P.E.R.C. NO. 83-157

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY and UNIVERSITY OF MEDICINE & DENTISTRY OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-82-92-41

UNIVERSITY OF MEDICINE & DENTISTRY OF N.J., COUNCIL OF CHAPTERS OF THE AAUP,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission affirms a Hearing Examiner's subpoena duces tecum to the extent it requires the production of certain documents, but not to the extent it requires, at this point in the litigation, the testimony of the Chancellor of Higher Education. The University of Medicine and Dentistry of New Jersey, Council of Chapters of the AAUP had filed an unfair practice charge against the State of New Jersey and the UMDNJ alleging that they unilaterally and discriminatorily placed a salary cap on unlicensed doctors and dentists represented by AAUP. The Chancellor of Higher Education allegedly established the criteria for piercing the salary cap for University faculty. The Association sought documents concerning the formulation of these criteria and the testimony of the Chancellor concerning his role in their formulation. The State and the University argued that the subpoena duces tecum should be quashed because, they believed, the Appropriations Acts for the years 1981-83 wholly preempted negotiation over the criteria for piercing the salary cap and made irrelevant any inquiry into how or why the criteria were established and because the Association was impermissibly seeking to probe the mental processes of the Chancellor of Higher Education. The Commission held that the documents were relevant and discoverable under Council of N.J. State College Locals v. State Board of Higher Education, 91 N.J. 18 (1982), given the Chancellor's apparent dual role of negotiator and regulator, but that a ruling on the necessity of the Chancellor's personal testimony should be deferred until the parties had an opportunity to digest and litigate the significance of the relevant documents.

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Charging Party.

Appearances:
For the Respondent, Melvin E. Mounts, Deputy Attorney General

For the Charging Party, Sterns, Herbert & Weinroth (Mark D. Schorr, of Counsel)

DECISION AND ORDER

The State of New Jersey ("State") and the University of Medicine & Dentistry of New Jersey ("University")[1/] have received special permission to appeal from a subpoena duces tecum directing the Chancellor of Higher Education to produce certain documents concerning the criteria he established for piercing the salary cap for University faculty and to testify concerning these criteria. We affirm the subpoena to the extent it requires the production of the requested documents, but not to the extent it requires the testimony of the Chancellor at this point in the litigation.

1/ At the commencement of this litigation the proper name of the latter defendant was the College of Medicine & Dentistry of New Jersey. The name has since been changed to the University. We have used "University" throughout our description of the proceedings for the sake of clarity.

On October 30, 1981, the University of Medicine & Dentistry of New Jersey, Council of Chapters of the AAUP ("AAUP") filed an unfair practice charge against the State and the University with the Public Employment Relations Commission. The charge alleged that the State and the University violated subsections 5.4(a)(1),(3), and (5)[2/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when, allegedly, they unilaterally and discriminatorily placed a salary cap on unlicensed doctors and dentists represented by AAUP.

The charge contained six counts, each of which alleged the following common factual background. AAUP has represented all full-time University faculty since 1972 and has negotiated five collective negotiations agreements with the State and/or University since that time. The State, the University, and the Department of Higher Education ("DHE") have actively participated in these negotiations and have approved all agreements. The latest agreement covers the period July 1, 1981 to June 30, 1983.

From July 1, 1973 until the filing of the charge in 1981, the Appropriations Acts adopted by the Legislature have provided that employees of the State, including University employees, could not receive a greater salary than $500 less

2/ 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; (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; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

than the head of their respective departments. Those Appropriations Acts, however, exempted from this limitation the "medical faculty" of the University.[3/] Prior to July 1979, the State had interpreted the term "medical faculty" as used in the Appropriations Acts to include individuals represented by AAUP, regardless of whether they were licensed or unlicensed doctors or dentists. Pursuant to the Appropriations Acts, and the agreements between the parties, the University had submitted to the State's Salary Adjustment Committee ("SAC"), and SAC had approved, faculty salaries in excess of the limitations set forth in the Appropriations Acts.

