P.E.R.C. NO. 77-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COLLEGE OF MEDICINE AND DENTISTRY
OF NEW JERSEY,
Respondent,

-and- Docket No. CO-76-56-41

COUNCIL OF A.A.U.P. CHAPTERS OF
THE COLLEGE OF MEDICINE AND
DENTISTRY OF NEW JERSEY,
Charging Party.

SYNOPSIS

The Commission affirms the conclusions of law of the Hearing Examiner that the College committed an unfair practice by unilaterally implementing a five day salary holdback without negotiations and in the face of a demand from the A.A.U.P. to negotiate. In reaching its determination the Commission, in agreement with the Hearing Examiner, finds and concludes that a salary holdback does constitute a term and condition of employment concerning which an employer, on demand, is required to negotiate in good faith. The Commission notes that it is not necessary to rule upon the Hearing Examiner's conclusion, excepted to by the A.A.U.P., that N.J.S.A. 52:14-15 mandates a minimum salary holdback and that the holdback could not be more than nine working days. The Commission further states that it need not pass upon the Hearing Examiner's conclusion, excepted to by the College, that the amendments to N.J.S.A. 34:13A-8.1, contained in P.L. 1974, c. 123, permit negotiations regarding a salary holdback even though that matter is the subject of a legislative enactment nor upon the Hearing Examiner's determinations, also excepted to by the College, that N.J.S.A. 52:14-15 does not apply to the employees herein represented by the A.A.U.P. and that the College as opposed to the State of New Jersey is the public employer. The Commission determines that its conclusion regarding the unfair practice charge does not turn on the disposition of the above-mentioned peripheral issues.

The Commission orders the College to cease and desist from refusing to negotiate collectively in good faith with the A.A.U.P. and from making unilateral changes in terms and conditions of employment, and affirmatively orders the College tc negotiate, upon request, with the A.A.U.P. concerning the matter of a salary holdback; to refrain from implementing a five day holdback of salary during the course of negotiations; to restore retroactively to the unit employees the five days of salary holdback commencing September 15, 1975; and to notify the Commission, in writing, of the steps taken to comply with the order.

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Charging Party.

Appearances:
For the Respondent, William F. Hyland, Attorney General (Guy S. Michaels, Deputy Attorney General, of Counsel).

For the Charging Party, Sterns & Greenberg, Esqs. (Mr. Michael J. Herbert, of Counsel).

DECISION AND ORDER

An Unfair Practice Charge (the "Charge") was filed with the Public Employment Relations Commission (the "Commission") on August 27, 1975 by the Council of A.A.U.P. Chapters of the College of Medicine and Dentistry of New Jersey (the "A.A.U.P.") against the College of Medicine and Dentistry of New Jersey (the "College") alleging unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). In particular, the Charge alleges an unfair practice within the meaning of N.J.S.A. 34:13A-5.4(a)(5) [1/] by

1/ That subsection prohibits employers from "(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."

virtue of the College's unilateral imposition of a five day holdback in salary for unit members employed by the College and represented by the A.A.U.P.

The Charge was processed pursuant to the Commission's Rules, and it appearing to the Commission's Executive Director,[2/] acting as the named designee of the Commission, that the allegations of the Charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on November 17, 1975.

Thereafter, on January 13, 1976 the parties filed with Robert T. Snyder, Hearing Examiner of the Commission, a stipulation of facts in which, inter alia, they waived the necessity of filing an answer to the Complaint by the College and requested the Hearing Examiner to make a legal determination on the basis of the stipulated facts regarding the following questions:

1. Does N.J.S.A. 52:14-15[3/] mandate the imposition of

2/ Now Chairman, Jeffrey B. Tener.

3/ That section provides as follows: "Except as otherwise specifically provided by law, all officers and employees paid by the State shall be paid their salaries or compensation biweekly in a biweekly amount; provided, however, the State Treasurer and the Director of the Division of Budget and Accounting shall fix the time of payments in the biweekly amount so that payments will commence biweekly when there shall have been developed an interval of not more than 9 working days between the last day of the biweekly period for which the salary or compensation has been earned and the date of payment.

a salary holdback at the College?

2. If a salary holdback is mandated by the above statute, must it be negotiated with the A.A.U.P. prior to its implementation?

In addition, the College stated in the letter transmitting the stipulation of facts that the parties had agreed that they could address the question of whether the institution of a salary holdback procedure is a mandatory subject of negotiations even absent any statutory mandate in that regard.

Briefs were filed with the Hearing Examiner by the College on January 23, 1976 and on February 3, 1976 by the A.A.U.P. On June 30, 1976 the Hearing Examiner issued his Recommended Report and Decision which included findings of fact, conclusions of law, and a recommended order. The original of that Report was filed with the Commission and copies were served on all parties. A copy is attached to this Decision and Order and made a part of it. Thereafter, pursuant to approved requests for extensions of time within which to file exceptions and responses thereto, exceptions were filed by the College on August 24, 1976, by the A.A.U.P. on September 20, 1976, and a letter response was filed by the College on October 5, 1976. Finally, on October 12, 1976 the Commission received a letter from the A.A.U.P. which stated that the A.A.U.P. did not intend to apply for permission to submit any further response in this matter.

For reasons set forth more fully below, we agree with the conclusions of the Hearing Examiner that the College

committed an unfair practice by unilaterally implementing the five day salary holdback without negotiations and in the face of a demand from the AAUP to negotiate.

The Hearing Examiner found, based upon the stipulated facts and an exhaustive legal analysis, that a salary holdback does constitute a term or condition of employment concerning which a public employer is required, upon demand by a majority representative of employees in an appropriate unit, to negotiate in good faith. Neither party has filed an exception regarding these findings of fact and conclusions of law and we adopt them substantially for the reasons cited by the Hearing Examiner.[4/]

Additionally, the Hearing Examiner concluded that N.J.S.A. 52:14-15, set forth fully in note 3 above, does mandate a minimum salary holdback and that the holdback could not be more than nine working days. The A.A.U.P. excepts to this conclusion, contending that the statement which was attached to that bill makes it clear that the holdback period was discretionary with the named State officials and that there need be no holdback at all. We find that it is not necessary for us to determine whether the cited statute serves only to limit the salary holdback to a maximum of nine working days or whether it mandates that there be at least a minimal holdback. We would reach the same conclusion under either of those interpretations.

4/ It is noted that N.J.A.C. 19:14-7.3(b) provides in part: "Any exception which is not specifically urged shall be deemed to have been waived."

Similarly, we need not pass upon the Hearing Examiner's legal conclusion that N.J.S.A. 52:14-15 does not apply to the employees herein represented by the A.A.U.P. and that the College as opposed to the State of New Jersey is the public employer.[5/] Our conclusion regarding the alleged unfair practice charge does not turn on the disposition of that issue. Assuming arguendo that the statute does apply to employees of the College as the College argues, we still find a violation of the Act.

Finally, we need not reach the argument of the A.A.U.P. or the Hearing Examiner's conclusion that the amendments to N.J.S.A. 34:13A-8.1 contained in P.L. 1974, c. 123 permit negotiations regarding a salary holdback even though that matter is the subject of a legislative enactment.

In our view, the issue presented is a narrow one: did the College violate the cited section of the Act by unilaterally imposing a five-day salary holdback without negotiating with the A.A.U.P. in spite of a request for such negotiations from the A.A.U.P.? We conclude that it did.

The parties stipulated that prior to the unilateral implementation of the salary holdback by the College, the A.A.U.P., through its attorney, wrote to the College and stated that it was aware of the possibility of a holdback and that the institution of such an action without prior negotiation would be a violation of their agreement and this Act. In a letter in response the College indicated its intention to proceed unilaterally and it

5/ The bulk of the College's exceptions were addressed to this point.

did so. We believe that these stipulations of fact are dispositive of this matter.

As stated the Hearing Examiner found, and we agree, that the alteration in an employee's salary payment effectuated by the institution of a holdback does constitute a term and condition of employment. This finding was not excepted to by either party. Assuming, without deciding, that N.J.S.A. 52:14-15 did apply it does not require that the holdback be five days as unilaterally implemented herein. Similarly, even if five were the only possible number of days, a fact which we do not find and which even the State did not appear to argue, the method and scheduling of implementation would have to be negotiated.[6/] Therefore, the Commission finds that, regardless of the interpretation of the statutes, the College violated its duty under the Act when it refused to negotiate in any way with the Council concerning the proposed holdback of salary and proceeded to unilaterally

6/ The College sent all unit members a letter stating the procedure for implementing the holdback. See the August 19th Memorandum discussed in the Hearing Examiner's Recommended Report and Decision. Absent all the other considerations the College's refusal to negotiate on even the method and scheduling for implementing the holdback is enough to constitute a violation of the Act and sustain our holding herein.

Nothing appears in the record which would have precluded negotiations on the scheduling and implementation of the holdback. This is especially true since the College has apparently been operating since its inception in 1970 on a no-holdback system. There is no reason to assume that the College's procedure as enunciated in its memo of August 19, 1976 was mandated even under the College's interpretation of the relevant statute.

implement the said holdback.[7/]

Based upon the foregoing, we hereby adopt the findings of fact and conclusions of the Hearing Examiner except as modified herein.

