under the laws and rules governing the operation of that agency provided that the Commission agrees to hear the case; or
>
> b. The employee may appeal to the Superior Court Assignment Judge, in which case the decision of the Assignment Judge or his designee shall be final.... The Assignment Judge may designate any Court employee or other representative who is not an employee of the Courts, to hear and make recommendations to him for disposition.
>
> All grievances and complaints that are related to Judiciary policy and/or the authority of the Chief Justice, Supreme Court, Administrative Director of the Courts or the Assignment Judge under Rule 1:34-4 and any other applicable statute or court rule shall be limited to Step 3(b)....

12. The grievance procedure of the 1987-89 contract (J-8) covering Passaic County's principal probation officers had this final step:

> Step 3 If the grievance is not resolved to the mutual satisfaction of both parties, or if the Chief Probation Officer fails to respond to the grievance within the aforementioned time period, the grievant may choose to utilize one of the following two options:

a. The officer may appeal to the Civil Service Commission pursuant to any rights he/she may have under Title 11, and subject to the policy on Civil Service as provided for in Article III of this Agreement.

b. The officer may appeal to the Superior Court Judges....

13. The 1986-89 contract (J-9) between the State (AOC) and the CWA covered administrative and clerical employees. Article 4, Section D had this final step of the grievance procedure:

> Step 3 If the grievant is not satisfied with the decision at Step 2, the grievance shall be submitted within seven (7) workdays to the Chief of Labor Relations or a representative of same. The hearing shall be held within fifteen (15) workdays following receipt of the grievance. A written decision shall be rendered within fifteen (15) workdays following the hearing, which decision shall be final and binding....

But Article 4, Section E added:

> The above procedure for resolving grievances is to remain in effect during the life of this Agreement unless the Supreme Court by amendment to its Rules of Court or by a policy determination adopts an arbitration procedure for use statewide and appoints a Judicial Arbitrator after consultation with appropriate majority representatives of judicial employees, in which case the following procedure shall become operational automatically.
>
> In the event a dispute is not resolved under Steps D.1-3 of this Article and involves a contractual grievance as defined in B.1 above, at the request of the Union the dispute may be submitted upon seven (7) days' notice to an impartial Judicial Arbitrator appointed pursuant to the above provisions for a final and binding determination. The Union and Management shall have the right to present witnesses, to examine and present documentary and other evidence in support of their position. The Arbitrator's decision shall be in writing.

This language has been in all contracts covering these employees since 1981. No arbitration procedure has been adopted yet.

14. During successor contract negotiations within the six months before this charge, CWA demanded negotiations over binding arbitration for units of AOC employees and judicial employees in Burlington, Ocean and Monmouth Counties. The judiciary responded that such a procedure could not be negotiated as a matter of policy.

Jurisdiction

We first discuss our jurisdiction. Three cases guide us. Passaic Cty. Probation Officers Ass'n v. Passaic Cty., 73 N.J. 247 (1977)("Passaic I"); In re Judges of Passaic Cty., 100 N.J. 352 (1985)("Passaic II"), and CWA Local 1044 v. The Honorable Chief Justice, 118 N.J. 495 (1990).

Passaic I ruled out negotiations over an extension of the work hours of probation officers to match an extension of the court hours of trial judges. The Supreme Court's plenary authority over all matters touching court administration, N.J. Const., Art. 6, §2, ¶3, transcends the Legislature's power to enact statutes governing judicial employees. But as a matter of comity, the Supreme Court has accepted such statutory arrangements unless its constitutional responsibility to administer the judicial system mandates a contrary rule. A contrary rule was mandated in Passaic I, given an AOC directive prohibiting negotiations over fixed hours of work and a

need to change the hours to ensure the effective administration of the courts. The employees, however, had a constitutional right [3/] to urge that the directive be rescinded and to pursue discussions with the judges of Passaic County.

Passaic II upheld our determination under Passaic I that we did not have jurisdiction to decide whether the judiciary or the county was the employer of certain employees. But the Supreme Court reiterated its desire to achieve maximum comity with all statutory arrangements not inconsistent with its constitutional function. The Court has thus applied some provisions of our Act to its employees and has used our resources. The Court invited us to find the facts and make recommendations in labor relations cases involving judiciary employees:

> Hence we would invite P.E.R.C. to continue to perform, as its Director of Representation did here, a factfinding function in aid of litigants. For although differing substantive standards may obtain in judicial labor relations..., P.E.R.C.'s general experience and expertise in such matters will provide a valuable adjunct to the several branches of government in working out a viable system of employer-employee relations. Id. at 364.