Following negotiations leading to the agreement for July 1, 1979 to June 30, 1981, the University submitted to SAC requests for salary increases for "medical faculty," including unlicensed doctors and dentists. The State, however, told SAC not to process or approve such requests because DHE, through its Chancellor, T. Edward Hollander, was seeking a legal opinion from the Attorney General concerning whether unlicensed doctors and dentists were included within the definition of the term "medical faculty" in the Appropriations Acts. The AAUP filed an unfair practice charge alleging a refusal to negotiate in good faith, but the charge was withdrawn in April, 1980 when the Attorney General issued an opinion stating that the term "medical faculty" as used in the Appropriations Acts did include unlicensed doctors and dentists.

3/ AAUP cited the following Appropriations Acts: L. 1981, c. 190; L. 1980, c. 56; L. 1979, c. 119; L. 1978, c. 60; L. 1977, c. 137; L. 1976, c. 42; L. 1975, c. 128; L. 1974, c. 58.

The Legislature then adopted two more Appropriations Acts[4/] which continued the exclusion of "medical faculty" at the University from the salary cap. In addition, these acts specified:

> ...With respect to salary adjustments at the College of Medicine and Dentistry of New Jersey, recommendations for such salary adjustments shall be made in accordance with criteria promulgated by the Chancellor of Higher Education and the Director of the Division of Budget and Accounting.

On December 16, 1980, negotiations commenced for a successor agreement to the one which expired on June 30, 1981. Eight negotiations sessions were held between then and July 24, 1981. AAUP sought to negotiate the issue of piercing the salary cap, but Frank Mason, Director of the State Office of Employee Relations, informed AAUP that the State, pursuant to its interpretation of the Appropriations Acts, would unilaterally determine and impose guidelines for salaries in excess of the salary cap. During negotiations, the State did impose the salary cap guidelines which its agencies had developed without negotiating with AAUP. On August 4, 1981, AAUP ratified a successor agreement, but specifically reserved the right to challenge any limitations that might exist or be imposed on salaries.[5/]

4/ P.L. 1980, c. 56; P.L. 1981, c. 1980.

5/ As will be seen, the State and University admitted in their Answer the factual background just described. There are, however, some subsidiary allegations which the State and University have not admitted. AAUP had also alleged that the Chancellor had attempted to limit the salaries of unlicensed physicians and dentists through the promulgation of salary guidelines, rather than through challenging the Attorney General's Opinion or through collective negotiations; the Answer denied this allegation. In addition, AAUP had alleged that during negotiations, it learned of a memorandum from the president of the University advising Chancellor Hollander that criteria for waiver of salary caps would be negotiated; the Answer stated the defendants had no knowledge upon which to admit or deny this allegation.

Count I concluded that the State violated subsections 5.4(a)(1) and (5) by unilaterally imposing salary cap guidelines. AAUP requested that the State be ordered to negotiate the guidelines for determining salaries of faculty above the cap and to pay salary and interest thereon to those faculty members denied increases as a result of the unilaterally imposed salary cap guidelines.

Count II alleged that as a result of the salary cap guidelines, the University unilaterally designated certain administrators and faculty members to be exempt from the salary cap. Like Count I, Count II concluded that the State's refusal to negotiate such guidelines violated subsections 5.4(a)(1) and (5) and asked for the same relief.

Count III alleged that prior to the negotiations for the 1981-1983 contract, SAC approved salaries in excess of the salary cap established in the Fiscal Year 1981-82 Appropriations Act for certain basic scientists (unlicensed doctors and dentists), as mandated by earlier contracts. The University, without negotiation, froze the salaries of those basic scientists whose salaries were in excess of the current cap.[6/] Count III concludes that the freezing of these salaries breached the parties' contract and therefore violated subsections 5.4(a)(1) and (5). AAUP requested an order requiring the State to compensate faculty who had previously exceeded the cap.

Count IV alleged that the University has designated individual administrators and basic scientists to exceed the

6/ The Answer admitted these allegations.

salary caps; the persons designated are predominantly administrators who are managerial executives and thus not employees under the Act.[7/] Count IV then alleged that the University has discriminated against AAUP, its members, and the employees it represents in violation of subsections 5.4(a)(1) and (3) through its implementation of the salary cap guidelines and by rewarding managerial executives with salaries over the cap.[8/] AAUP requested that the State be ordered to compensate members of the unit according to its contract and that those faculty members illegally denied increases receive back salary and interest.

