

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY, UNIVERSITY
OF MEDICINE AND DENTISTRY OF
NEW JERSEY,

Respondent,

-and-

Docket No. CO-82-92

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

Charging Party.

SYNOPSIS

On an application for interim relief brought by the Charging Party, a designee of the Public Employment Relations Commission denies the twofold request of the Charging Party: (1) that the Respondent negotiate "criteria" for the "piercing" of the salary cap for the 1982-83 fiscal year; and (2) that the Respondent implement a seven (7) percent salary increase, effective July 1, 1982, as to 200 to 300 faculty members, who are at or above the current salary cap of \$59,000. The Commission's designee found that salary cap "criteria" were preempted from negotiations by the several Appropriations Acts of the legislature between 1980 and 1983 under State v. State Supervisory Employees Association 78 N.J. 54 (1978). Further, the designee distinguished implementation of the seven (7) percent of the salary increase, which involves discretion as to who may "pierce" the salary cap, from those cases where interim relief has been granted, which involved the denial of payment of automatic salary increments in the context of negotiations for a successor agreement: State of New Jersey, I.R. No. 82-2, 7 NJPER 532 (1981) and City of Vineland, I.R. No. 81-1, 7 NJPER 324 (1981). Thus, there was a failure to demonstrate substantial likelihood of success on the merits of the amended Unfair Practice Charge and no demonstration of irreparable harm because the right to compensation was not clear and could, if necessary, be remedied at the end of the case.

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Appearances:

For the Respondent
Irwin I. Kimmelman, Attorney General
(Melvin E. Mounts, DAG)

For the Charging Party
Sterns, Herbert & Weinroth, Esqs.
(Mark D. Schorr, Esq.)

INTERLOCUTORY DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on October 30, 1981, and amended on July 22, 1982 (C-1), which amendment is the subject of the instant application for interim relief, by the University of Medicine and Dentistry of New Jersey Council of American Association of University Professors Chapters (hereinafter the "Charging Party" or the "AAUP") alleging that the State of New Jersey, University of Medicine and Dentistry of New Jersey (hereinafter the "Respondent," the "State" or the "University") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"). The amended Unfair Practice Charge consists of Counts 1 to 12 with Counts 1-3 and 7-9 alleging violations by the Respondent of N.J.S.A.

34:13A-5.4(a)(1) and (5) of the Act ^{1/} and with Counts 4-6 and 10-12 alleging violations by the Respondent of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act. ^{2/}

The Counts alleging a violation of Subsections(a)(1) and (5) of the Act, supra, may be summarized as follows: the AAUP and the University have since 1972 been parties to five collective negotiations agreements covering full-time faculty members, the current agreement being effective July 1, 1981 to June 30, 1983; the State, the University and the Department of Higher Education (DHE) have actively participated in and approved all of the foregoing agreements; from July 1, 1973 until the present, Appropriation Acts adopted by the Legislature have provided that employees of the State, including those employed by the University, could not receive a salary greater than \$500 less than the heads of their respective departments, said Acts exempting from this limitation University "medical faculty," in addition to other State employees, including the President of the University; the State always interpreted the term "medical faculty" to include individuals represented by the AAUP without regard to whether they were licensed doctors or dentists, as a result of which the State's Salary Adjustment Committee (SAC) has uniformly approved faculty salaries at the University in excess of the limits set forth in the Appropriation Acts; following the negotiations, which led to the current agreement, the University submitted to SAC a request for salary increases for "medical faculty" (including those not licensed doctors and dentists), but SAC was told by the State

1/ These Subsections prohibit public employers, their representatives or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

"(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."

