P.E.R.C. NO. 86-149

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX,

Petitioner,

-and- Docket No. SN-85-11

AFSCME, COUNCIL 52, LOCAL 1247, AFL-CIO,

Respondent,

SYNOPSIS

The Public Employment Relations Commission declines a request by the County of Essex to restrain binding arbitration of a grievance which AFSCME, Council 52, Local 1247, AFL-CIO filed. The grievance alleges the County violated the parties' contract when it denied merit/increment pay to several employees. The Commission holds that the grievance may be submitted to binding arbitration because it pertains to the mandatorily negotiable issue of compensation.

P.E.R.C. NO. 86-149

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX,

Petitioner,

-and- Docket No. SN-85-11

AFSCME, COUNCIL 52, LOCAL 1247, AFL-CIO,

Respondent,

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

For the Respondent, Oxfeld, Cohen & Blunda, Esqs. (Arnold S. Cohen, Of Counsel)

DECISION AND ORDER

On August 29, 1984, the County of Essex ("County") filed a Petition for Scope of Negotiations Determination. The County seeks a permanent restraint of binding arbitration of a grievance that AFSCME, Council 52, Local 1247, AFL-CIO ("AFSCME") filed against it. The grievance alleges the County violated the parties' contract when it denied merit/increment pay to several employees.

On October 10, 1984, a Notice of Hearing issued.

On March 7, 1985, Hearing Examiner David F. Corrigan conducted a hearing. The parties examined witnesses and introduced exhibits. Following the hearing, the County requested that the Commission permit an arbitrator to interpret the merit/increment

clause. AFSCME opposed this request. The parties filed post-hearing briefs and reply briefs by August 5, 1985.

On November 4, 1985, the Hearing Examiner issued his report and recommended decision. H.E. No. 86-20, 12 NJPER ___ (¶_____ 1986) (copy attached). He denied the County's request and found instead that, under the contract, merit/increments were to be awarded to employees who "usually" met the expected standards. He then concluded that the County's denial of these increments was arbitrable for two reasons: (1) the dispute was disciplinary within the meaning of N.J.S.A. 34:13A-5.3; and (2) in any event, the negotiated merit/increment system involved the mandatorily negotiable subject of compensation.

On December 23, 1985, the County filed exceptions. It contends that the Hearing Examiner's contractual interpretation is wrong and that denial of merit/increments is not discipline because merit/increments are awarded only to employees whose overall work is rated better than satisfactory. It further contends that it has a managerial prerogative to determine eligibility for merit/increments and that only the economic component of the program is negotiable. Finally, the County contends that AFSCME's specific claims are not arbitrable because they pertain to the establishment or modification of evaluation criteria and to the determination of the evaluator.[1/]

1/ The County requested oral argument. We deny that request as the matter has been fully briefed.

On January 30, 1986, AFSCME filed its reply. It agrees with the Hearing Examiner that the merit/increments are negotiable as salary and that the withholdings are arbitrable as discipline.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-8) are accurate. We adopt and incorporate them here with these additions.

We modify finding No. 4 to clarify that movement from minimum to maximum occurs by one-half steps. Although each classification has six steps, it takes ten increases to reach maximum. Once an employee is evaluated in each of the ten categories, the scores are averaged. Those with scores averaging 3.0-2.5 are rated outstanding and receive a merit/increment; those with 2.4-2.0 are rated good and receive a merit/increment; those with 1.9-1.0 are rated satisfactory and do not receive a merit/increment; those with .9-0 are rated unsatisfactory and do not receive a merit/increment. The agreement also provides for across-the-board salary increases.

We supplement finding No. 5. Despite the negotiated evaluation categories of rarely, sometimes, usually and with a high degree of consistency, the four evaluation team members used the following scale: 0 - below average, 1 - average, 2 - above average and 3 - excellent. Only some employees were told of the change.

We modify finding No. 6 to show that the first evaluation period ran from June 1, 1982 through September 30, 1982. Approximately 28 employees were evaluated under the program.