Count V alleged that the University, in implementing its salary cap guidelines, intended to embarrass the AAUP, deprive it of the benefit of the collective agreement, and discourage non-members from joining the union.[9/] Count V concluded that the State therefore violated subsections 5.4(a)(1) and (3) and asked for the same relief as Count IV.

Count VI alleged that the University has discriminated in its implementation of the contract to benefit administrators, who are not employees under the Act, and to hurt AAUP, its members, and the employees it represents.[10/] Count VI concluded that the State has violated subsections 5.4(a)(1) and (3) and asked for the same relief as Counts IV and V.

On July 23, 1982, AAUP amended its charge to include Counts VII through XII. Each count again incorporated the common factual background which the University and State have admitted.

7/ The Answer admitted these allegations.
8/ The Answer denied this allegation.
9/ The Answer denied this allegation.
10/ The Answer denied these allegations.

Count VII alleged that the Appropriations Act covering fiscal 1983 contains no provision setting a salary cap because the Governor vetoed that provision. The Act instead contains a provision allowing the president of the Civil Service Commission and the Director of the Division of Budget & Accounting to make rules and regulations to implement salary increases for State employees. Pursuant to this provision, Count VII further alleged, the president of the Civil Service Commission and the Director of the Division of Budget & Accounting have imposed a salary cap of $59,000 on State employees and have allowed employees represented by AAUP to pierce the cap only to the extent allowed by the Chancellor who has unilaterally limited the number of faculty members who can exceed the cap and has promulgated criteria upon which the College will allow faculty members to exceed it. Count VII also alleged that the University's executive vice-president has informed the AAUP that all salary increases will be subject to a $59,000 cap and that where employees are already receiving more than $59,000, their salaries will be frozen.[11/] Count VII concluded that the State's unilateral imposition of salary cap guidelines violated subsections 5.4(a)(1) and (5) and requested that these salary cap guidelines be abolished, that the salaries

11/The Answer admitted the allegations concerning the Appropriations Act, admitted that the president of the Civil Service Commission and the Director of Budget and Accounting have promulgated SAM #8-83 which authorizes the University president to grant up to 30 exceptions to the $59,000 maximum for chief subordinates or faculty not holding certain degrees and which provides for the establishment of criteria by the Chancellor and Director of Budget and Accounting for such salary actions, and admitted that the University's executive vice-president informed the AAUP that everyone whose salary is over $59,000 would have his or her salary frozen pending receipt of the State criteria regarding the cap.

of employees be determined by the parties' contract, and that the employees illegally denied increases receive back pay and interest.

Count VIII alleged that the University, without negotiation and based on the guidelines, will designate certain administrators and faculty members to be exempt from the salary cap.[12/] Count VIII concluded that the State therefore violated subsections 5.4(a)(1) and (5) and asked for the same relief as Count VII.

Count IX alleged that prior to the most recent negotiations, SAC approved salaries in excess of the cap and in accordance with earlier contracts for members of AAUP's unit, and that the University has, without negotiation, frozen these salaries.[13/] Count IX concluded that the parties' contract has been breached and that the State therefore violated subsections 5.4(a)(1) and (5). Count IX requested that the State be ordered to compensate faculty who have previously exceeded the cap in accordance with the parties' contract.

Count X repeated the allegations of Count IV with respect to the salary cap guidelines and exemptions for fiscal year 1983 and asked for the same relief.[14/]

Count XI repeated the allegations of Count V with respect to the salary cap guidlines and exemptions for fiscal year 1983 and asked for the same relief.[15/]

12/ The Answer admitted this allegation.
13/ The Answer admitted that prior to 1977 SAC had approved salaries in excess of the cap and that the University has frozen these salaries.
14/ The Answer made the same admissions and denials.
15/ The Answer made the same denial.

Count XII repeated the allegations of Count VI with respect to the salary cap guidelines and exemptions for fiscal year 1983 and asked for the same relief.16/

AAUP requested interim relief ordering the University and State to pay employees salary increases due them under the contract and denied them pursuant to the salary cap guidelines. On August 17, 1982, Commission designee Alan R. Howe conducted a hearing on this request. The parties filed briefs. On August 25, 1983, the Commission designee denied the requested relief. I.R. No. 83-5, 8 NJPER 522 (¶13241 1982). In this interim relief decision, he found that AAUP had not established a likelihood of success on the merits because it appeared to him that the State and the University had no obligation to negotiate the criteria for the piercing of the salary cap for unlicensed doctors and dentists since the Appropriations Acts gave exclusive authority to certain State officials, including the Chancellor of Higher Education, to set such criteria.