ORDER

Pursuant to N.J.S.A. 34:13A-5.4(c) the Public Employment Relations Commission hereby orders the College of Medicine and Dentistry of New Jersey to:

1. Cease and desist from:

(a) Refusing to negotiate collectively in good faith with the Council of A.A.U.P. Chapters of the College of Medicine and Dentistry of New Jersey as the majority representative of the employees in the unit described below, concerning terms and conditions of employees in that unit: all full-time teaching and/or research faculty and all part-time teaching and/or research faculty who are employed at 50% or more of full-time employed by the College of Medicine and Dentistry of New Jersey.

(b) Making unilateral changes in terms and conditions of employment in the above described unit.

7/ We also note, as did the Hearing Examiner, that the parties were in the midst of negotiating a successor collective negotiations agreement during this entire series of events. The College was free to propose the holdback as part of these negotiations for any reason it deemed warranted, including administrative efficiency, the stated legislative purpose for enacting N.J.S.A. 52:14-15, or to bring its procedures into conformity with the general State practice, as initially stated in the correspondence between the College and the Division of Budget and Accounting. As a term and condition of employment the parties would have been obligated to negotiate on the subject along with all other subjects being negotiated for the new agreement.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, negotiate with the Council of A.A.U.P. Chapters of the College of Medicine and Dentistry as the majority representative of the employees in the aforesaid appropriate unit, concerning the subject matter of a salary holdback.

(b) During the course of the negotiations conducted pursuant to 2(a) above, revoke, and refrain from implementing, a five (5) day holdback of salary, as applied to employees in the aforesaid appropriate unit.

(c) Restore retroactively to the unit employees the five (5) days of salary unilaterally held back commencing September 15, 1975.[8/]

8/ In ordering the restoration of the five days of salary unilaterally held back the Commission is attempting to recreate the situation as it existed at the time the College committed the unfair practice herein. The status quo ante represents that setting which is least likely to afford either party an advantage during the course of negotiations on the holdback. As stated in In re Galloway Township Board of Education, P.E.R.C. No. 76-32, 2 NJPER 186 (1976) "(B)ecause the status quo is predictable and constitutes the terms and conditions under which the parties have been operating, it represents an environment least likely to favor either party" (P.E.R.C. No. 76-32 at pg. 6, 1 NJPER 186-187) cf. In re Piscataway Township Board of Education, P.E.R.C. No. 76-91, 1 NJPER 49 (1975).

The Commission reiterates that it finds it unnecessary to pass upon the interpretation of the various statutes discussed in the Hearing Examiner's Report and does not intend that this Decision and Order be read to adopt or favor any one particular analysis. As stated in footnote 7, supra, regardless of which of the interpretations is correct, the College is free to propose a holdback and the Council must negotiate. Therefore, a restoration of the status quo ante seems most appropriate to effectuate the purposes of the Act.

(d) Notify the Commission, in writing, within twenty (20) days of receipt of this Order what steps the Respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Forst, Hipp and Parcells voted for this decision.
Commissioner Hurwitz voted against this decision.
Commissioner Hartnett was not present.

DATED: Trenton, New Jersey
January 26, 1977
ISSUED: January 27, 1977

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Docket No. CO-76-56-41

COUNCIL OF A.A.U.P. CHAPTERS OF THE
COLLEGE OF MEDICINE AND DENTISTRY
OF NEW JERSEY,

Charging Party.

For the Respondent, William F. Hyland, Esq., Attorney General
of New Jersey
(Guy S. Michaels, Esq., Deputy Attorney General)

For the Charging Party, Sterns & Greenberg, Esqs.
(Michael J. Herbert, Esq., of Counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

Statement

An unfair practice charge having been filed on August 27, 1975, by Council of A.A.U.P. Chapters of the College of Medicine and Dentistry of New Jersey, (herein "A.A.U.P." or "Council"), and it appearing to the Executive Director, Jeffrey B. Tener, that the allegations in the said charge, if true, may constitute unfair practices on the part of the College of Medicine and Dentistry of New Jersey (herein called "Respondent" or "College"), the Public Employment Relations Commission ("Commission"), by its named designee, the said Executive Director, issued a complaint and notice of hearing on November 17, 1975 against the Respondent. The complaint alleges that by virtue of a unilateral imposition of a five (5) day holdback in salary for faculty employed by Respondent, effective September 5, 1975, the Respondent has committed an unfair practice in violation of N.J.S.A. 34:13A-5.4 (a) (5). 1/

1/ A section of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (herein "the Act").

On January 13, 1976, the parties filed with the undersigned a stipulation of facts in which they waived the necessity of filing answer by the Respondent and respectfully asked the Hearing Examiner to maintain jurisdiction for the purpose of making conclusions of law and recommendations to the Commission. The parties stipulated that the Hearing Examiner make a legal determination based upon the stipulated facts alone of the following two questions posed:

(1) Does N.J.S.A. 15:14-15 mandate the imposition of a salary holdback at the College.

(2) If a salary holdback is mandated by the above statute, must it be negotiated by the A.A.U.P. prior to its implementation.

In a covering letter forwarding the stipulation to the undersigned, the Council attorney noted agreement by the parties that they may also address the alternative question of whether the institution of a salary holdback procedure is a mandatory subject of negotiation even absent any statutory mandate in this regard.

On January 23, 1976 and February 3, 1976, Respondent and Council, respectively, filed briefs. Upon the entire record in this case, including the stipulation of facts and exhibits annexed thereto, I make the following:

FINDINGS OF FACT

I

Respondent's Status

The complaint alleges, the parties stipulated and I find that the Respondent is a public institution of Higher Education providing medical and dental education pursuant to N.J.S.A. 18A:64C-1 et seq., and is thus a public employer within the meaning of N.J.S.A. 34:13A (c).

II

The Employee Organization and its Status

The complaint alleges, the parties stipulated and I find, that the Council is the duly authorized single collective negotiations representative for faculty at the College of Medicine and Dentistry of New Jersey, [2/] and is thus its employee representative within the meaning of N.J.S.A. 34:13A-3 (e).

2/ On June 13, 1972, in Docket No. RO-404, the Commission certified the Council or its predecessor, as the exclusive representative of all full-time teaching and/or research faculty and all part-time teaching and/or research faculty who are employed at 50% or more of full-time employed by the College of Medicine and Dentistry of New Jersey.

III

The Unfair Practice

As noted, the complaint alleges violation of N.J.S.A. 13A-5.4 (a) (5) which, insofar as applicable here, prohibits a public employer "from refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of the employees in that unit..."

The Stipulation of Facts

A review of the salient stipulated facts, including, where appropriate, references to various of the attachments thereto, now follows:

The parties entered into a collective negotiations contract on June 3, 1973, which was to expire on June 30, 1975. For a number of weeks, both prior and since June 30, 1975, the parties were in negotiation concerning a successor contract and had agreed to extend the non-economic portions of the current contract during the period of negotiations.

N.J.S.A. 52:14-15 provides as follows:

> Except as otherwise specifically provided by law, all officers and employees paid by the State shall be paid their salaries or compensation biweekly in a biweekly amount; provided, however, the State Treasurer and the Director of the Division of Budget and Accounting shall fix the time of payments in the biweekly amount so that payments will commence biweekly when there shall have been developed an interval of not more than 9 working days between the last day of the biweekly period for which the salary or compensation has been earned and the date of payment.

On April 29, 1975, Edward Cohen, Assistant Chancellor for Health Professions Education, informed Dr. Stanley S. Bergen, Jr., President of the College, that, pursuant to direction from the Division of Budget and Accounting and information from the Attorney General's Office, a salary holdback system must be instituted at the College for all employees in order to conform with statewide procedures under the statutory requirements of N.J.S.A. 52:14-15.1.

The April 29th letter from Cohen to Bergen attached and referred to an April 2 letter from Deputy Attorney General Cuff. In that letter to Cohen, Cuff noted that the College's proposed action of instituting a one-week holdback of salary "...represents the College's attempt to conform to a uniform state procedure."

An earlier memorandum dated March 24, 1975 from Edward G. Holfgesang, Acting Director, Division of Budget and Accounting, Department of Treasury, to Ralph A. Dungan, Chancellor, Department of Higher Education provided as follows:

> Under the authority of C. 52:27B-40 we set up our central payroll system to provide for a one-week holdback on salary payments. This was done primarily in order to avoid overpayments and the subsequent refunds and adjustments which must necessarily characterize a "current payment" system.
>
> It is my understanding that in attempting to consolidate its payroll function the College of Medicine and Dentistry is considering a uniform one-week holdback as an integral part of the new system.
>
> I would like to take this opportunity to recommend strongly that the holdback policy be adopted, not only because it greatly simplifies the management of a payroll system, but also as a matter of equity in conforming their system to our central payroll system. 3/

Prior to this time, faculty represented by the A.A.U.P. had received salary checks every two weeks, which checks covered the time period between their receipt. The College has now revised the payment schedule to one in which although payment still received every two weeks, the payment covers the two week period preceding the week in which the checks are received. This present procedure conforms to the hold back method utilized by the State central payroll system, which system is in effect in all State institutions of higher education with the exceptions of Rutgers University, the New Jersey Institute of Technology and the College of Medicine and Dentistry.