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. In Ridgefield

Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

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

Thus, we do not decide the contractual merits of the grievance or any defenses the County may have.

In addition, we stress the narrow scope of the parties' dispute. The merit/increment pay plan, its procedures and the amount of merit/increment pay were all negotiated and are not at issue. At issue, only, is the arbitrability of disputes concerning the negotiated plan's application.

The parties negotiated an agreement which provides, in part, that "the steps in the salary schedule are not automatic" and that only employees who receive a "meritorious" evaluation will receive merit/increments. Rather than agree to a compensation system that included the more traditional package of across-the-board increases with or without automatic increments, these parties negotiated a compensation package that provided for across-the-board increases and merit/increments to be paid to

certain employees pursuant to a negotiated set of standards. The parties agreed to an implementing plan entitled "Merit/Increment Pay Program." It provides, in part, that there are 10 Objectives/Responsibilities on which an employee will be rated and that an employee must receive an overall rating of 2.0 or higher to receive a merit/increment payment. The parties also specifically agreed that:

> If an employee disagrees with the decision regarding his/her Merit/Increment increase the employee may grieve the decision through the Grievance Procedure described in this contract.

The parties developed Merit Evaluation forms which provide for individual ratings in the 10 negotiated categories. According to the form, to get the required "2", an employee must "usually" meet the negotiated standard in the particular category. The total points rating scale provides that an average rating of 2.4-2.0 is good; an average rating of 1.9-1.0 is satisfactory. Thus, the program provides that an employee can be rated satisfactory overall (and not receive a merit/increment) although he, on average, does not "usually" meet the negotiated merit/increment standards.

After these ratings were negotiated, the Director of Therapeutic Services instructed the evaluators to use a scale whereby only employees who do an above average job would be "meritorious" and those who received an overall rating of 1.9-1.0 would be considered average.

For the first evaluation period, all covered employees received merit/increments; for the second period, 20 out of 28

employees ultimately received merit/increments. Receiving these merit/increments is the only way an employee can advance on the negotiated step guide. Those employees at the top step are not eligible.

Thus, the parties negotiated a hybrid compensation plan that in some respects rewards meritorious employees with increments for doing a "good" job and in other respects punishes a few employees by withholding increments for not "usually" meeting job standards. Our decision, therefore, does not address either a pure merit plan or an automatic increment plan, but resolves, only, the legal enforceability of the County's agreement to arbitrate disputes involving employees not receiving merit/increments under this specific negotiated plan.

The Hearing Examiner found that only employees whose work was found to be unsatisfactory were denied merit/increments and therefore, that the dispute involves discipline and is arbitrable under N.J.S.A. 34:13A-5.3.[2/] AFSCME supports that

---

2/ This section provides, in part,

> In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment. Nothing herein shall be construed as permitting negotiation of the standards or criteria for employee performance.

* * *

Footnote Continued on Next Page

conclusion. The County concedes that if only "poor" employees are denied merit/increments, such denials are disciplinary and arbitrable. It argues, however, that only above average employees receive merit/increments and that the denials of merit/increments in this case are therefore not disciplinary.

There are specific parts to this negotiated plan that support both parties' contentions. Supporting a finding that the dispute is disciplinary are these factors: employees who "usually" meet the negotiated standard get merit/increments, the large

---

2/ Footnote Continued From Previous Page

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

majority of employees received merit/increments and merit/increments are the only way to progress on the salary guide. Supporting a finding that the dispute is not disciplinary are the contract language that increments are not automatic and the overall ratings scale providing that satisfactory employees do not get merit/increments. We need not, however, resolve this dispute because even if the denial of merit/increments does not contain enough disciplinary elements to constitute "discipline" under section 5.3, we agree with the Hearing Examiner that under the circumstances of this case, the grievance still predominantly involves the mandatorily negotiable subject of compensation and is arbitrable.

IFPTE, Local 195 v. State, 88 N.J. 393 (1982), articulates the three-part test for determining whether a subject is mandatorily negotiable and hence legally arbitrable:

> a subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
> Id. at 404-05.