On November 5, 1982, the Director of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1.

On January 24, 1983, after having received an extension of time, the State and University filed their Answer. In addition to the responses to AAUP's factual allegations, which we have already described, the Answer asserted three separate defenses: "(1) the Complaint fails to state an unfair practice upon which relief can be granted," (2) "the subject matter of the charge is

16/ The Answer made the same denials.

preempted by law and regulations and therefore is non-negotiable," and (3) "the action complained of in the charge was accomplished pursuant to specific mandate of the legislature in the Appropriations Act and pursuant to duly authorized and adopted regulations of the president of the Civil Service Commission, the State Treasurer, and the Director of the Division of Budget and Accounting, and in accordance with criteria legitimately approved and issued by the Civil Service president and the Director of Budget and Accounting, based upon recommendations from the Chancellor of Higher Education."

The issues having been joined by the Complaint and Answer, Commission Hearing Examiner Edmund G. Gerber scheduled a hearing for March 7, 1983. In connection with that hearing, AAUP requested, and the Hearing Examiner issued, a subpoena duces tecum directing Chancellor Hollander to testify at the hearing and to bring with him:

> All correspondence, memoranda, resolutions, guidelines and other documents which were used in planning for or effecting salary limitations imposed on faculty at the University...for fiscal years 1981, 1982 and 1983.

The State and University then filed a motion for special leave to appeal the Hearing Examiner's ruling on the subpoena duces tecum pursuant to N.J.A.C. 19:14-4.6 and an accompanying brief. AAUP filed an opposing brief. On May 9, 1983, the Chairman of the Commission granted the motion. Accordingly, the propriety of the subpoena duces tecum is now before us.[17/]

17/ The merits and all other aspects of the case are not before us, and we intimate no opinion on any other matters besides the subpoena duces tecum.

The State and the University contend that the documents and testimony sought are irrelevant to the Complaint and hence the subpoena duces tecum should be quashed. The State and University essentially argue that the Appropriations Acts for the years 1981-83 wholly preempt negotiation over the criteria for piercing the salary cap and make irrelevant any inquiry into how or why the criteria were established. In addition, the State and the University argue that the subpoena should be quashed because it impermissibly seeks to probe the mental processes of the Chancellor of Education. They cite United States v. Morgan, 313 U.S. 409 (1941) ("Morgan"); Chicago, B.&.Q.R. Co. v. Babcock, 204 U.S. 585 (1907) ("Babcock") and N.J. Turnpike Auth. v. Sisselman, 106 N.J. Super. 358 (App. Div. 1969), certif. denied, 54 N.J. 565 (1969) ("Sisselman").

AAUP responds that under Council of N.J. State College Locals v. State Bd of Higher Education, 91 N.J. 18, 28 (1982) ("Council"), it had a right to inquire into the reasoning and circumstances surrounding the Chancellor of Education's promulgation of the criteria for piercing the salary cap in order to determine whether the criteria "...were arbitrary, adopted in bad faith, or passed primarily to avoid negotiation on terms and conditions of employment;" in this connection, AAUP stresses the Chancellor's dual role as, on the one hand, negotiator and signer of the applicable contracts setting salaries and, on the other

hand, promulgator of the criteria affecting the negotiated salaries.[18/] In addition, AAUP stresses that its allegations that the criteria were discriminatorily motivated in violation of subsection 5.4(a)(3) (Counts IV-VI and X-XII) require inquiry into the pertinent documents and the Chancellor's state of mind concerning the formulation of criteria. AAUP argues, moreover, that the Morgan, Babcock, and Sisselman decisions do not forbid inquiry into the Chancellor's "mental processes" since they do not apply when allegations of improper behavior on the part of a directly involved official are present. AAUP cites Sisselman and Hyland v. Smollok, 137 N.J. Super. 456 (App. Div. 1975), certif. den. 71 N.J. 328 (1976) ("Hyland") on this point. AAUP further contends that even if the "mental processes" rule is applied to preclude requiring the Chancellor to testify, it cannot block the production of relevant documents.