When the A.A.U.P. was informed that the College had intended to change the present payroll system, which would result in the deferral of one weeks' pay during the celendar year 1975, its attorneys, on its behalf, informed President Bergen by letter dated June 3, 1975, that such action would constitute a unilateral modification in terms and conditions of employment, in violation of N.J.S.A. 34:13A-5.4(a) (5).

On August 7 and 12, James McKeever, Director of Personnel Resources at the College, responded to the A.A.U.P. in letters directed to the Council's attorneys, that the implementation of the holdback system was pursuant to the

3/ By letter memorandum to Dungan dated April 11, 1975, Holfgesang referred to the provision in 52:14-15.1 which, in his view, mandated the adoption by the College of a one-week holdback on salary payments.

clear direction of the Attorney General's Office, the Department of the Treasury and the Department of Higher Education. Mr. McKeever further set forth the implementation of the holdback system, commencing during the fall of 1975.

Mr. McKeever's August 7, 1975 letter read in part, as follows:

> "...we have been given clear directive from the Attorney General's Office, the Department of Treasury and the Department of Higher Education to proceed in the most expeditious manner possible to accomplish the holdback. Accordingly, we have developed an implementation schedule which will be begun on September 15, 1975 at which time all of those employees throughout the College who are not currently on a five (5) day holdback schedule--that includes all Faculty--will receive a special one weeks' salary check for the period of work 9/7/75 through 9/13/75..."
>
> * * *
>
> "...The 12/5/75 pay checks and all subsequent pay checks will, of course, be reflective of the five (5) day holdback, that is, the 12/5/75 pay checks will, of course, cover the period of work 11/16/75 - 11/29/75."
>
> * * *
>
> "Of more recent date, we were advised by Dr. Stanley Von Hagen and others that discussions would not be necessary insofar as the A.A.U.P.'s position was made clear in your June 3rd correspondence. Insofar as we have been given a clear directive from the State, we have no choice but to proceed in the manner outlined above..." 4/

On August 19, Mr. McKeever informed all faculty, including those represented by the A.A.U.P., of the implementation of the salary holdback commencing on September 15, 1975. The notice advised, in part, that "this action (and similar ones on the Newark-Jersey City campuses and at Raritan Valley Hospital is being taken to bring the salary schedules of the Faculty

4/ In the later letter of August 12, Mr. McKeever noted a correction to the timing of the implementation of the five (5) day holdback in that the schedule described in the August 7 letter was to apply in full only to the Faculty located on the Piscataway campus and all other personnel located at Rutgers Medical School and Raritan Valley Hospital, but that as to those Faculty located on the Newark-Jersey City campuses, the schedule would apply through the special pay date of 11/14/75 (for the period of work 10/26/75-11/8/75). The August 12 letter attached a series of conversion schedules for five day holdback which outlined the timing of the changes for each of the two faculty groups.

at all locations of the College and all Housestaff Officers and Regular Staff on the Piscataway and Greenbrook campuses into conformity with the salary schedules of the majority of College employees and into compliance with appropriate State law, that is N.J.S.A. 52:14-15 and 52:18-28. It is further being taken in a gradual manner so that the resultant difficulties will be kept at a minimum." The August 19 memorandum further noted that "The five (5) days' salary withheld is, of course, payable to each affected individual at the time of his or her departure from the College."

When the College did not comply with the demand of the A.A.U.P., that it not implement the salary holdback system, on August 26, 1975, it filed an unfair practice charge alleging a refusal to bargain, in contravention to N.J.S.A. 34:13A-5(a) 5. On August 28, the A.A.U.P. by its attorneys, wrote to President Bergen asking him not to implement the salary holdback system until a determination of the merits of the unfair practice charge had been determined.

On September 9, 1975, President Bergen informed the attorneys for the A.A.U.P., that he would not comply with the A.A.U.P.'s request to postpone the implementation of the salary holdback system. In his letter, President Bergen noted that the College "...has been directed since 1970 to institute salary holdback provisions within the administrative policies of the College."

On November 13, the College transmitted its position to the Public Employment Relations Commission, concerning the unfair practice charge and stated that the revision of the present salary payment system was in conformity with existing statutory requirements and that such an action is legislatively mandated and is not a subject of mandatory collective negotiations.

The Positions of the Parties

The position of the Council as set forth in the charge [5/] is incorporated as its position in the stipulation. The Council alleges therein that contrary to the position of the College, N.J.S.A. 52:14-15 does not compel the imposition of a holdback in salary since it clearly states that payments cannot be made in "more than 9 working days between the last day of the bi-weekly period," etc., and is clearly intended to prevent an extended

5/ And the complaint, by virtue of N.J.A.C. 19:14-1 and the Commission's practice, which converts the charge into a complaint thus instituting formal proceedings.

holdback, rather than any holdback at all. The Council also alleges therein that even if N.J.S.A. 52:14-15 required a holdback, this 1956 statute is subordinate to the New Jersey Employer-Employee Relations Law, originally enacted in 1968 and expanded in 1974 by Chapter 123, which modified the terms of N.J.S.A. 34:13A-8.1 to make the obligation to negotiate subordinate only to pension statutes. The Council also alleges in the charge that the impact of the five (5) day holdback in pay upon faculty will be substantial. In support, a memorandum from Dr. Irwin N. Perr, a faculty member at Rutgers Medical School, to President Bergen of the College, among others, dated May 23, 1975 is attached. That memorandum outlines the consequences in terms of lessened earnings and benefits the faculty would suffer from the institution of a five (5) day holdback of salary. Dr. Perr notes that the deferral of pay would not only reduce income the first year (from 52 weeks salary to 51) but would also reduce both the contributions of the person and of the State to his retirement plan. Dr. Perr notes that the loss in contribution to the pension plan resulting from the reduction in income in the first year of the deferral, compounded annually at six (6) percent interest, over a twenty to thirty-five year period for a junior faculty person, would be considerable.

In its brief, the Council argued that an extensive statement attached to Senate Bill No. 44, which became C. 118 Laws of 1956 (52:14-15), makes clear that the State Treasurer and the Budget Director have complete discretion to reduce or to not even undertake the holdback period. That statement shows that the Legislature's concern in adopting the holdback provision was with the elimination of a heavy administrative load then imposed on payroll functionaries in the preparation of corrected checks for actual time worked when a State employee leaves State service or takes unearned time off, prior to the end of a semi-monthly pay period. Alternatively, the Council takes the position that the College faculty are not covered by the terms of N.J.S.A. 52:14-15 since they are not State employees but are rather employees of the College, an autonomous public institution of higher education and are thus not subject to the provision of a statute proscribing the manner of payment of salary to officers and employees of the State. Reliance is placed here upon DeAngelis, et al. v. Addonizio, et al., 103 N.J. Super 238 (L. Div. 1968), in which the court determined that employees of the College are in the service of the College, not the State, and thus are not entitled to the guarantee of civil service status contained in the New Jersey

Constitution or its implementing statutes. Finally, the Council in its brief contends, as it earlier alleged in its charge, that the holdback of salary, as an aspect of the manner of payment of salary and the basis of its computation, constitutes a term and condition of employment concerning which the College is mandated to negotiate. The Council notes that the requirement that the College negotiate the salary holdback does not rely upon the 1974 amendments to the New Jersey Employer-Employee Relations Act but may be derived from an analysis of the trilogy of cases decided by the Supreme Court in 1973, Dunellen Board of Education v. Dunellen Education Association, 64 N.J. 17, 24 (1973); Board of Education of Englewood v. Englewood Teachers Assn., 64 N.J. 1 (1973), and Burlington County College Faculty Association v. Burlington County College, 64 N.J. 10 (1973). The Council also notes that its position is consistent with decision of the National Labor Relations Board and the Commissioner's decision in Hillside Board of Education, 1 NJPER 55 (P.E.R.C. No. 76-11, 10/2/75). The Council argues that the holdback constitutes a loss to the unit employees of an entire weeks' salary. Given the relative youth of many of the faculty and the relatively stable employment relationship they enjoy with the College, recoupment of the weeks' salary upon resignation, retirement or death is unlikely to take place for many years. As a consequence, and because of a reasonable projection of continued inflation, it is likely that the employees will suffer an outright loss of the salary involved.

Since the Council made a timely demand to negotiate and such demand was rejected by the College, the Council finally contends that the College's unilateral action violated its negotiation duty under the Act and constitutes a refusal to negotiate.

The Respondent argues in its initial reply to the charge that the College is an agency of the State, relying upon N.J.S.A.18:64G-2, [6] of the 1970 enabling Act.

6/ 18A:64G-2 entitled, "Findings and declarations" provides as follows: "The Legislature and Governor of the State of New Jersey hereby find that the establishment and operation of a program of medical and dental education is in the best interest of the State to provide greater numbers of trained medical personnel to assist in the staffing of the hospitals and public institutions and agencies of the State and to prepare greater numbers of students for the general practice of medicine and dentistry, and find, declare and affirm, as a matter of public policy of the State, that it is the responsibility of the State to provide funds necessary to establish and operate such programs of education, in the most economical and efficient manner, and that, in furtherance of such policy, the school of medicine heretofore established by Rutgers, the State University, (hereinafter called the "Rutgers Medical School") and the N.J. College of Medicine and Dentistry shall be combined into a single entity to be known as the College of Medicine and Dentistry of New Jersey."