That part of the test dealing with preemption is not applicable. There are no statutes or regulations concerning

salaries or increments for these employees. Compare Egg Harbor Tp. Bd. of Ed., P.E.R.C. No. 86-49, 11 NJPER 692 (¶16239 1985) (N.J.S.A. 18A:29-14 preempts binding arbitration of increment withholding disputes for teaching staff members); see also East Brunswick Bd. of Ed., P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984), aff'd App. Div. Docket No. A-5596-83T6 (3/19/85), certif. den. 101 N.J. 280 (1985).[3/]

That part of the test dealing with employee interests has been met. Compensation and rates of pay are among the items that most clearly affect the work and welfare of public employees. Woodstown-Pilesgrove Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582 (1980); Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1 (1973). For these employees, their interest in receiving merit/increments is quite significant. Merit/increments are the only way to advance on the negotiated step guide. For most unit members, their step guide range is from $12,500 to $17,206. They can only obtain that $4,706 increase through merit/increments.

Negotiability, therefore, turns on whether the County's agreement to submit disputes about the negotiated merit/increment

---

3/ The County's reliance on Bd. of Ed. Bernards Tp. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311 (1979) is misplaced because that case dealt with teachers who are statutorily entitled to increments absent a withholding for inefficiency or other good cause. In addition, review of a withholding decision for teaching staff members is statutorily delegated to the Commissioner of Education. N.J.S.A. 18A:29-14; compare East Brunswick.

plan to binding arbitration significantly interferes with its determination of governmental policy. Our Supreme Court has recognized that most decisions of the public employer affect the work and welfare of public employees to some extent and that negotiation will always impinge to some extent on the determination of governmental policy. Local 195 at 404. Accordingly, it has required a showing of significant interference before a negotiated agreement may be set aside. Further the Court has stressed that:

> [A] viable bargaining process in the public sector has also been recognized by the Legislature in order to produce stability and further the public interest in efficiency in public employment. When this policy is preeminent, then bargaining is appropriate. Woodstown-Pilesgrove at 591.

In Lullo v. International Assoc. of Fire Fighters, 55 N.J. 409 (1970), the Court emphasized the legislative command and public policies requiring collective negotiations over compensation and rejected a claim that employers should be free to increase individual employee compensation unilaterally. The Court stated:

> It has been said that advantages to an employee through an individual contract "may prove as disruptive of industrial peace as disadvantages." Individually negotiated agreements constitute "a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole. J.I. Case Co. v. NLRB, [321 U.S. 332 at 338-339; NLRB v. Allis-Chalmers, [388 U.S. 175 at 180-181 (1967)].
> Id. at 428.

Since Lullo, the Supreme Court has always held compensation issues mandatorily negotiable. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9, 15 (1983); Local 195 at 403; Woodstown-Pilesgrove at 589; Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 49 (1978); Burlington County College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973); Englewood at 6-7. Recently, the Appellate Division stressed the strong legislative policy favoring collective negotiations and held mandatorily negotiable the compensation issue of initial placement on a salary guide for teachers. Belleville Ed. Ass'n v. Belleville Bd. of Ed., 209 N.J. Super. 93 (App. Div. 1986). The Appellate Division also recently rejected an employer's contention that it had a non-negotiable prerogative to determine which specific faculty members should receive extraordinary salary increases. State of New Jersey and University of Medicine and Dentistry v. University of Medicine and Dentistry of New Jersey Council of American Association of University Professors Chapters, Docket No. A-11-85T7 (4/14/86), aff'g P.E.R.C. No. 85-106, 11 NJPER 290 (¶16105 1985); P.E.R.C. No. 86-7, 11 NJPER 452 (¶16158 1985)("UMDNJ").