Ordinarily, the adoption of any specific statute or regulation setting or controlling a particular term or condition of employment will preempt negotiations on that subject. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978). In the Council case, however, our Supreme Court held that regulations are not entitled to absolute preemptive effect without

18/ In their brief, the State and the University anticipated AAUP's reliance on the Council case and argued that it should not apply since the criteria for piercing the salary cap are not mandatorily negotiable, the Chancellor of Higher Education does not play any role with respect to the grievance process as he did in the Council case, and the charge has not specifically alleged that the Chancellor's criteria were arbitrary, adopted in bad faith, or passed primarily to avoid negotiation over terms and conditions of employment.

further inquiry when the regulating agency also performs certain employer functions regarding the same employees that it regulates. Under the Council case, we hold that further inquiry into the Chancellor of Higher Education's promulgation of criteria for piercing the salary cap is warranted because of his dual role as negotiator and regulator.

In the Council case, the Chancellor of Higher Education formulated, and the Board of Higher Education approved, regulations governing staff reductions at State Colleges during periods of fiscal exigency. The Chancellor and Department of Higher Education, however, also performed employer functions concerning the employees the regulations covered: the Chancellor and the Department participated in collective negotiations as part of the management team, signed collective agreements, and played a significant role in resolving grievances. Stressing the possibility that an agency performing the dual roles of regulator and employer could abuse its preemptive regulatory power to insulate itself from negotiations and thus undermine the collective negotiations process, the Court accorded a presumed, but not absolute, preemptive effect to agency-employer regulations. The Court stated that the presumption of preemption could be overcome by demonstrating that the regulations were arbitrary, adopted in bad faith, or passed primarily to avoid negotiation on terms and conditions of employment and then listed the following relevant factors:

> ...(1) the extent to which the regulation was consistent with or necessary to effectuate the agency's statutory authority; (2) the relationship between the regulation and the exercise of

> the agency's regulatory jurisdiction; (3) the scope of the agency's employer role; (4) the agency's rationale for adopting the regulation; (5) the circumstances under which the regulation was adopted; (6) the scope and composition of the class of employees affected by the regulation; (7) the basic fairness of the regulation to the employees affected; and (8) the extent to which the employees or their representatives had the opportunity to express their views on the regulation during its formative stages.
> Supra at pp.

Assessing these factors, the Court concluded that the regulations in question deserved preemptive effect.

In the instant case, N.J.S.A. 18A:64G-6 defines the relationship between the University, the Chancellor of Higher Education, the Governor's Office of Employee Relations, and the negotiations process:

> The board of trustees of the university, 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 university.... It shall have the power and duty to...:
> (s) Function as a public employer under the "New Jersey Employer-Employee Relations Act...and conduct all labor negotiations, and with the participation of the Chancellor's Office and the Governor's Office of Employee Relations act as the chief spokesperson with respect to all matters under negotiation.
> (Emphasis supplied)

The Chancellor and the Department of Higher Education, as the Answer admits, have actively participated in negotiations and approved all collective agreements with AAUP including the current one. The Chancellor and the Department of Higher Education have also played a central role in promulgating the criteria for piercing the salary cap. We believe that the statutory and actual role of the Chancellor and Department of Higher Education in the negotiations process and in promulgating criteria for

piercing the salary cap appear to make the Chancellor a dual regulator-employer under the Council case and entitle his regulations to presumed, rather than absolute, preemptive effect. The possibility of abuse against which the Council case guards may be present here because of the role the Chancellor plays in the negotiations process and the direct connection between his criteria for piercing the salary cap and the negotiations process.[19/]

Given our determination that the criteria for piercing the salary cap appear to be entitled to presumptive rather than