2/ This additional Subsection prohibits public employers, their representatives or agents from:

"(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act."

not to process or approve such request because DHE was seeking a legal opinion from the Attorney General as to whether unlicensed faculty members were included within the definition of "medical faculty" in the Appropriations Acts; this resulted in the filing by AAUP of an Unfair Practice Charge on December 10, 1979, and amended on February 24, 1980, (Docket No. CO-82-159); the foregoing Unfair Practice Charge was "resolved" by an Opinion of the Attorney General in April 1980 to the effect that "medical faculty" included faculty members at the University who were not licensed physicians and dentists; thereafter two more Appropriations Acts continued the exclusion of "medical faculty" at the University from the salary caps, but providing, additionally, that with respect to salary adjustments at the University "...recomendations for such salary adjustments shall be in accordance with criteria promulgated by the Chancellor of Higher Education and the Director of the Division of Budget and Accounting...;" the Chancellor of DHE, during negotiations for the current agreement, refused to subject to negotiations the criteria for the waiver of salary caps for members of the unit represented by the AAUP with the State's negotiator, Frank Mason, Director of OER, advising the representatives of the AAUP that guidelines for salary in excess of the salary caps would be determined by the State and imposed unilaterally; thereafter the State unilaterally imposed salary guidelines adversely affecting members of the AAUP unit; additionally, certain administrators and faculty members were designated by the University to be exempt from the salary caps and this unilateral action took place during negotiations for the current agreement; the University has also unilaterally frozen the salaries of basic scientists whose salaries were in excess of the current caps; the Appropriations Act for FY 1983 contains no provision for a salary cap, it having been eliminated by veto of the Governor, but it does provide that the President of the Civil Service Commission and the Director of the Division of Budget and Accounting are to make rules and regulations to implement salary increases for State employees; and, on information and belief, the said President and the Director have imposed a salary

cap of \$59,000 on State employees and have allowed members of the AAUP unit to "pierce" the caps only to the extent allowed by the Chancellor of DHE, who has unilaterally limited the number of faculty members who can exceed the caps and who also has unilaterally promulgated criteria upon which the University will allow faculty members to exceed the caps; as a result certain faculty members represented by the AAUP will lose monies due to them; finally, certain administrators and faculty members will be unilaterally designated by the University to be exempt from the salary caps without negotiations with the AAUP.

The Counts alleging a violation of Subsections(a)(1) and (3) of the Act, supra, may be summarized as follows: the University, in implementing salary guidelines has permitted certain managerial executives outside the AAUP unit to exceed the salary caps and has thereby discriminated against members represented by the AAUP, depriving them of benefits collectively negotiated and discouraging non-members from joining the AAUP, all of which is an embarrassment to the AAUP and inherently destructive of employees rights.

On July 23, 1982 the undersigned, who has been delegated the authority to act upon requests for interim relief on behalf of the Commission, executed an Order to Show Cause, returnable August 17, 1982 at the Commission's offices in Newark, which ordered the Respondent to show cause why an order should not be entered directing it to make payment to employees represented by the Charging Party of salary increases in accordance with the provisions of the current collective negotiations agreement, pending the disposition by the Commission of the instant unfair practice proceeding. The Charging Party had filed a supporting affidavit with the amended Unfair Practice Charge, and on August 2, 1982 the Charging Party filed a supporting brief and Appendix. The Respondent filed a brief in opposition on August 11, 1982. On the return date a hearing was conducted by the undersigned where both parties appeared by counsel and argued orally, during which an undisputed statement of facts was developed, followed by their contentions on the application

of the law.

The undersigned hereby denies the Charging Party's requested application for interim relief for the reasons hereinafter set forth.

* * * *

The standards that have been developed by the Commission for evaluating the appropriateness of the grant of interim relief are quite similiar to those applied by the courts on like applications. The test is twofold: a substantial likelihood of success on the merits as to the facts and the law in the light of Commission and Court precedent; and the irreparable nature of the harm that will occur if the requested relief is not granted. Both of these requisites must be satisfied before the requested relief may be granted.^{3/}

THE UNDISPUTED FACTS

Based upon: (1) the amended Unfair Practice Charge; (2) the affidavit of Fred J. Roisen; (3) the Appendix to the Charging Party's brief; (4) the agreed statement of facts by counsel for the parties at the hearing; and (5) Exhibit C-6, the February 27, 1981 criteria for SAC approval of University faculty and administrators' salaries above the department head maximum, promulgated by the Chancellor of DHE and the Director of Budget and Accounting -- it appears that the following facts are undisputed:

1. The Charging Party and the University have since 1972 been parties to five collective negotiations agreement covering full-time faculty members, the current agreement being effective July 1, 1981 to June 30, 1983. The State, the University and the Department of Higher Education (DHE) have actively participated in and approved all of the foregoing agreements. At the present time there are approximately 780 faculty members in the negotiations unit.