Lullo and its progeny reflect well-established management-labor relations case law holding compensation issues,

including merit pay, mandatorily negotiable.[4/] In NLRB v. Katz, 369 U.S. 736 (1962), the Supreme Court confirmed that criteria and procedures for merit increases are mandatory subjects of bargaining, citing J. H. Allison & Co., 70 NLRB 377, 18 LRRM 1369 (1946), enforced 165 F.2d. 766, 21 LRRM 2238 (6th Cir. 1948) cert. den. 335 U.S. 814 (1948). In J. H. Allison, the National Labor Relations Board held merit increases to be an integral part of the wage structure and a mandatory subject of bargaining. The rationale for holding merit increases to be a mandatory subject was spelled out in NLRB v. Berkley Machine Works, 189 F.2d 904, 28 LRRM 2176 (4th Cir. 1951). There the court said "[c]collective bargaining with respect to wages might well be disrupted or become a mere empty form if the control over the wages of individual employees were thus removed from the bargaining area. Id. at 907.[5/]

4/ While private sector precedents concerning the scope of negotiations are of limited value in deciding public sector cases, these precedents are helpful because they recognize that merit pay generally forms part of an overall negotiated compensation plan and they articulate the management-labor relations policy reasons for requiring collective negotiations.

5/ Other states have followed this private sector precedent in finding merit pay mandatorily negotiable. In New York State, merit increases are a mandatory subject of negotiations. City of Newburgh, 16 PERB ¶16-3030 (1983); County of Ulster, 14 PERB ¶14-3008 (1981); see also Jefferson County Board of Supervisors v. New York State Public Employment Relations Board, 36 N.Y. 2d. 534, 330 N.E. 2d. 621, ___ N.Y.S. 2d. __ (1975). In Florida, "the payment of wages is a statutory subject of collective bargaining, requiring matters of salary increases and bonus awards be submitted to the mediatory influence of collective bargaining." Pasco County School Bd.

Footnote Continued on Next Page

The County does not question that, standing alone, compensation is a mandatory subject of negotiation. It contends, however, that this grievance is not arbitrable because it would require an arbitrator to review the evaluations behind its determinations that certain employees should not receive merit/increments.

We agree that public employers have a managerial prerogative to evaluate employees, choose evaluators and determine evaluation criteria for the purpose of implementing decisions on matters outside the scope of negotiations. Numerous court cases and Commission decisions have so held, drawing a distinction between these non-negotiable issues and generally negotiable evaluation procedures. Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523, 531-33 (1985)(layoff); Teaneck at 16, 18 n. 3 (tenure and reappointment); Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed.

5/ Footnote Continued From Previous Page

v. Florida Public Employees Relations Commission, 353 So.2d 108, 122 (Fla. Dist. Ct. App. 1978). The Supreme Court of New Hampshire has stated that "[c]Courts have rather consistently held that such items as overtime pay, extra duty pay, vacation and holiday pay, bonus or merit pay, severance pay, shift differentials, and pensions are mandatory subjects of bargaining encompassed within the term 'wages.' Clark, The Scope of the Duty to Bargain in Public Employment, in Labor Relations Law in the Public Sector, at 88 (A. Knapp ed. 1977)...." Appeal of Berlin Ed. Ass'n, NHEA/NEA, N.H. , 485 A.2d 1038, 1041 (1984). But see Area 10 Community College Ed. Ass'n v. Merged Area IV School District, PERB Case No. 663 and 674 (4/9/76) (amount, timing and procedures of merit pay are mandatorily negotiable, evaluation for determining eligibility is permissive).

Ass'n., 91 N.J. 38 (1982)(preemption); Local 195 at 410, 417 (promotions); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90-91 (1978)(layoff); Bridgewater Tp. v. P.B.A. Local 174, 196 N.J. Super. 258 (1984)(job fitness); State v. State Troopers NCO Ass'n, 179 N.J. Super. 80 (App. Div. 1981)(promotions); Fair Lawn Bd. of Ed. v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554 (1980)(tenure reappointment); In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 26-27 (App. Div. 1977)(vacancy); North Bergen Tp. Bd. of Ed. v. North Bergen Fed. Teachers, 141 N.J. Super, 97, 104 (App. Div. 1976)(promotions). In all these evaluation cases, the underlying decision the employer seeks to make is outside the scope of negotiations. Therefore, evaluation criteria used to implement these non-negotiable decisions are also non-negotiable.