As such, the College is obliged to direct and control expenditures in accordance with State budget appropriation acts, citing N.J.S.A. 18:64G-6(f). 7/ Among those acts, contends the College, is N.J.S.A. 52:14-15 which has earlier been quoted in full.

The Respondent further argues that this provision mandates some holdback period, albiet a limited one, by providing that the bi-weekly payments will commence "when there shall have been developed an interval..." (Emphasis added)

Such action, urges the Respondent, is a statutory obligation on the part of the College and is not a subject of mandatory collective negotiation. The Respondent relies upon the principle of statutory construction that implied repeal of statutes is not to be favored. The Respondent then concludes that the recent amendment to the Act at N.J.S.A. 34:13A-8.1 8/ cannot be interpreted to override the State's obligation to institute a holdback, in the absence of direct language evidencing contrary intent of the Legislature. As the Legislature clearly did not intend to render nonoperative those prior mandates concerning its public employment affairs by the passage of the cited amendment, N.J.S.A. 52:14-15 must be deemed to remain unaltered. Respondent is thus under no obligation to negotiate the subject of a holdback mandated by Statute.

7/ 18A:64G-6 entitled "Powers and duties of board" reads as follows:

"The board of trustees of the College, within the general policies and guidelines set by the Board of Higher Education, shall have the general supervision over and be vested with the conduct of the college. It shall have the power and duty to:

(f) Direct and control expenditures and transfers of funds appropriated to the college and in accordance with the provisions of the State budget and appropriation acts of the Legislature, and, as to funds received from other sources, direct and control expenditures and transfers in accordance with the terms of any applicable trusts, gifts, bequests, or other special provisions, reporting changes and additions thereto and transfers thereof to the Director of the Division of Budget and Accounting of the State Department of the Treasury. All accounts of the college shall be subject to audit by the State at any time;"

8/ 34:13A-8.1 originally provided in pertinent part, "...nor shall any provision hereof annul or modify any statute or statutes of this State." (Section 10 of P.L. 1968, c. 303). The same provision now reads: "...nor shall any provision hereof annul or modify any pension statute or statutes of this State." (Section 6 of P.L. 1974, c. 123) (Emphasis added).

In its brief, the Respondent relies upon Board of Education of the Town of Huntington v. Associated Teachers of Huntington, 30 N.Y. 2d. 22, 331 N.Y.S. 2d. 17, 282 N.E. 2d 109 (Court of Appeals, 1972) as clarified in Syracuse Teachers Association, Inc. v. Board of Education Syracuse City School District, 36 N.Y. 2d. 743, 361 N.Y.S. 2d. 912 (Court of Appeals, 1974) for the proposition that a public employer need not negotiate with respect to terms and conditions of employment limited by plain and clear prohibitions in either statutory or decisional law.

The Respondent also argues in its brief that even assuming arguendo, N.J.S.A. 52:14-15 does not mandate a salary holdback, a mandatory negotiations obligation does not attach to the subject matter because involved here is only a rearrangement of payment schedule under which salary payments remain in the same amount and are paid at the same interval. Consequently, the change is clearly an insignificant and immaterial one which does not give rise to an obligation to negotiate.

Issues Presented

The stipulation of facts and the submission of the parties pose the following issues for determination in this proceeding:

1. Does the five (5) day holdback in payment of earned salary constitute a term or condition of employment concerning which the public employer is required to negotiate in good faith with a majority representative of employees in an appropriate unit under N.J.S.A. 34:13A-5.4(a) (5) of the Act. 2/ In particular, is the holdback a proposed new rule or modification of an existing rule governing working conditions which "shall be negotiated with the majority representative before they are established." (N.J.S.A. 34:13A-5.3).

2. If the subject matter of the holdback in salary is a term or condition of employment does a State statute (N.J.S.A. 52:14-15) which deals with the imposition by the State of a limited salary holdback on certain employees;

(a) mandate the imposition of a holdback, and if so,

(b) does it apply to the employees here involved?

3. If the Statute mandates a holdback and does cover these employees, does the Statute preclude negotiations concerning the subject matter of salary holdback?

2/ 34:13A-5.4(a) (5) prohibits employers, their representatives or agents, in pertinent part, from "Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employees in that unit..."

4. If the Statute does not preclude negotiations concerning salary holdback, has the College violated its negotiating duty under the Act?

Holdback of Salary as a Term or Condition of Employment

In Board of Education of the City of Englewood v. Englewood Teachers Association, 64 N.J. 1 (1973), the Supreme Court determined that working hours and compensation of individual teachers are terms and conditions of employment within the contemplation of the Act. Thus, it held grievances concerning these subjects were suitable for negotiation and grievance procedures, including ultimate arbitration as provided in the parties' agreement. The Court noted that the Board of Education's unilateral compensated extention of the working hours of four special education teachers as well as the unilateral denial of tuition reimbursement and an application for placement on a certain salary guide for another teacher, were contract interpretations which "...would directly and most intimately affect the employment terms and conditions of the five individuals involved without affecting any major education policies." Id. at page 8. See also Hillside Board of Education, P.E.R.C. 76-11, 1 NJPER 55. It matters not that the dispute as to the negotiability of the subject matter arises during negotiations for a new agreement as in the instant case, and not in the context of a claimed violation of an existing agreement, as in City of Englewood.

It also appears to follow that the method or means of compensation as well as the level of compensation directly and intimately affect the employment terms and conditions of employees. See King Radio Corporation, Inc., 166 NLRB 648 (1967) (change from weekly to bi-weekly payment); General Motors Corp., 59 NLRB 1143, mod. and enf'd. 16 LRRM 833. (Transfer from salary to hourly rate pay base).

The Respondent, in effect, admits that the subject matter involved herein has an impact upon wages, hours, or other conditions of employment but argues, nevertheless, that the instant holdback of salary does not have a material or substantial impact since the salary payments remain the same and payment is received at the same bi-weekly intervals. Neither of the cases which the Respondent cites in its brief in support of this proposition is persuasive when applied to the subject matter here involved. In one, Seattle First National Bank v. NLRB, 444 F. 2d 30, a free investment service was utilized by only three percent of unit employees and involved the investment of only $655.21 over representative periods prior to the employer's unilateral

imposition of a service charge of one-half the amount charged non-employees. In the other, Westinghouse Electric Corporation v. NLRB, 387 F. 2d 542, an independent contractor operating cafeterias in the employer's plants raised food prices for employees. The Court in each case found the change had minimal impact on employees and denied enforcement of NLRB orders to bargain. In each case, unlike the instant one, the service was provided primarily for the convenience and accommodation of employees, and in Westinghouse, in particular, contrary to the instant subject matter, alternative food sources other than the plant cafeteria were available.

Here, every faculty member, employed at every College facility is affected by the holdback, and none have any choice to avoid the impact of the immediate loss and probable lengthy delay in recoupment of a full weeks' salary, a basic term and condition of their employment. In addition, during the transition period some employees wereto receive a single week's pay on at least one payroll date. There is in every case a delay in receipt of one week's pay which may not be recouped by a substantial majority of the faculty for a period of years until resignation, retirement, or death. At least during the first year in which the holdback became effective, faculty members will have received one week's less pay than in previous years. While I do not agree with the argument of the A.A.U.P.'s attorney that the faculty will suffer a loss of at least one-half of the salary heldback because no interest applies and continuing inflation will reduce its value, since the payment will ultimately be made at the then current, higher salary level, nonetheless, the loss of one week's salary and the delay in its receipt is a real loss, which, applied to the substantial complement of faculty employed in the unit, comprises a significant sum.

I, therefore, conclude that the salary holdback intimately affects the terms and conditions of employment of the employees. I also conclude that the manner or mode of paying earned salary is a rule governing working conditions within the meaning of N.J.S.A. 34:13A-5.3. [10/] Having determined that the holdback in salary constitutes a term or condition of employment, the Respondent still may be under no duty to negotiate, if its authority is constrained by another statute, mandating certain action with respect to the subject matter.

10/ That section, in part, specifically requires "proposed new rules or modifications of existing rules governing working conditions" to be "negotiated with the majority representative before they are established." See, Rutgers, the State University, P.E.R.C. No. 76-13 at page 9, f.n. 6 of the Decision and Order.