2. Article VIII, "Compensation Benefits," of the current agreement, supra,

3/ See Township of Little Egg Harbor P.E.R.C. No. 94, 1 NJPER 37 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); and Township of Stafford, P.E.R.C. 76-9, 1 NJPER 59 (1975).

provides under Section A, "Salary Program," as follows:

"1. All salary adjustments shall be subject to the terms and conditions of the appropriations legislation and administered consistent with the rules and regulations adopted by the University in conformity with the appropriate elements of the State's Compensation Plan.

"2. Subject to legislative enactment providing appropriation of funds for these specific purposes, the following benefits will be provided during fiscal years 1981-1982 and 1982-1983..."

Thereafter a ten (10) percent across the board increase is provided for fiscal year 1981-82 and a seven (7) percent across the board increase is provided for fiscal year 1982-83.^{4/}

3. Beginning July 1, 1972 Appropriations Acts adopted by the Legislature have provided that employees of the State could not receive a salary greater than \$500 less than the heads of their respective departments, said Acts, however, exempting from this limitation University "medical faculty." The State always interpreted the term "medical faculty" to include individuals in the collective negotiations unit represented by the AAUP without regard to whether they were licensed doctors or dentists. As a result, the State's Salary Adjustment Committee (SAC) has uniformly approved faculty salaries at the University in excess of the limits set forth in the Appropriations Acts. The Attorney General in April 1980, in response to a request from the Chancellor of DHE, issued an Opinion to the effect that "medical faculty" included faculty members at the University who were not licensed doctors or dentists.

4. The Appropriations Acts for 1980-81 (P.L. 1980, Ch. 56) and 1981-82 (P.L. 1981, Ch. 190) provided for a salary cap for employees of the College

^{4/} At the hearing counsel for the Charging Party stated that the only monetary relief sought in this proceeding involves the seven (7) percent across the board contract increase effective July 1, 1982. Counsel further indicated that approximately 300 faculty members are presently frozen at or over \$59,000 (the origin of this figure will be set forth hereinafter) and have received no increase. Faculty members under \$59,000 received the contract increase of July 1, 1982. Counsel for the Respondent is in agreement with the foregoing except that he states that the number of faculty members at or over \$59,000 is 200 rather than 300.

(University) of \$500 less than the salary of the Chancellor of Higher Education, with the exception that the salaries of administrators and medical faculty may be increased above the Chancellor's salary with the approval of the President of the Civil Service Commission and the Director of the Division of Budget and Accounting. The Appropriations Acts then continued: "...With respect to salary adjustments for the College... recommendations for such salary adjustment shall be in accordance with criteria promulgated by the Chancellor of Higher Education and the Director of the Division of Budget and Accounting..." (Emphasis supplied).

5. The AAUP unsuccessfully sought in the negotiations for the current agreement to negotiate the criteria for faculty salaries, which the President of the University on February 24, 1981 had said would "...be brought to the ... negotiations." However, Frank Mason, the Director of OER, later advised the AAUP that such criteria would be determined by the State and imposed unilaterally. These criteria were promulgated as of February 27, 1981 and were effective from July 1, 1980 through June 30, 1982 (Exhibit C-6).

6. The salary cap as of July 1, 1981, the effective date of the current agreement, was \$55,500 and the ten (10) percent across the board salary increase, supra, was implemented in accordance with the foregoing criteria. However, no faculty members were permitted to "pierce" the salary cap and those faculty members above the salary cap of \$55,500 were frozen.

7. The Appropriations Act for 1982-83 contains no salary cap but does provide as follows:

"The State Treasurer, the President of Civil Service Commission, and the Director of the Division of Budget and Accounting shall establish rules and regulations governing salary ranges and rates of pay.

"No salary range or rate of pay shall be increased or paid in any State department, agency, commission, or higher education institution without the approval of the President of the Civil Service Commission and the Director of the Division of Budget and Accounting, pursuant to rules and regulations." (Emphasis supplied).