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3/ N.J. Const. Art. I, ¶19 provides:

> Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

CWA Local 1044 held that neither Passaic I nor our Act compelled negotiations over collecting representation fees from judicial employees. The Court has discretion to determine whether it should follow a statutory arrangement. If comity is sought:

> [the Court] must examine the terms of the legislative enactment, its importance, the extent of its interference with sound judicial administration, and the significance of the issue to the judiciary, ultimately striking a balance between the interests served by comity and those served by the administration of justice. [118 N.J. at 501]

While the judiciary is not bound by our rulings, comity and sound labor relations have often led it to accept our services.

CWA asserts that we have jurisdiction to hold that the AOC violated the Act when it refused to negotiate over binding arbitration proposals. The AOC asserts that we should exercise our jurisdiction to determine that arbitration would unconstitutionally interfere with judicial power. We cannot accept either position. Based on the cases we have just discussed, it is up to the Supreme Court to decide what provisions of the Act it will follow as a matter of comity and what provisions of the Act it will not follow as a matter of its responsibility to administer the judicial system. Our role is to find the facts and to give the Court the benefit of our experience and expertise concerning public sector labor relations and grievance procedures. N.J.S.A. 34:13A-5.2. We will therefore issue a private advisory opinion, rather than a formal binding opinion.

Having found the facts, we will now review labor relations policies concerning grievance arbitration. We will examine the private sector experience, our State's public sector experience, and the AOC's concerns about grievance arbitration for judicial employees.

## The Private Sector

29 U.S.C. §173(d) provides:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Congressional policy favors agreements to submit grievances to binding arbitration. Textile Workers' Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957). Over 95% of private sector contracts provide for binding arbitration. Labor and Employment Arbitration, ¶ 1.01 (Matthew Bender & Co., 1988).

The Steelworkers Trilogy made grievance arbitration a centerpiece of national labor relations policy. See United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S 593 (1960). Arbitration is "a major factor in achieving industrial peace" and "the very heart of the system of industrial self-government." Warrior & Gulf at 578 and 581, respectively. A substitute for strife and litigation, it provides a fast, cheap, therapeutic and impartial way to end disputes.

American Mfg. Co; see also Local 153, OPEIU v. Trust Co. of New Jersey, 105 N.J. 442 (1987); Gorman, Basic Text on Labor Law, at 551-556 (1976); Elkouri and Elkouri, How Arbitration Works, at 4-10 (4th ed. 1985). Arbitrators are usually chosen based on their knowledge of an industry and the common law of the shop; "the ablest judge cannot be expected to bring the same experience and expertise to bear upon the determination of a grievance." Warrior & Gulf at 582; Enterprise Wheel & Car Corp.

In the private sector, a dispute is legally arbitrable so long as it is mandatorily or permissively negotiable. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S 342 (1958). A private employer could agree to have an arbitrator review entrepreneurial decisions. But a party cannot be required to arbitrate any dispute which it has not contractually agreed to arbitrate. AT&T Technologies v. CWA, 475 U.S 643 (1986); Warrior & Gulf at 582. An arbitration clause raises a presumption of arbitrability which can only be overcome if it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation covering the dispute. Warrior & Gulf, at 582-583. This presumption recognizes the competence of arbitrators in interpreting collective bargaining agreements, furthers the national labor policy of peacefully resolving labor disputes, and best accords with the parties' presumed objectives. AT&T at 650.

Judicial review of private sector awards is narrow. Courts will not review alleged errors of fact, interpretation,

procedure or remedy and will instead ask only if the award draws its essence from the contract. United Paperworkers Int. Union v. Misco, 484 U.S. 29 (1987); Enterprise Wheel & Car Corp. Public policy attacks on an award will be rejected unless the public policy is "well-defined and dominant"; can be "ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests"; and is proven by facts of record. W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766 (1983); Misco.

The New Jersey Public Sector

N.J.S.A 34:13A-5.3 requires negotiations "with respect to grievances, disciplinary disputes, and other terms and conditions of employment." Its last paragraph specifies that:

> Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes. The procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws. Grievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement. [Emphasis added]

West Windsor Tp. v. P.E.R.C., 78 N.J. 98, 105-106 (1978) elaborates upon the duty to negotiate over grievance procedures. The first step of any grievance procedure must permit employees to contest decisions affecting their terms and conditions of employment. But it is up to the parties to determine the other details of the grievance mechanism. "These details would cover items such as time restrictions, the number of steps in the grievance procedure, the forum for resolution at each step and the forum for final, binding resolution, if any." Id. at 106. In particular:

> the decision whether to use binding arbitration as a means for grievance resolution is a procedural detail left to the parties to adopt or reject as the terminal step of the contractual grievance mechanism. The parties are free to agree to arbitrate all, some, or none of the matters as to which the employees' right to grieve is guaranteed by N.J.S.A. 34:13A-5.3. [Id. at 107]

The Legislature, however, has mandated that binding arbitration be the terminal step of the grievance procedure in certain disciplinary disputes affecting school board employees. N.J.S.A. 34:13A-29.