Does State Law Mandate a Salary Holdback for State Employees

The Statute which the Respondent claims limits its authority to negotiate with respect to the subject matter, has been quoted in full at page 3, infra. One must first look to the words used in determining its intent and meaning. The crucial word is "shall" in the phrase "shall fix the time of payment in the bi-weekly amount" and the crucial phrase is "when there shall have been developed an interval of not more than nine working days." The use of the word "shall" normally denotes a complusion with respect to the conduct at issue. There is a presumption that it is used in an imperative, not a directory sense. Kohler v. Barnes, 123 N.J. Super. 69, 81. The Council would have me derive an interpretation that the word "shall" in context gives the State discretion not to holdback salary. This interpretation is claimed to be derived from the statement attached to the Senate Bill No. 44 which was ultimately enacted into law as 52:14-15 (L. 1956 c. 118). That statement grounds the enactment of the holdback provision upon the need to reduce administrative complexity in the preparation of its payrolls as turnover among an enlarged work force has increased. Nothing contained in that statement supports the Council's interpretation that the word "shall" should be given anything but its normal imperative meaning. The holdback is central and not incidental to the end sought by the Legislature. 11/ Neither does the statement serve to support the Council's claim that the limitation upon the maximum number of work days which may be totalled in imposing a holdback in pay permits the State to refrain from imposing any holdback at all. The provision mandates the development of an "interval". Its particular dictionary meaning applicable here, is "a space, gap, or distance between objects, states, qualities, etc." (Webster's New Collegiate Dictionary, 1961 edition. G. & C. Merriam Co.). The clear sense of the language of the provision, in light of the Legislature's intent, and the essence of the Act leads me to conclude that the Legislature has required a holdback of salary up to nine working days in length. 12/

11/ The Council claims the Legislative reason is not the real reason the College has instituted the holdback here. The record contains no evidence to support its contention that the holdback has been instituted to reduce its cash flow problem. Even if it did, the statutory purpose must still be held to govern a holdback instituted pursuant to its terms.

12/ The minimal interval necessary to comply with the statutory provision is unclear but it is not a matter of concern here. The actual interval imposed by the College is five days. It is this interval, unilaterally imposed, within the parameters of the statute, with which this decision must be concerned.

Application of the Statute to the Faculty Employed by the College

While I have concluded that the Statute mandates a holdback of salary, the question remains, raised by the Council in its brief, whether it applies to the faculty employed by the College.

The present N.J.S.A. 52:14-15 became effective July 1, 1956. 13/ The New Jersey Medical and Dentistry College was created by the laws of 1968, c. 67, effective June 21, 1968 (N.J.S.A. 18A:64C-1 et seq.). The Act provided for the acquisition by the State of the Seton Hall College of Medicine and Dentistry to be operated as a public facility with the primary purpose of educating practicing physicians and dentists within the State. In §64C-2 the College was constituted "...an instrumentality exercising public and essential governmental functions." Under the original Act, the Governor appointed seven members to a Board of Trustees (§64C-4). The Board of Trustees were provided general supervision over and were vested with the conduct of the College. Upon acquisition of the Seton Hall College of Medicine and Dentistry the Board of Trustees was to assume full responsibility for its operations and to take such other action as may be likely to insure continued operations of the College (§64C-14). Among other powers, the Board of Trustees was granted the power and duty to sue and be sued; to determine the educational curriculum and program of the College; to determine the policies for its organization, administration and development; file an annual request for appropriation with the state treasurer; disburse all monies appropriated to the college by the legislature and all monies received from tuition, fees, auxiliarily services and other sources; direct and control expenditures of the college in accordance with the appropriation acts of the legislature, and, as to funds received from other sources, in accordance with the terms of any applicable trusts, gifts, bequests, or other special provisions; accept from any government or governmental department, agency or other public or private body or from other source grants or contributions of money or property which the board may use for or in and of any of its proposals; acquire (by gift, purchase, condemnation or otherwise), own, lease, use and operate property, whether real, personal or mixed, or any interest therein, which is necessary or desirable for college purposes; and exercise the right of eminent domain (§64C-8 (b), (c), (d), (e), (f), (g), (n), (o) and (q)).

13/ Prior to the 1956 amendment of the section it provided that "accept as otherwise specifically provided by law, all officers paid by the state, all state employees and all employees employed in the several counties and classified as state employees, shall be paid their salaries or compensation semi-monthly."

Those powers make clear that the College had available to it, sources of funds other than governmental appropriations. Furthermore, unlike the statute creating the State College system (N.J.S.A. 18A:64-18) the instant enabling Act contained no requirement that monies derived from fees were required to be paid to the State Treasurer or to become part of the General State Fund.

The 1968 enabling Act provided not only for the acquisition of the Seton Hall school but also for the acquisition of a public hospital in any municipality in which a site had been selected for the College (18A:64C-21). The Act further provided that all permanent municipal employees of the hospital acquired, except physicians and dentists, "shall continue as employees of the College and in accordance with the provisions of Title 11 of the Revised Statutes, Civil Service, shall not suffer loss of position or be removed, suspended or demoted except for cause." (18A:64C-25). Shortly after creation of the College in 1968, the College acquired the former Newark City Hospital. A group of employees of the former City Hospital who, by virtue of the acquisition, became employees of the College, sought a declaratory judgment as to their entitlement to full civil service status under the New Jersey Constitution and implementing statutes. The Court held that the employees of the hospital were employees of the College and not of the State or the State Department of Higher Education and thus were not entitled to full civil service status, but only those limited rights specifically granted by the enabling Act. DeAngelis, et al., v. Addonizio, et al., 130 N.J. Super 238 (Law Div., Larner, J.S.C., 1968).

Interestingly, in DeAngelis, contrary to the position it takes in the instant proceeding, the College contended that it and not the State was the employer of the former City Hospital employees.

After reviewing the genesis of the dispute arising from the takeover of the hospital by the College on July 1, 1968 pursuant to an agreement with the City of Newark, and the positions of the parties, Judge Larner then turned to the central issue in the case:

> "It is urged by the plaintiff that the college is but an agency of the State of New Jersey, exercising 'public and essential governmental functions' established under N.J.S 18A:64G-2 in the State Department of Higher Education. Although the statutory scheme creates the college as a corporate entity with corporate succession, it is urged that such corporate organization is only for convenience of administration and that, as a matter of substance, the college is a mere branch or agency of the State for the particular purpose of operating and administering a college of medicine and dentistry..." (page 250 of the opinion)

Following a discussion of various cases cited by plaintiff employees in support of their position, Judge Larner analyzed and determined the issue in the following language at pp. 251-254 of the opinion:

> "The foregoing cases dealing with the authorities and other governmental corporate entities illustrate that the mere fact that the corporate body exercises public and governmemtal functions does not in itself dictate that its employees are in the service of the State. The crux of this problem is whether the function of life of the particular agency is dependent upon the State in its management and control, and whether it depends solely and entirely upon the financial sustenance it receives from the State through its tax revenues.
>
> The college was established in the State Department of Higher Education as a body corporate with corporate succession, controlled and managed by a board of trustees appointed by the Governor with the advice and consent of the Senate. N.J.S. 18A:64C-2 to 4. The board of trustees has general supervision over the conduct of the college, including the following powers, among others: to adopt a corporate seal; sue and be sued; determine the policies for organization, administration and development of the college; disburse all moneys received from various sources; appoint officers and employees and fix their compensation; fix and determine with the approval of the State Treasurer the tuition rates and other fees; grant diplomas; enter into contracts with the State, any other public body, private individual or corporation; accept grants from public or private agencies; acquire, sell or lease real and personal property; exercise the right of eminent domain, and adopt such bylaws, rules and regulations as are necessary for the operation of the college. N.J.S.A. 18A:64C-8.
>
> It is significant also that the college has powers incident to the proper government, conduct and management of the school 'without recourse or reference to any department or agency of the state,' except as may be specifically provided in the legislation. N.J.S.A. 18A:64C-9. The college is deemed to be an employer for the purposes of the act integrating public employees into the social security system (N.J.S.A. 43:15A-1, 71), N.J.S. 18A:64C-11; and the legislation further provides that nothing contained therein involving the college or its activities shall be deemed to create or constitute a debt, liability or pledge of credit of the State of New Jersey, N.J.S. 18A:64C-17.
>
> The State has the responsibility to provide the financial support necessary to the continuation of the college program, N.J.S. 18A:64C-1, and does so through annual appropriations made upon budget requests of the college board of trustees. This financing is supplemented by tuition and fees

> and by grants and gifts from private and other public sources. With particular reference to the hospital facility operated by the college, a large portion of the financing is derived from patient's fees, including $7,400,000 annually from the City of Newark for care of the indigent.
>
> An analysis of the foregoing powers, duties and method of operation of the college and the hospital points to the conclusion that the college is a truly independent entity whose autonomy is substantive rather than merely formal or organizational. The board of trustees has full control of policies and functioning of the college, subject to minor supervisory functions of some state agencies. Not only does the institution have complete power to control its own destiny without recourse to any department or agency of the State, and not only is it designated as an employer for social security purposes, but it is granted power to enter into contracts with the State. If the college was but an agency or arm of the State as asserted by the plaintiffs, such power to contract with the State would have been wholly unnecessary and inappropriate.
>
> From the viewpoint of financial support, it is evident that although the college depends in part on annual appropriations from the State, a substantial portion of its financial maintenance is derived from other sources. And what is more significant to the issue at hand is that the major source of revenue for the maintenance of the hospital is derived from non-state sources. It follows, therefore, that the existence and functioning of the hospital does not depend entirely upon financial support from the State and its tax revenues, and that the employees of the hospital are not paid exclusively from state tax revenues.
>
> The court therefore finds that the employees of the hospital are in the service of the college, as an independent employer, and not in the service of the State. As a consequence, they are not entitled to the guarantee of civil service status contained in the New Jersey Constitution or its implementing statutes."

The judgement in DeAngelis was not appealed by any of the party defendants, which included the Mayor and Council of the City of Newark, the College, the Director of the Newark City Hospital, the State Attorney General, the Civil Service Commission of New Jersey, the State Commissioner of Education, and the President of the College.