19/ We note the State's assertion that the Chancellor does not consider the grievances of University faculty, but do not believe that such consideration is always necessary under the Council case to make an agency head who actively participates in negotiations a dual regulator/employer for purposes of assessing the preemptive effect of his regulations. The absence of any role in the grievance process, however, might be relevant to the third factor (scope of the agency's employer role) listed in the Council case for determining whether the presumption of preemption is overcome. We also note the State's argument that the State Treasurer, the president of the Civil Service Commission, and the Director of Budget and Accounting play no employer role concerning University faculty. It is not clear to us, however, that the Director of Budget and Accounting does not have some employer attributes since he is an employee of the Governor's Office which, like the Chancellor, also participates in negotiations pursuant to N.J.S.A. 18A:64G-6. Further, the Chancellor appears to be the primary formulator of the criteria which the State Treasurer and the president of the Civil Service Commission ultimately consider for approval. Again, the extent of the role the Chancellor, as opposed to other agencies, plays in formulating the criteria and the absence of employer attributes in those other agencies are factors for consideration in determining whether the presumption of preemption has been overcome. Finally, we note the State's argument that the criteria for piercing the salary cap are not mandatorily negotiable. We need not address that argument now, before a full record is developed, because even if the employer had a right to determine such criteria unilaterally, it still could not adopt criteria, as the AAUP alleges, in order to discriminate against unions, their members, and the employees they represent in violation of subsection 5.4(a)(3) of the Act. See, e.g., In re Borough of Teterboro, P.E.R.C. No. 83-137, 9 NJPER __ (¶_____ 1983) (employer need not negotiate over decision to make layoffs, but may not layoff employees in order to discourage union activity).

absolute preemptive effect, it will be necessary for the Hearing Examiner in the first instance to consider the factors listed in the Council case and for AAUP to have the opportunity to attempt to overcome the presumption of validity attaching to the criteria. Evidence concerning the Council factors -- for example, the rationale for adopting the criteria and the circumstances surrounding the regulation's adoption -- must be taken and a record developed.[20/] The documents and testimony which the subpoena duces tecum seeks are directly relevant to determining the applicability of these factors and are helpful in establishing the necessary record. The relevancy of evidence sought through the subpoena duces tecum is further sharpened by the presence of allegations in the Complaint that the University has used the Chancellor's guidelines for piercing the salary cap to renege on salary commitments the University and the Chancellor had approved, to discriminate against AAUP, its members, and the faculty it represents, and to discourage support for AAUP; these allegations raise motivational issues which are central to a determination of whether subsection 5.4(a)(3) of the Act has been violated and which may turn upon the evidence AAUP seeks.[21/]

20/ Although AAUP has not appealed from the Commission designee's denial of preliminary injunctive relief and although we disagree with that decision to the extent it holds that the Chancellor's criteria are without further question entitled to absolute preemptive effect, we express our agreement with the denial of preliminary injunctive relief. The presumption of preemptive effect we must accord the criteria in dispute until the record is further developed militates against preliminary relief.

21/ These allegations also make clear that AAUP's pleadings did bring into question whether the regulations were arbitrary, adopted in bad faith, or passed primarily to avoid negotiation on terms and conditions of employment. AAUP was not required to plead the exact and conclusory wording of Council's exception to the absolute preemption rule for regulations; its specific factual allegations establish its claim to fit within this exception.

We next consider the contention of the State and the University that the subpoena duces tecum must be quashed because it would improperly probe the mental processes of the Chancellor. Although we generally disagree with this flat assertion, we will modify the subpoena to require only the production of documents, rather than the testimony of the Chancellor, at this point in the litigation.

Sisselman is the New Jersey case most directly on point. There, the Appellate Division of the Superior Court held that defendant landowners could not depose Turnpike Authority Commissioners concerning the decision to condemn their land. The Court stated:

> We now turn our attention to Judge Pashman's order of April 5, 1968, insofar as it denied defendants' motion to take the oral depositions of the three Turnpike Authority Commissioners. That denial was based, as noted above, on the premise that they were immune from inquiry into the mental processes by which they made their decisions, in the absence of allegations of improper behavior on their part.
>
> We agree with that determination on the basis of the record herein. United States v. Morgan, 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429 (1941), expresses the generally accepted rule that the head or heads of an administrative agency may not be examined to probe the mental processes surrounding his or their promulgation of a regulation. Administrative determinations have a quality resembling that of a judicial proceeding. See, too, Braniff Airways Incorporated v. C.A.B., 126 U.S. App. D.C. 399, 379 F.2d 453, 460 (D.C.C.A. 1967).
>
> Moreover, all the facts material to the determination of legality or arbitrariness of the actions of the Authority have been spread upon this lengthy record, and there is no showing that interrogation of the commissioners personally is necessary to enable the correct determination of this litigation. Supra at p. 367 (emphasis supplied).