Under West Windsor, a proposal to have binding grievance arbitration is mandatorily negotiable. See also State of New Jersey, P.E.R.C. No. 81-81, 7 NJPER 70 (¶12026 1981). Such clauses are common in public sector labor agreements, although an employer need not agree to one. CWA v. P.E.R.C., 193 N.J. Super. 658, 664 (App. Div. 1984).

In the public sector, the nature of disputes which may be arbitrated is more confined than in the private sector. For almost

all public employees in New Jersey, a subject is not legally arbitrable unless it is mandatorily negotiable. Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n, 78 N.J. 144 (1978).[4/] And a subject is not mandatorily negotiable unless:

> (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982)].

This balancing test has resulted in a much narrower scope of mandatory negotiations than in the private sector.

N.J.S.A. 34:13A-5.3 also specifies that a disciplinary dispute cannot be submitted to binding arbitration if it can be contested through an alternate statutory appeal procedure. CWA v. P.E.R.C.; Bergen Cty. Law Enforcement Group v. Bergen Cty., 191 N.J. Super. 319 (App. Div. 1983). For example, discharged employees with civil service protection cannot seek review through binding arbitration. They already have a neutral, final forum.

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4/ N.J.S.A. 34:13A-16 authorizes a permissive category of negotiations and thus of legally arbitrable subjects for firefighters and police officers, but that category has been narrowly construed. Paterson Police PBA Local No. 1 v. Paterson, 87 N.J. 78 (1981).

In the public sector, like the private sector, an arbitrator's authority depends upon the terms of the collective negotiations agreement. For example, contracts often limit the arbitrator's authority to add to, alter, amend, or modify an agreement's terms. See Cty. College of Morris Staff Ass'n v. Cty. College of Morris, 100 N.J. 383 (1985); CWA v. Monmouth Cty. Bd. of Social Services, 96 N.J. 442 (1984). The parties may also withdraw certain types of disputes from the arbitrator's jurisdiction altogether.

In the public sector, judicial review of arbitration awards is more expansive than in the private sector. An award may be set aside if a contractual interpretation is not reasonably debatable, State v. State Troopers Fraternal Ass'n, 91 N.J. 464, 469 (1982), or if it exceeds the arbitrator's contractual authority. N.J.S.A 2A:24-8; Monmouth Cty. Bd. of Social Services; Cty. College of Morris. Further, an award may be vacated if the arbitrator ignores the public interest and welfare or statutory criteria. Kearny PBA Local No. 21 v. Town of Kearny, 81 N.J. 208, 217 (1979). The arbitrator must make sufficient findings of fact and must act "fairly and reasonably to the end that labor peace will be stabilized and promoted." Id. at 216.

Negotiations Over Binding Grievance Arbitration for Judicial Employees

Employees propose binding grievance arbitration because they do not wish the employer or its designee to have the final say when a dispute arises over the interpretation or application of a

labor agreement. Some employers oppose such proposals during collective negotiations because they desire to retain that final say, while other employers agree to binding arbitration because they believe their employees will have more confidence in a grievance resolution system if the final decision-maker is not an agent of the employer or because they are uncomfortable reviewing the appropriateness of their own actions. The present grievance procedures do not end with an unaligned decision-maker: in cases which cannot be appealed to the Department of Personnel, an employer representative -- an Assignment Judge -- makes the final decision.[5/]

AOC asserts that permitting a neutral decision-maker to resolve grievances may usurp judicial power. But given the restraints upon what may be legally arbitrated, our procedures to restrain arbitration over non-negotiable subjects, the parties' power to limit what may be contractually arbitrated, and the opportunity for judicial review, we believe that negotiations can accommodate the employees' desire for impartial review with the judiciary's concern for protecting its unique powers.

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5/ A breach of contract suit is not a desirable alternative to an effective grievance procedure since "the costly, prolonged, and technical procedures of court are not well adapted to the peculiar needs of labor-management relations." Elkouri and Elkouri at 7. CWA contends that such a suit is even less desirable for judicial employees who may be uncomfortable with having one judge consider the merits of another judge's disposition of a grievance.