In 1970, the Legislature created the College of Medicine and Dentistry of New Jersey, the present party Respondent in the instant proceeding (18A:64G-1 et seq.) - the result of a merger of the College and Rutgers Medical School.

The main thrust of the new statute, which revised and repealed parts of the original 1968 Act, was to provide the College with authority to acquire the then existing School of Medicine of Rutgers, the State University, (Rutgers Medical School) (18A:64G-2). See Briscoe v. Rutgers, 130 N.J. Super 493, 496-7.

In the 1970 Act, the Legislature did not introduce any change in the original 1968 enabling Act designed to reverse or undercut Judge Larner's intervening decision in DeAngelis.

While many of the pre-existing provisions of 18A:64C-1 et seq. were repealed and new provisions substituted, a close examination of the two Statutes discloses very few substantive changes of any nature. The Board of Trustees was enlarged from seven to eleven voting members and the Chancellor of the Department of Higher Education and the Commissioner of Health were added as ex officio members (18A:64G-4). The power of the Board of Trustees to sue and be sued was removed, but otherwise its authority to exercise general supervision over and to conduct the affairs of the College were not disturbed. A revision was made requiring that the Board direct and control expenditures and transfers of funds appropriated to it in accordance with the provisions of the State budget as well as the appropriation acts of the Legislature.(18A:64G-6 (f))[14/]

The 1970 Act specifically carries forward the power of the Board of Trustees to exercise such powers incident to the proper government of the College without recourse or reference to any department or agency of the State, except as otherwise provided by this Act (18A:64G-7).

I conclude that the Court's decision in DeAngelis, governs the relationship between the College and the State just as effectively today as it did in 1968 when it issued. See White v. City of Paterson, 137 N.J. Super 220, 224 (App. Div. 1975).

14/ A provision of the State budget for the fiscal year 1975-76 requires that "The Classification, Compensation, Promotion and Salary Administration Program Plans" of Rutgers, N. J. Institute of Technology and the College "...be maintained... in accordance with standards and guidelines established by the President of the Civil Service Commission and approved by the State Treasurer and the Director of the Division of Budget and Accounting and shall be subject to audit by the Department of Civil Service..." (P. 445, Appropriation Handbook, fiscal year 1975-76, P.L. 1975, c. 128). As earlier noted, the 1970 enabling Act did not require College compliance with the holdback statute. In the absence of statutory authority derived from 52:14-15 itself, I conclude that this language in the current State budget is an insufficient basis for requiring the College's Compensation Plan to comply with the holdback of salary even if such a holdback is one of the standards or guidelines established by the C.S.C. and approved by the Treasurer and Budget Director.

The decision of the Court in DeAngelis which was concerned with the status of the College's non-professional hospital employees, is equally applicable to the faculty members employed by the College in the unit represented for purposes of collective negotiations by the Council. Neither enabling Act differentiates between classifications of employees in terms of their employment relationship or the College's relationship to the State. Just as the former Newark City Hospital as a constituent facility of the College derives revenue from non-state sources, so do the constituent schools of the College, including the former Seton Hall College of Medicine and Rutgers Medical School, among others, derive portions of their revenue from non-state sources. That factor while significant in determining whether the College's employees were in the service of the State or College in DeAngelis, is of even greater significance in determining whether the employees here involved come within the salary holdback mandated in N.J.S.A. 52:14-15.

The stipulation of facts does not indicate to what extent the private sources of funds available to the College constitute a source of the salary payments made to the faculty. To the extent that any portion of faculty salary is derived from sources other than State appropriation, on that ground alone, the holdback mandated in 52:14-15 by its terms could not apply. This is so, because the provision speaks in terms of salaries of "...all officers and employees paid by the State..." /Emphasis supplied/. Further, to the extent any particular segment of the faculty is supported by fees, private grants and the like, it would be anomalous for the provisions of the holdback statute to apply to those faculty paid out of State monies and not to apply to faculty whose salary is derived in whole or in part from other sources. Clearly, the Legislature could never have intended to reach such a result.

Applying the results derived from a reading of DeAngelis to the faculty involved here, as employees of the College they cannot be found to be included among state officers or employees whose salary is required to be held back an interval of not more than nine working days, pursuant to N.J.S.A. 52:14-15.

The conclusion that the instant faculty are not covered by the holdback provision is strengthened as a result of a close inspection of the statutory framework in which the holdback provision appears. The holdback provision is incorporated in Title 52 of the New Jersey Statutes, titled "STATE GOVERNMENT, DEPARTMENTS AND OFFICERS". Subtitle 3 in which Chapter 14 appears is titled "EXECUTIVES AND ADMINISTRATIVE DEPARTMENTS, OFFICERS AND EMPLOYEES." Article 3

of Chapter 14, which includes 52:14-15, is titled "Salaries, etc. of officers and employees in general". The College is nowhere included among the departments and agencies listed in subtitle 3 of Title 52 which comprise the executive and administrative departments of the State of New Jersey.[15/]

Apart from the foregoing, there is evidence indicating that the State has only belatedly sought to impose the status of a State Agency upon the College, and not uniformly in every proceeding in which the issue is apparent or could have been raised.

Thus, Hofgesang, State Acting Director, Division of Budget and Accounting, in his letter to Ralph Dungan, Chancellor, Department of Higher Education, as recently as March 24, 1975 "recommended strongly" that the holdback policy be adopted for the College. Not until April 11, 1975, did the same official make reference to 52:14-15. The same letter of March 24, 1975, refers to a central payroll system established under authority of 52:27B-40 pursuant to which a one-week holdback of salary was instituted for State Agency employees. While the College was then proposing to conform to a uniform state procedure, it is clear that neither the State nor College viewed the College as part of the centralized payroll system. All the exhibits point to the College's preparation of its own payroll. In fact, Hofgesang's April 11th letter to Dungan, notes that "...in order to comply with the statutory requirement, the College of Medicine and Dentistry must follow essentially the same system which we have adopted for our central payroll system." /Emphasis added/

Furthermore, although the College President notes in response to the Council's attorneys that the College had been directed since late 1970 to institute a salary holdback, it is odd that a full five years elapsed apparently before sufficient pressure was generated in mid 1975, for the College to institute a salary holdback in September 1975.

Even now, neither Rutgers, the State University, nor the New Jersey Institute of Technology, sister institutions to the College, all three of which may be accurately characterized as "autonomous public universities", see Rutgers v. Piluso, 60 N.J. 142 (1972), have been requested or required by the

15/ Contrary to the Respondent's contention made in its response to the charge, N.J.S.A. 18A:64G-2 does not define the College as an "Agency of the State". The public interest in creating a cadre of trained medical personnel to staff hospitals and public institutuions in the State should not be equated with the creation of a state agency. See DeAngelis, supra; White v. City of Paterson 132 N.J. Super 220 (App. Div. 1975); New York Public Library, et al., v. New York State Public Relations Board, et al, 87 LRRM 2632 (App. Div.), aff'd, 90 LRRM 2463 (Court of Appeals)

State to institute a salary holdback of any kind.

Finally, it is interesting to note that over the years the State has consented to negotiation units under the Act limited to employees of the College. For example, see College of Medicine and Dentistry of the State of New Jersey and Teamsters Local 286, Affiliated with the International Brotherhood of Teamsters Public Service Employees, Docket No. R-97 (licensed practical nurses, clerical, health case and services, and operations maintenance and service employees); The College and Professional and Technical Employees Union, Local 484, Docket No. RO-993 (security guards and security officers); The College and Essex County Building Trades Bargaining Committee, Docket No. RE-21 (craft employees); and, of course, the instant unit, of teaching and research faculty, Docket No. RO-404.

If, as the State contends now, the College faculty are employees of a State Agency, subject to a holdback statute concerning its employees, then consistency would have required the State to seek that each of the classifications of employees involved in these prior representation proceedings be included in a respective statewide unit in accordance with the Commission's holding in State of New Jersey (NeuroPsychiatric Institute, et al), P.E.R.C. No. 50 and the Supreme Court's determination in In re State of New Jersey and Professional Association of N.J. Dept. of Education, 64 N.J. 231 (1974), aff'g P.E.R.C. No. 68 (1972), finding that the scope of units of state employees must be statewide. Yet, the State agreed in each of these proceedings to units limited in scope to the College.[16/]

Based upon the foregoing, I conclude that the provisions of N.J.S.A. 52:14-15 do not apply to the employees of the College, including its faculty represented by the Council and, accordingly, there is no statutory requirement that the salary of the faculty involved be held back for a period of up to nine days.

16/ In a current representation proceeding before the Commission involving pharmacists employed by the College, The College and New Jersey Society of Hospital Pharmacists, Docket No. RO-76-9, the College has appeared by the same counsel as in the instant proceeding, the Attorney General of New Jersey, urging that the pharmacists be included in a Collegewide professional unit. Significantly, the State does not contend that the pharmacists employed by the College are already included in a statewide professional unit which specifically includes pharmacists, certified by the Commission, in State of New Jersey and N.J.C.S.A.-N.J.S.E.A., Docket No. RO-824 on June 10, 1975. Only such a unit claim would be consistent with the State's claim in this proceeding that the College is a State Agency.