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

In Willingboro Bd. of Ed., P.E.R.C. No. 80-46, 5 NJPER 553 (¶10240 1979), aff'd App. Div. Docket No. A-1756-79 (12/8/80), certif. den, 87 N.J. 320 (1981), we made the same distinction between evaluations to determine the receipt of mandatorily negotiable benefits and evaluations to determine non-negotiable personnel decisions. There we held arbitrable a grievance

contesting the denial of a sabbatical leave, a mandatorily negotiable subject, and rejected the employer's claim that it had a managerial prerogative to determine criteria and assess applicants unilaterally. We approved this reasoning from a decision of the Special Assistant to the Chairman denying interim relief.

> The Board refers to particular judicial decisions that it maintains support its contention that "criteria" type decisions relating, for example, to an evaluation of the qualifications and abilities of particular applicants are neither negotiable nor arbitrable. However, the "procedures-criteria" dichotomy referred to by the Board has been consistently applied only in the context of negotiations and arbitrations relating to managerial prerogatives such as promotions, transfers, reductions in force (RIFs) and the like, not in the context of negotiations and arbitration concerning required subjects for collective negotiations such as sabbatical leave policies.
>
> I conclude that to extend the "procedures-criteria" analysis to apply to mandatory subjects such as sabbatical leaves and other economic terms and conditions of employment would be to permit a public employer to unilaterally determine which teachers would receive particular economic fringe benefits that had been negotiated. There is no support found for this proposition in either Commission or judicial decisions in this State. 5 NJPER at 476.

The Appellate Division affirmed "essentially for the reasons expressed" in the two Commission decisions.[6/]

6/ Justice Handler, in his concurring opinion in Teaneck, drew a similar distinction between arbitrability of terms and conditions of employment and managerial prerogatives. He suggested that the Court's holding barring arbitration of

Footnote Continued on Next Page

The Willingboro analysis is compelling. The merit/increments at issue in this case are compensation and compensation is negotiable. Cf. Township of Middletown, P.E.R.C. No. 85-122, 11 NJPER 377 (¶16136 1985)(evaluation system linked to economic benefits is negotiable)[7/]

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

> It would be easier to pay those employees it wants to reward and not pay those it wants to penalize without the constraints of negotiations and binding arbitration, if it had so agreed. Sl. Opinion at 19.

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

6/ Footnote Continued From Previous Page

complaints of racial discrimination in promotion decisions did not rule out arbitration of such complaints concerning terms and conditions of employment.

7/ By way of remedy in Middletown, we summarily rejected the Association's claim for additional compensatory time off for all unit members. Instead we ordered the Township to post a notice of its violation.

The employees' interest in negotiating compensation as part of a viable negotiations process outweighs the employer's interest in deciding unilaterally who should receive merit/increments under the circumstances of this case. It is not disputed that the establishment of the merit/increment plan is negotiable. The County points out that both parties agreed to a potential delay in movement along the step guide by agreeing to a merit/increment program. But if an employer has a right to determine unilaterally who will get the merit/increments, the perverse effect will be to discourage negotiations over any merit/increment programs and to discourage employee representatives and employers from working together to improve work performance. Additionally, the suspicion of favoritism and divisiveness stressed in Lullo might be heightened. Collective negotiations with respect to wages might be disrupted if control over wages of individual employees is removed from the negotiations arena. Berkeley. On balance, therefore, we find that the County's agreement to submit disputes over denials of increments under this negotiated merit/increment plan is legal.8/

During the grievance procedure AFSCME raised seven specific objections to the County's implementation of the merit/increment plan. We now discuss the negotiability of each issue.

8/ The parties may, of course, negotiate a plan that provides for complete employer discretion to determine recipients of merit/increments.

The first objection concerns the County's alleged failure to notify employees of what work standards were expected of them. The County concedes that disputes about notice are arbitrable but defends on the merits. We do not decide the contractual merits of grievances in scope of negotiations proceedings. Instead, it is an issue to be resolved before the arbitrator. State Troopers.