Contract proposals which would significantly interfere with the judiciary's responsibility to administer the courts are not mandatorily negotiable. Like all other public employers, the judiciary may refuse to negotiate when negotiations would significantly interfere with its governmental mission and need only negotiate when it is acting as an employer in determining the employment conditions of its employees. West Windsor at 115. Even if a proposal is mandatorily negotiable, the judiciary may protect its legitimate interests as an employer by saying no. Hunterdon Cty. Freeholder Bd. v. CWA, 116 N.J. 322, 338 (1989). Further, a dispute that is not mandatorily negotiable may not be submitted to binding arbitration. Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 135 N.J. Super. 120 (App. Div. 1975). Our procedures may be invoked if the parties desire an opinion on the negotiability of a proposal or the legal arbitrability of a grievance. N.J.A.C. 19:13-1.1 et seq. Therefore, the judiciary may not bind itself to have an arbitrator decide judicial policy questions and the arbitrator will be restricted to considering disputes over basic employment conditions where the employer has acted as an employer.

N.J.S.A. 34:13A-5.3 prohibits binding arbitration over disciplinary disputes which may be appealed elsewhere. The Department of Personnel apparently hears appeals in some cases involving judicial employees. The parties may also agree to have non-disciplinary disputes resolved through an alternate statutory

appeal procedure and may limit or negate an arbitrator's contractual jurisdiction in any other way they see fit.

AOC suggests that an arbitrator might add "little in the way of experience or personal perspective that judges don't themselves already have." (Brief at 30). But an arbitrator could add the perspective of a labor relations neutral. Further, arbitrators are mutually selected by the parties: the choice is solely theirs. If negotiations culminate in an agreement to arbitrate, the parties may select arbitrators with knowledge of the judiciary's operations, but with no present tie to the employer; or a panel of arbitrators composed of representatives of each party and a neutral; or an arbitrator from the American Arbitration Association's panel of professional labor arbitrators.

The AOC opposes negotiations because it worries that an arbitrator might trespass upon judicial authority by filling in contractual gaps. But the arbitrator's authority is limited by law to grievances within the scope of negotiations and by contract to grievances within the scope of the arbitration clause. The parties may also negotiate specific restrictions on the arbitrator's interpretive or remedial powers. The AOC's concerns address the wisdom of agreeing to a particular arbitration proposal rather than the mission of preserving the administration of justice.

The AOC suggests that a binding arbitration procedure might preclude judicial review. We agree with CWA that it would not. When the judiciary reviews an arbitration award, it does not act in

the role of an employer. Courts review public sector awards to make sure they are reasonably debatable, contractually authorized, and consistent with the public interest, welfare and statutory criteria. That judicial function will be performed and those standards applied in cases involving judicial employees as well as in cases involving other public sector employees. A specific contractual reference to judicial review is neither customary nor necessary.

The AOC suggests that it would be premature to negotiate over binding arbitration while the judiciary's labor relations policies are evolving. This concern might warrant saying no to a particular proposal or crafting a counterproposal fitted to a particular situation; but it does not warrant the complete exclusion of negotiations over binding arbitration proposals. CWA Local 144 was different. There, task forces had recommended that the judiciary not negotiate over collecting representation fees from judicial employees in negotiations units also containing County employees. Here, terminal grievance procedures have been negotiated in both mixed units and statewide units and the only question is whether a particular type of terminal procedure may be negotiated. The concerns present in CWA Local 144 are absent here.[6/]

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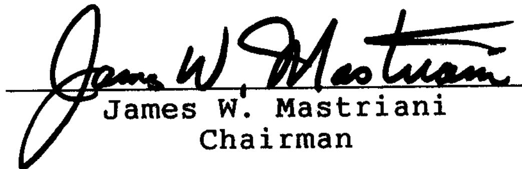
6/ The AOC suggests that questions could arise about the funding of arbitration awards affecting county-paid judicial employees. We are confident that any such questions can be expeditiously resolved, if necessary, through an appropriate procedure. Cf. In re Court Reorganization Plan of Hudson Cty., 161 N.J. Super. 483 (App. Div. 1978).

In conclusion, it has not been demonstrated that binding arbitration should not be a lawfully negotiable subject for judiciary employees. We take no position on the merits of any particular proposal or counterproposal. Given our advisory jurisdiction, we do not enter an order.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Johnson, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
January 17, 1991
ISSUED: January 18, 1991