Assuming, arguendo, the Statute Applies to the Employees Involved, Do its Provisions Preclude Negotiation of a Holdback in Salary

While I have concluded above that the statute does not cover the faculty involved in this proceeding, the parties have stipulated and briefed the issue of the impact of the statute on the College's negotiation obligation. Accordingly, I deem it my responsibility to address the issue raised by the parties as to whether the statute, assuming it to mandate a holdback and to cover the employees, precludes negotations of a subject matter otherwise mandatorily negotiable.

Were this analysis to be undertaken pursuant to the provisions of Chapter 303 (P.L. 1968) prior to the 1975 amendments (P.L. 1974, c. 123, effective January 20, 1975), there would have been little question that the parties would have been estopped from negotiating the subject matter of a holdback in salary in the face of a statute (52:14-15) requiring the State to impose a holdback of no more than nine days in length. Such a result would have been foreordained by the language of the pre-Chapter 123 law which provided, in part, "...nor shall any provision hereof annul or modify any statute or statutes of this State." (N.J.S.A. 34:13A-8.1) Under this language, the State lacked authority to negotiate with respect to a subject matter as to which it is mandated to act in a particular manner.[17] As stated by the Commission, most recently, in The Board of Education of the Township of Rockaway and Rockaway Township Education Association, P.E.R.C. No. 76-44 (6/22/72) at page 10 of its Decision and Order:

> "Based upon N.J.S.A. 34:13A-8.1 as it read under Chapter 303 and as interpreted by the Supreme Court in the Dunellen Trilogy, the collective negotiations process of the Act could not have produced a result that would 'annul or modify any statute'."

Examining the issue in light of the Chapter 123 amendments presents a different picture. Now, N.J.S.A. 34:13A-8.1 reads, in pertinent part, "...nor shall any provision hereof annul or modify any pension statute or statutes of this state..." [Emphasis added]. By this language, the Legislature

17/ Under Chapter 303, had the Council limited its negotiation demand to negotiation of a salary holdback between 1 and 9 days, there would have been no conflict with the mandate of the statute, which by its terms permits the holdback to be imposed for any period between those two limits. But the Council has not so limited its demand and, in fact, takes the position that a holdback is not compelled at all. The inference I draw from this stated position and the absence of any demand limited to negotiation within the one to nine day range is that the Council demands no holdback at all.

has appeared to make clear that statutes other than pension statutes may be modified by collective negotiations undertaken between a public employer and employee organization concerning terms and conditions of employment. Such a conclusion is buttressed by the existing legislative history as well as recent decisions of the courts since the effective date of the Chapter 123 amendments.

There appear to have been no reports of the Senate and Assembly Committees which considered the Senate Bill No. 1087, ultimately enacted into law as P.L. 1974, c. 123. The report of its sponsors which accompanied the introduction of the original Senate Bill No. 1087 has only limited value since the proposed amendment of Sec. 10 of P.L. 1968, c. 303 (C.34:13A-8.1) went through substantial revision before it achieved its final version.[18] The Statement did manifest the sponsors' concern that the scope of negotiations under the Act required clarification in light of the Dunellen Trilogy. In this respect it provided:

> " "It is the purpose of sections 4 and 6 of this bill to clarify the scope of negotiations between public employers and employee organizations. The importance of some clarification was emphasized by the Supreme Court in Burlington County College Faculty Association v. Board of Trustees, Burlington County College, 64 N.J. 10 (1973), and in Dunellen Board of Education v. Dunellen Education Association, 64 N.J. 17 (1973).
>
> "The clarification set out in section 4 of this act is for the purpose of resolving the tension which exists between statutory provisions for the settlement of controversies and disputes which preceded the enactment of the Employer-Employee Relations Act and the existence of contractual procedures for the resolution of grievances arising under a collective agreement, including provisions for binding arbitration.[19] Under the addition to section 4

18/ The original version of Section 6 of c. 123 provided, in pertient part:
> "Nothing in this act shall be construed to annul the duty, responsibility or authority vested by statute in any public employer or public body except that the impact on terms and conditions of employment of a public employer's or a public body's decisions in the exercise of that duty, responsibility or authority shall be within the scope of collective negotiations."

19/ Section 4 of S-1087 in the original bill survived substantially intact. (C.34:13A-5.3). It then, and in the final approved version, contained the following change from P.L. 1968, c. 303:
> "Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance 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."

> of this act, an employee organization may negotiate and utilize procedures for the resolution of grievances, and both parties may arbitrate disputes within the definition of 'grievance' in their collective negotiation agreement.
>
> "Section 6 is intended to give greater guidance to PERC and to the courts in making the determination whether a particular issue is within the scope of negotiations. Section 6 provides that guidance without enacting a list of negotiable subjects. Questions concerning the scope of negotiations will still be resolved on a case-by-case basis, but both the administrative agency charged with enforcing this act and the courts will be aided by the statutory standard that the impact on terms and conditions of employment of the exercise of statutory duties by a public employer is negotiable."

In Dunellen Board of Education v. Dunellen Education Association, 64 N.J. 17 (1973) the Supreme Court had noted at pages 24 - 25 in discussing a potential conflict between the Education Laws and the pre-Chapter 123 Act:

> "(n)owhere in the Act did the Legislature define the phrase 'terms and conditions' as used in section 7 nor did it specify what subjects were negotiable and what subjects were outside the sphere of negotiation. In section 10 it did expressly provide that no provision in the act shall 'annul or modify any statute or statutes of this State.' N.J.S.A. 34:13A-8.1. In the light of this provision it is our clear judicial responsibility to give continuing effect to the provisions in our Education Law (Title 18A) without, however, frustrating the goals or terms of the Employer-Employee Relations Act (N.J.S.A. 34:13A-1 et seq.). /64 N.J. at 24-25./"

The Supreme Court continued at page 31:

> "Thus far our Legislature has not chosen to set forth the individual subjects which are to be negotiable and has left the matter to the judiciary for case by case determination as to what are terms and conditions of employment within the meaning of N.J.S.A. 34:13A-5.3. But it has at the same time clearly precluded any expansive approach here by directive unequivocably that provisions in existing statutes such as our educational laws shall not be deemed annulled or modified. N.J.S.A. 34:13A-8.1." /Emphasis added/

Hearings held before a joint committee of the Legislature on May 7, 1974, on the original version of the pending S-1087 did shed some light on the intent of the bill's sponsors to respond to the Supreme Court's views of the then existing relationship between the negotiations obligation under the Act and provisions in existing statutes. See, e.g. the following colloquoy appearing at page 80 of the transcript of the hearing between proponent Senator Martin L. Greenberg and Gerald L. Dorf, P.C., the then Labor Relations Counsel

to the New Jersey State League of Municipalities and counsel to the League's PERC Committee:

> "SENATOR GREENBERG: Mr. Dorf, if the Legislature amended the PERC statute as set forth in 1087, of course the language in the Dunellen Case with regard to the ability to negotiate would be modified by that legislation.
> "MR. DORF: In effect it would overrule Dunellen, yes, in my judgment.
> "SENATOR GREENBERG: And you agree we have the power to do that.
> "MR. DORF: Certainly. What I'm questioning is the advisability of doing it.
> "SENATOR GREENBERG: I understand your position."

In his prepared statement to the Joint Committee, Dorf expressed an apparently valid concern that Section 6 of S-1087 even in its then original version (which deleted the pre-existing language from c. 303 "nor shall any provision hereof annul or modify any statute or statutes of this State") would appear to expand the area of mandatory negotiation:

> "G. Existing Statutes.
>
> "1. Titles 11 and 18A
>
> "Apparently one of the major aims of S. 1087 is to substantially weaken the existing statutory structure in Title 11 (Civil Service) and Title 18A (Education). We believe this to be a highly unfortuante approach.
>
> "S. 1087 would weaken these other statutory schemes generally by excluding the language on page 9, line 6 which provides that the PERC statute shall not annul or modify any statute or statutes of this state. Further, this Bill attacks the hearing provisions of Civil Service and the Commissioner of Education on page 7, line 72 (S. 1087) where it provides that:
>
> > "'...notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance 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.'
>
> "The League is strongly opposed to both of the aforementioned attempts to weaken existing statutory structure. We believe that the expertise provided by the Civil Service Commission and the Commissioner of Education should not be scrapped in every instance in favor of an arbitrator. Therefore, the League strongly supports the position taken on page 10 of A. 1705.
>
> "Under existing law, particularly in the education field, other statutory structure of dispute resolution supersede contracted grievance procedures where there is concurrent jurisdiction. We believe this to be the wisest approach and support its specific continuance as provided in A. 1705." (p.p. 125A-126A)

Other witnesses expressed like concerns. (See, e.g. Presentation in Opposition of the New Jersey Council of School Administrators, pp. 149A-150A of the Joint Committee Hearing.)