8. Effective June 26, 1982 the State Treasurer, the President of the Civil

Service Commission and the Director of the Division of Budget and Accounting promulgated four regulations pursuant to the 1982-83 Appropriations Act, supra (see Charging Party's brief, pp. 9a-18a). SR#4, herein involved provides, in part, as follows:

"No employee in the unclassified service shall be paid a cash salary rate in excess of \$59,000 except with the approval of the employee's department head and the President of the Civil Service Commission and the Director of the Division of Budget and Accounting. The salaries of administrators and faculty at Rutgers the State University, the University of Medicine and Dentistry of New Jersey and the New Jersey Institute of Technology, as specified by the Chancellor of Higher Education, may be increased beyond \$59,000 in accordance with criteria promulgated by the Chancellor of Higher Education and the Director of the Division of Budget and Accounting." (Emphasis supplied).

9. The \$59,000 salary cap for the current fiscal year originates from SR#4, supra. The "criteria" to be promulgated by the Chancellor of Higher Education and the Director of the Division of Budget and Accounting for the "piercing" of the \$59,000 salary cap have not as yet issued. When these criteria are promulgated they will supersede Exhibit C-6, the criteria of February 27, 1981, supra, which expired June 30, 1982.

THE RELIEF SOUGHT

The AAUP seeks an order upon the Respondent that it implement the seven (7) percent increase as to the 200 or 300 faculty members, who are at or above the salary cap of \$59,000, which necessarily involves utilization of the new criteria yet to be promulgated under SR#4, supra.

The AAUP, having unsuccessfully sought to negotiate the subject matter of the criteria of February 27, 1981 (C-6), also seeks an order upon the Respondent that it negotiate the new criteria yet to be promulgated under SR#4.

DISCUSSION AND ANALYSIS

1. The Irreparable Harm Standard

The undersigned first takes up the irreparable harm standard because he is persuaded that the undisputed facts do not establish that the Charging Party will

be irreparably harmed if the requested relief is not granted. See Montville Township Board of Education, P.E.R.C. No. 76-51, 2 NJPER 230, 231 (1976) and City of Jersey City, P.E.R.C. No. 77-13, 2 NJPER 293, 294 (1976).

In Montville the Commission's designee granted interim relief, in part, with respect to the obligation of the Board to negotiate procedures pertaining to reduction-in-force, but denied interim relief as to resulting changes in workload, stating that "...the potential harm, if any, is not so great or so irreparable that it could not be remedied at the end of the case in the final Commission ruling..." (2 NJPER at 231).

In City of Jersey City the Commission's designee denied interim relief in a case involving a unilateral increase of five hours in the employees' work week, stating "...They will of course be required to work extra hours, apparently one per day, but that is remediable with money and interim relief will normally not be available to remedy a monetary wrong..." (2 NJPER at 294).

The undersigned finds inapplicable several decisions of Commission designees cited by the AAUP, which involved the refusal of a public employer to pay previously agreed upon or automatic salary increments where such payment constituted the maintenance of the status quo during negotiations for a successor agreement. See Union County Regional High School Board of Education, P.E.R.C. No. 78-27, 4 NJPER 11 (1977); State of New Jersey, I.R. No. 82-2, 7 NJPER 532 (1981); and City of Vineland, I.R. No. 81-1, 7 NJPER 324 (1981), enf'd, App. Div. Docket No. AM-1037-80T3 (7/15/81).

The foregoing decisions granting interim relief in increment cases were predicated upon judicial enforcement of Commission decisions in such cases as Galloway Township Board of Education v. Galloway Township Education Association, 78 N.J. 25 (1978), Hudson County Board of Chosen Freeholders v. Hudson County PBA, App. Div. Docket No. A-2444-77 (4/9/79) and Rutgers, The State University v.

University College Teachers Association, App. Div. Docket No. A-1572-79 (4/1/81).

The undersigned does not perceive that the claimed right of the AAUP to negotiate the criteria for "piercing" the salary cap during the current fiscal year for some 200 or 300 faculty members is to be equated with the rights of employees who have been denied an automatic salary increment, the denial of which would alter the status quo. There is absent herein any ongoing negotiations for a successor agreement and thus there is no status quo to be maintained. Further, any claim for monies found to be due to affected faculty members can be remedied at the end of the case by an order for payment, which, under current Commission policy, would include interest at the rate of twelve (12) percent per annum.