A second objection concerns the County's failure to notify employees who their evaluators would be. The County argues that although it sounds like a procedure issue, it is substantive and non-negotiable. It conjectures that it may not have been feasible to notify employees who their evaluators would be. We disagree. Such notice provisions are negotiable. Bethlehem. In the absence of specific facts showing that the practical effect of this negotiable procedural requirement is substantive, we will not restrain arbitration, even if the underlying substantive issue were non-negotiable.

A third objection alleges that a sickness verification requirement was unilaterally implemented. One of the negotiated standards is that an employee "cannot be sick without documentation more than 4 days." This issue falls within a narrow exception to the general negotiability of the merit/increment plan. The parties have agreed to a standard based on the number of days an employee is out sick. We believe that the establishment of a verification policy is the County's prerogative, although the application of the policy is arbitrable. Cf. Barnegat Tp. Bd. of Ed., P.E.R.C. No.

84-123, 10 NJPER 269 (¶15133 1984); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982).

A fourth objection concerns an allegation that certain supervisors did not follow the negotiated rating scales. AFSCME alleges the County was inconsistent and arbitrary in its application of the negotiated plan. The County does not make a negotiability argument but instead argues that the facts negate AFSCME's claim. We will not decide the merits of this dispute. Resolution must come through the negotiated grievance procedure.

The remaining three objections concern alleged changes in and the arbitrary application of the evaluation criteria. The County argues that it has a managerial prerogative to modify and apply unilaterally the standards for merit/increments it negotiated.[9/] We disagree. Based on our overall negotiability analysis in this case, we deny the County's request to restrain arbitration of these disputes.

9/ Parties can negotiate complete employer discretion over merit/increments pay, automatic increments with no employer discretion or some intermediate approach. General Controls Co., 88 NLRB No. 242, 25 LRRM 1475 (1950). Here, the parties negotiated specific criteria and a right to review denials through the negotiated grievance procedure.

ORDER

The County's request for a restraint of arbitration is denied except to the extent AFSCME seeks to arbitrate the adoption of a sickness verification policy.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Johnson and Smith voted in favor of this decision. Commissioners Reid and Wenzler were opposed. Commissioner Horan was not present.

DATED: Trenton, New Jersey
June 25, 1986
Issued: June 26, 1986

H.E. NO. 86-20

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF
THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX,

Petitioner,

-and- Docket No. SN-85-11

AFSCME, COUNCIL 52,
LOCAL 1247, AFL-CIO,

Respondent.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission decline to restrain binding arbitration of grievances which AFSCME, Council 52, Local 1247, AFL-CIO filed against the County of Essex. The grievances allege that the County violated its collective negotiations agreement with Council 52 when it denied several employees merit increment pay. The Hearing Examiner recommends the Commission find that the dispute is disciplinary within the meaning of N.J.S.A. 34:13A-5.3 and predominantly involves a matter of compensation and therefore may be submitted to binding arbitration.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 86-20

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF
THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX,

Petitioner,

-and- Docket No. SN-85-11

AFSCME, COUNCIL 52,
LOCAL 1247, AFL-CIO,

Respondent.

Appearances:

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

For the Respondent, Oxfeld, Cohen & Blunda, Esqs.
(Arnold S. Cohen, of Counsel)

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

On August 29, 1984, the County of Essex ("County") filed a scope of negotiations petition with the Public Employment Relations Commission. The petition seeks a restraint of binding arbitration of several grievances which AFSCME, Council 52, Local 1247, AFL-CIO ("Council 52") seeks to submit to binding arbitration. The grievances allege the County violated its agreement with Council 52 when it denied "merit pay" to several employees.

On October 10, 1984, a Notice of Hearing was issued and I was assigned Hearing Examiner.

On March 7, 1985, a hearing was held. Both parties examined and cross-examined witnesses, introduced exhibits and

argued orally. The parties filed post-hearing briefs and reply briefs by August 5, 1985. On July 11, 1985, the County moved to remand the matter, in part, to arbitration to permit the arbitrator to interpret the merit pay clause in the contract. On July 16, 1985, AFSCME opposed this request.