After the final version of S. 1087 had been drafted, which restored the original language from c. 303 with the addition of the modifying word "pension", a proposed amendment introduced on July 30, 1974,[20/] accompanied by a Statement of Explanation, shows clearly the opponent members' understanding of the effect of this change in C34:13A-8.1. The proposed amendment, among others, took the simple form of the omission of the word "pension" from Section 6 of c. 123. The accompanying statement, headed, "S-1087 Nullifies Previously Enacted Statutes" provided, in pertinent part, as follows:

> "S-1087, as amended and passed by the Senate, provides on page 9, lines 3 through 9, as follows: 'Nothing in this act shall be construed to annul or modify, or preclude the continuation of any agreement during its current term heretofore entered into between any public employer and any employee organization, nor shall any provision hereof annul or modify any pension statute or statutes of this state.' According to normal legislative interpretation, all previous statutory enactments other than those concerning pensions are hereinafter subservient to the provisions of Chapter 303 as amended. The affect of this change in language is a 180 degree reversal of prior public policy, which currently provides that Chapter 303 shall not annul or modify any previous statutory enactment.
>
> "By providing that Chapter 303, as amended by S-1087, supersedes all other statutory enactments, collective bargaining agreements negotiated pursuant to its provisions would no longer be subject to other statutory schemes. Hereafter, collective negotiations would not be limited solely to terms and conditions of employment, but would encompass all other administrative and policy matters except those concerning pensions.
>
> "We believe that the legislature, in its wisdom has appropriately enacted expansive statutory schemes in both the areas of Education (18A) and Municipal Law (Titles 40 and 40A). Many of the topics covered in those legislative schemes may be appropriate matters for negotiations. However, most of the matters covered in those statutes are clearly the sole prerogative and obligation of the state legislature. If the legislature is to protect the citizens of the State of New Jersey from serious fiscal and operational difficulties throughout all levels of government in the state, it cannot relinquish its control over the areas which are presently regulated by statute. For to do any less, the legislature must be prepared to permit every local governmental unit and employee representative to 'write their own state laws for their own particular circumstances'."

20/ Chapter 123 was finally approved October 21, 1974.

In spite of the concerns expressed by opposing witnesses and legislators, c. 123, as adopted, contains the modifying word "pension" in C.34:13A-8.1.

The apparent plain meaning of this change in C.34:13A-8.1 has been noted by the Courts. In one proceeding, a board of education sought to enjoin an arbitration proceeding sought by an employee organization. At issue was whether school board assignments of an additional teaching period for teachers whose regular classes were being taught by specialists in music, physical education and art affected terms and conditions of employment. The Board of Education defended, in part, on the ground that the grievance was not arbitrable because the subject matter concerned a dispute which, under N.J.S.A. Title 18A the State Commissioner of Education was empowered to hear and determine. The Court resolved the issue in favor of arbitration. Red Bank Board of Education v. Worrington, et al., 138 N.J. Super. 564 (Sup. Ct., App. Div., 1976). In the course of its opinion, the court noted as follows, at page 572 of its opinion:

> "The New Jersey Employer-Employee Relations Act evidences a clear legislative intent that disputes over contractual terms and conditions of employment should be solved, if possible, through grievance procedures. We are convinced, moreover, that where provision is made for binding arbitration of such controversies, recourse for otheir resolution must be by that means and not to the Commissioner, for to hold otherwise would effectively thwart and nullify the legislative design expressed in the New Jersey Employer-Employee Relations Act.
>
> "Our conclusion is buttressed by two of the 1974 amendments to the New Jersey Employer-Employee Relations Act (L. 1974, c. 123), which appear to supply the clarification mentioned in Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n., supra. One (§ 6) amends N.J.S.A. 34:13A-8.1 by deleting from it the clause 'nor shall any provision hereof annul or modify any statute or statutes of this State.' The other (§ 4) adds to N.J.S.A. 34:13A-5.3 this sentence:
>
> *** Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any statute, grievance 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."

Cf. Board of Education of the Township of Ocean, the County of Monmouth v. Township of Ocean Teachers' Association et al., ___ N.J. Super. ___, (Docket Not. A-3334-74, App. Div. 5/5/76).

In view of the foregoing, I conclude that the Legislature intended to permit negotiations to annul or modify any statute except pension statute or statutes. In view of the foregoing, I conclude that even if the statute at issue here (C.52:14-15) could be construed to apply to the College's faculty employees, the subject matter of a salary holdback would still be mandatorily negotiable and negotiations would not be precluded by the pre-existing statutory requirement that a holdback of up to nine days be imposed for these employees, among others.

The State's Negotiations Obligation

The conclusion is warranted from an examination of the record exhibits, particularly, the Council's letter of June 3, 1975 and the College's reply of August 7, 1975, portions of which have earlier been alluded to, that the Council made timely demand to negotiate the subject matter of a salary holdback and that the College both declined to negotiate in response to the demand and then unilaterally instituted a holdback of salary.[21/] The College thus has violated its negotiation duty as to the subject matter of a salary holdback. Piscataway Township Board of Education and Piscataway Township Education Association, P.E.R.C. No. 91 (7/21/75), appeal dism. as moot, Docket No. A-8-75 (June 1976).

21/ I do not find that the College's implementation of the holdback constitutes a unilateral change in the parties' collective agreement as argued by the Council in its attorney's June 3, 1975 letter to President Bergen of the College. As the parties stipulated, only the non-economic portions of the expired June 3, 1973 to June 30, 1975 contract were extended past June 30, 1975 while negotiations on a successor agreement continued. Thus, economic terms, which logically could have been the only terms violated by the holdback were not in effect on September 15 when the holdback was implemented.

CONCLUDING FINDINGS

I find and conclude, based upon the foregoing analysis and conclusions reached on each of the issues presented for determination, that the State has failed to comply with its negotiation obligation under the Act, and has thus violated, and is violating 34:13A-5.4(a)(5) of the Act.

IV The Remedy

Having found that the Respondent has engaged in, and is engaging in, unfair practices within the meaning of 34:13A-5.4(a)(5) of the Act, I find that it is necessary that the Respondent be ordered to cease and desist from the unfair practices found and to take certain affirmative action designed to effectuate the policies of the Act. Respondent having refused to negotiate with the Council as the exclusive negotiating representative of its employees in the unit found appropriate, for affirmative relief I will order the Respondent, upon request, to negotiate in good faith with the Association as to the subject matter of a salary holdback, and, if an understanding is reached, embody it in a signed written agreement with the Council. Since, in addition, Respondent has also unilaterally altered, terms and conditions of its faculty employees, by implementing a five (5) day holdback of salary, for affirmative relief I will also order the Respondent to revoke and refrain from implementing a salary holdback pending negotiations in good faith, upon request, with the Council concerning the said subject matter, and, meanwhile, restore retroactively to the unit employees the five days of salary which it has held back commencing September 15, 1975.

All of the foregoing, I find to be necessary to neutralize the effects of the Respondent's unfair practices and to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and the entered record in this case, I make the following:

Conclusions of Law

1. The Respondent, College of Medicine and Dentistry of New Jersey, is a public employer within the meaning of N.J.S.A. 34:13A-3(c) of the Act.

2. Council of AAUP Chapters of the College of Medicine and Dentistry of New Jersey is a representative of employees within the meaning of N.J.S.A. 34:13A-3(e) of the Act.

3. The Respondent's teaching and research faculty employees described in the section entitled "The Employee Organization and its Status," above, employed by the Respondent constitute a unit appropriate for the purposes of collective negotiations within the meaning of N.J.S.A. 34:13A-13-5.3 of the Act.

4. At all times since 1972, the Council has been and continues to be, the certified exclusive negotiating representative of the employees in the approriate unit described in conclusion 3, above, within the meaning of N.J.S.A. 34:13A-5.3 of the Act.

5. At all times since August 7, 1975, the Respondent has refused, and continues to refuse, to negotiate in good faith with the Council as majority representative of the employees in the appropriate unit described in Conclusion 3, above, and has thereby engaged in, and is engaging in, unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(5) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and purusant to N.J.S.A. 34:13A-5.4(c) of the Act and Section 19:14-7.1 of the Commission's Rules and Regulations, I hereby issue the following recommended:

O R D E R

Respondent, College of Medicine and Dentistry of New Jersey shall:

1. Cease and desist from;

(a) Refusing to negotiate collectively in good faith with the Council of AAUP Chapters of the College of Medicine & Dentistry of New Jersey as the majority representative of the employees in the unit described below, concerning terms and conditions of employees in that unit: all full-time teaching and/or research faculty and all part-time teaching and/or research faculty who are employed at 50% or more of full-time employed by the College of Medicine and Dentistry of New Jersey.

(b) Making changes in terms and conditions of employment in the above described unit, during the course of collective negotiations for a successor agreement with the Council.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, negotiate with the Council of AAUP Chapter of the College of Medicine and Dentistry as the majority representative of the employees in the aforesaid appropriate unit, concerning the subject matter of a salary holdback affecting the terms and conditions of employment.

(b) Revoke, and refrain from implementing a five (5) day holdback of salary, as applied to employees in the aforesaid appropriate unit, during negotiations for a successor agreement with the Council, or, if such agreement has been achieved, but does not cover the subject of salary holdback, during the course of independent negotiations as to the said subject matter.

(c) Restore retroactively to the unit employees the five (5) days of salary held back commencing September 15, 1975, during the course of collective negotiations for a successor agreement or independent negotiations with the Council.

(d) Notify the Commission, in writing, within twenty (20) days of receipt of this Order what steps the Respondent has taken to comply herewith.

Robert T. Snyder
Hearing Examiner

DATED: Trenton, New Jersey
June 30, 1976