Based upon the foregoing, the undersigned finds that the Charging Party has failed to satisfy the irreparable harm standard, supra.

2. The Substantial Likelihood Of Success Standard

As noted above, the Charging Party must establish that it has a substantial likelihood of success on the merits of the amended Unfair Practice Charge as to the facts and the law in the light of Commission and Court precedent. Both the Charging Party and the Respondent cite State v. State Supervisory Employees Association, 78 N.J. 54 (1978), the Charging Party contending that the recent Appropriations Acts "...have only a limited preemptive effect..." on negotiations (78 N.J. at 81), and the Respondent contending that the Legislature has spoken "...in the imperative..." leaving "...nothing to the discretion of the public employer..." concerning who shall determine the manner in which the salary cap may be exceeded (78 N.J. at 80).

After considering the arguments of counsel, the undersigned is persuaded that the Legislature in enacting the Appropriations Acts for 1980-81, 1981-82 and 1982-83 spoke in the "imperative" when it entrusted named State officials with the responsibility to develop rules and regulations and criteria for

determining how State employees, including faculty members at the University, shall be permitted to "pierce" the salary cap for any given year. Negotiations on the subject matter of criteria for the "piercing" salary caps have, thus, been preempted.

The undersigned also agrees with the Respondent's reference to State Supervisory, supra, where criteria for evaluation of employees were held to be managerial prerogatives. Likewise, the rules and regulations and criteria for exceeding the salary cap represent a managerial prerogative which is not subject to collective negotiations.

In fiscal years 1980-81 and 1981-82 the criteria for "piercing" the salary cap were to be established by the Chancellor of Higher Education and Director of the Division of Budget and Accounting. This was done on February 27, 1981 when Exhibit C-6, supra, was issued. These criteria expired June 30, 1982. In fiscal year 1982-83 the State Treasurer, the President of the Civil Service Commission and the Director of the Division of Budget and Accounting issued, inter alia, SR#4, which provides that the criteria for "piercing" the salary cap are to be established by the Chancellor of Higher Education and the Director of the Division of Budget and Accounting. These criteria have not as yet been promulgated. Nevertheless, when issued the new criteria will enjoy the same insulation from collective negotiations as the criteria which expired June 30, 1982.

Even if it is assumed arguendo that the "criteria" for "piercing" the salary cap represent terms and conditions of employment, the Legislature has entrusted the regulation of said terms and conditions of employment to specific State officials in each of the Appropriations Acts since fiscal year 1980-81. As the Supreme Court stated in State Supervisory, supra: "...It must be emphasized, however, that the adoption of any specific statute or regulation setting or controlling a particular term or condition of employment will preempt any inconsistent

provision of a negotiated agreement... In short, the parties must negotiate upon and are free to agree to proposals governing any terms and conditions of public employment which have not been set, and thus preempted, by specific statutes or regulations..." (78 N.J. at 81).

As noted previously, the undersigned is persuaded that the Legislature in three Appropriations Acts has spoken in the imperative by investing named State officials with the exclusive authority to issue rules and regulations and criteria concerning the manner in which faculty members of the University may "pierce" the salary cap.

The undersigned has examined and considered two August 2, 1982 decisions by the New Jersey Supreme Court in Bethlehem Township Board of Education v. Bethlehem Township Education Association, Docket No. A-58-81, and Council of N.J. State College Locals v. State Board of Higher Education, Docket No. A-154-81, and finds nothing in either decision to alter the result herein, which is dictated by State Supervisory, supra.

Therefore, the undersigned finds and concludes that the Charging Party has failed to establish a substantial likelihood of success on the merits as to the facts and the law.

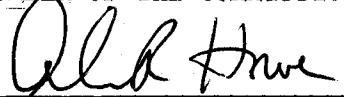
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ORDER

The Charging Party having failed to establish irreparable harm and a substantial likelihood of success on the merits as to the facts and the law, its application for interim relief as to the amended Unfair Practice Charge is **HEREBY DENIED**.

Dated: August 25, 1982
Newark, New Jersey

BY ORDER OF THE COMMISSION


Alan R. Howe
Hearing Examiner