Findings of Fact

1. Essex County is a public employer within the meaning of the Act.

2. AFSCME, Council 52, Local 1247, AFL-CIO is a public employee representative within the meaning of the Act.

3. The County and Council 52 were parties to a collective negotiations agreement from January 1, 1981 to December 31, 1983. Included within the recognition clause are "all non-medical professional employees of Essex County at Essex County Hospital Center, Essex County Geriatric Center [and] County Guidance Center."

4. Each job classification contains a salary range. Employees move from the minimum to maximum of the range in annual incremental steps (T20-22). These "incremental steps," however, are not automatic under the parties' agreement. Article XXV provides:

> The parties agree that the steps in the salary schedule are not automatic but effective 12/1/82 all those unit members who receive a "meritorious" evaluation shall receive an increase equal to 1/2 of the difference between the employee's current step and the next step on the schedule. This shall become an annual procedure effective 12/1 of each year of the agreement and shall not apply to unit members at maximum salary. The period for evaluation for 1982 shall be from the date of signing of the agreement until 10/1/82. Years following shall be annually from 10/1 through 9/30.

The Merit Plan Program agreed to by the County and AFSCME provides:

> All employees who have not reached the maximum of their Salary Range will be evaluated under this Merit/Increment Pay Program. No Merit Evaluation will be given to employees who are at the maximum of their salary range.

A. EVALUATION PERIOD

For 1982, employees will be evaluated from the date of agreement signed until October 1, 1982.

The next Evaluation Period will begin on October 1, 1982 and it will continue through September 30, 1983. Any extension of this Evaluation Period beyond calendar year 1983 will be negotiated in the next contract between the County and AFSCME.

B. INITIAL INTERVIEW

The Supervisor and the Employee must meet at the beginning of each evaluation period to review the Objectives and Standards which have been previously established by the County and AFSCME. (See attached Objectives/Responsibilities and Standards). The Employee and Supervisor will sign the form indicating this has been accomplished.

C. RATING INTERVIEW

Beginning date agreement is signed, the Supervisor must rate the Employee's performance for that Evaluation Period and must complete it and meet with the Employee to discuss the rating by October 15, 1982.

D. AWARDING OF MERIT INCREASES

There are 10 Objectives/Responsibilities on which an Employee will be rated. (See attached Rating Scale). An Employee will be eligible for a Merit/Increment Payment if the Employee receives an overall rating of 2.0 or higher. An Employee who leaves before the end of the Evaluation

> Period will be eligible for a Merit/Increment Payment on a prorated basis; that Employee must be rated by his/her Supervisor prior to leaving.
>
> Employees who begin employment after the Evaluation Period begins will be eligible for Merit/Increment Payment beginning with the next Evaluation Period. The Merit/Increment Payment will be made by the County on December 1, 1982.

E. GRIEVANCE MECHANISM

> If an Employee disagrees with the decision regarding his/her Merit/Increment Increase the Employee may grieve the decision through the Grievance Procedure described in this contract. [J-2].

The grievance procedure culminates in binding arbitration. (See Article VI of J-1) and AFSCME and the County intended that disputes involving the plan be submitted to binding arbitration (T-23; T-109).

Pursuant to this plan, employees are rated in the following ten categories:

1. Assessment of Clients
2. Participation in Staffing and Treatment Team Meetings
3. Treatment Planning/Unit Planning
4. Documentation and Record Keeping
5. Knowledge of Work/Psychotherapeutic Treatment of Clients
6. Quality of Work
7. Work Output
8. Participation in the Work of the Unit
9. Attitude
10. Attendance

The employees are rated based upon the standards required in each of the ten categories and receive scores from 0 to 3 in each category. 0 signifies that the employee rarely meets the standard

expected of him; 1 signifies that the employee sometimes meets the standard; 2 signifies that the employee usually meets the standard; 3 signifies a high degree of consistency in meeting the standards. Employees who receive ratings of 2.0 or higher receive "Merit/Increment" Payments. Conversely, those below do not.