In Hyland, the Appellate Division rejected another attempt to depose high-level government officials. There, a business manager, whom the Attorney General sought to remove from office for refusal to testify before a grand jury, accused the Attorney General of selective prosecution and sought his deposition. The Court ruled, however, that "...high level government officials should not be deposed, absent a showing of first-hand knowledge or direct involvement in the events giving rise to an action, or absent a showing that such deposition is essential to prevent injustice." Supra at p. 460 (emphasis supplied).

Based on Sisselman and Hyland, it is apparent that the New Jersey courts have not adopted a rule which would always forbid inquiry into an administrator's mental processes, regardless of the circumstances.[22/] Instead, it appears that some

22/ The State and the University assert that in Morgan and Babcock, the United States Supreme Court established that the mental processes of federal administrative officials may never be probed. More recent United States Supreme Court cases, however, have softened this rule. Thus, in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), the Court stated:

> The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decision-makers is usually to be avoided. United States v. Morgan, 313 U.S. 409, 422 (1941). And where there are administrative findings that were made at the same time as the decision, as was the case in Morgan, there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves.
> 401 U.S. at 420.

(continued)

examination of the mental processes behind the promulgation of a regulation or an administrative action may be in order if, and only if, there are specific allegations of improper behavior concerning an offical who has first-hand knowledge of, or direct involvement in, the events giving rise to the litigation. Here, there are such specific allegations concerning the Chancellor's role in the negotiations process and some inquiry into the reasoning and circumstances behind his adoption of the criteria in dispute therefore appears proper as well as necessary. The Council decision is consistent with this analysis because it permits examination of a regulator-employer's rationale for adopting a regulation as well as the circumstances under which the regulation was adopted, and this examination might not be possible in the absence of some discovery of pertinent materials.[23/]

We believe, however, that it would not be appropriate to require the testimony of the Chancellor of Higher Education at this point. Sisselman stated that when all the facts material to

22/ (continued)
See also, Camp v. Pitts, 411 U.S. 138 (1973); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); but see K. Davis, Administrative Law Treatise, §§17.4 and 17.5 (1980) (criticizing Overton). Further, we must apply state precedents on point and recognize that in non-constitutional matters of evidentiary and discovery rules concerning state administrative processes, state courts are free to adopt or depart from federal precedents concerning federal administrative processes.

23/ It does not appear that any public hearings were held concerning the adoption of the salary criteria in question or that any formal rationales for the criteria have been issued.

a determination of the legality or arbitrariness of an agency's actions have been spread upon the record, the personal testimony of administrative officials may not be necessary to enable the correct determination of the litigation. Accordingly, the better course here is to require the production of the documents sought, but to defer any ruling on the necessity of the Chancellor's personal testimony, and consequent distraction from his official duties, until the parties have had an opportunity to digest[24/] and litigate the significance of the relevant documents, thus establishing a specific factual context for the Hearing Examiner to decide whether further testimony is necessary.[25/] Accordingly, we enter the following order modifying the subpoena duces tecum.

ORDER

The subpoena duces tecum is affirmed to the extent it requires the Chancellor of Higher Education to produce to the AAUP:

> All correspondence, memoranda, resolutions, guidelines and other documents which were used by the Chancellor or the Department of Higher Education in planning for or effecting salary limitations imposed on faculty at the University of Medicine and Dentistry of New Jersey for fiscal years 1981, 1982 and 1983.

24/ The documents should be produced before the hearing so that the parties may be better able to prepare for the hearing and the hearing itself will not be unnecessarily prolonged by exchange and examination of documents.

25/ Similarly, should the State and University claim a privilege against producing any particular document within the terms of the subpoena duces tecum, the specific basis for the assertion of such a privilege should be addressed to the Hearing Examiner so that he may rule on the discoverability of the particular document.

The subpoena duces tecum is vacated without prejudice to the extent it requires the Chancellor of Higher Education to testify at this point in the litigation. The case is remanded to the Hearing Examiner for further proceedings consistent with this opinion.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Hipp, Butch, Newbaker, Suskin and Graves voted in favor of this decision. However, Commissioner Graves dissented from that portion of the decision quashing the subpoena requiring the testimony of the Chancellor of Higher Education.

DATED: Trenton, New Jersey
June 1, 1983
ISSUED: June 2, 1983