5. These standards were not unilaterally set by the County. Rather, they were mutually agreed to during negotiations with Council 52 (T26). There was testimony from County witnesses that the intent of the plan was that employees had to perform "above average" to receive a merit increment (T89). Those who were average do not (T113). While that may have been the unexpressed intent, I do not believe this resulted in an agreement between the County and AFSCME. Simply stated, the score of 2 means he usually met the standard required of him. That does not make him an above average employee. Conversely, an employee with a score of below 2, by definition, is considered to be an employee who does not usually meet the standards expected of him. Such an employee is not average under the plain language of the parties' agreed upon definition. An employee who does not usually meet the standards expected of him is a poor employee. From the County's perspective, the purpose of the plan was to increase efficiency and productivity (T102). The employees were evaluated by three supervisors ("unit managers") and the training officer (T111-112). Many of the categories involve subjective determinations (T113-116).

6. The Merit Pay Plan was agreed to on May 20 and provided for the following two evaluation periods: (1) June 1, 1982 through

September 1, 1982 and (2) October 1, 1982 through September 30, 1983. No employees were denied merit pay during the first evaluation period. Ten employees were initially denied merit pay during the second evaluation period (T6).

On October 17, 1983, the union filed grievances contesting the County's failure to make merit payments to the affected individuals. The grievance alleges that the County violated Article XXV of the contract when it denied employees merit pay. As a remedy, it sought "Review with union, administration, supervisors and employee on merit forms (Explanation by supervisors) -- payment of merit pay to all employees who did not receive merit." Two grievances were resolved in favor of the union during the course of the grievance procedure: one was changed after a "technical error" was discovered[1/] and the other after the County reconsidered (1T6). Three other grievances were not pursued because the affected individuals left County employ (1T6-7). The other five grievances were not resolved at the intermediate steps of the grievance procedure. Thus, on May 8, 1984, the County advised:

> As a follow-up to our last meeting and our telephone conversation yesterday, concerning the 1983 Merit Denial Cases, please be advised that I've discussed their individual records and I agree with the original Merit determinations as expressed by their supervisors.
>
> In addition, I am submitting a recommendation for Merit Payments for Karen Shubin and Harriet Power

---

1/ In the words of the County supervisor, a "gross error" had been made. (T102).

based upon recent documentation submitted to my Office.

Please contact me if you have any questions.

Council 52 sought to submit the unresolved grievances to binding arbitration, but the County filed this scope of negotiations petition and this proceeding followed. The parties voluntarily agreed to stay arbitration pending this determination.

The union has specifically contended that the denial of the merit increment violated the contract because:

(1) The County did not advise the employees of the standards expected of them;

(2) the attendance policy was changed in violation of the contract and merit program;

(3) employees were not advised of the 65% patient contact time requirement until after their increment was denied;

(4) certain in-service training was not considered;

(5) certain employees received increments with the same or worse employment records than those not receiving increments;

(6) grievants were not told who would evaluate them;

(7) supervisors did not follow the proper scale in making the evaluation.

(T24-39).

Both parties have filed post-hearing briefs. The County contends that the dispute is non-arbitrable because it pertains to the evaluation of employees which involve matters of judgment and policy. It relies on, inter alia, Bd. of Education Bernards Tp. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311 (1979); Bethlehem Tp. Bd. of Ed.

v. Bethelehem Tp. Ed. Ass'n, 91 N.J. 38 (1982); Hoboken Board of Education, P.E.R.C. No. 84-139, 10 NJPER 353 (¶15164 1984); Brookdale Community College, P.E.R.C. No. 84-16, 9 NJPER 560 (¶14234 1983). It further asserts that employees not receiving merit increments are not "disciplined" within the meaning of N.J.S.A. 34:13A-5.3. It argues, instead, that this is a program designed to reward employees for above average work. It further asserts that this aspect distinguishes this case from East Brunswick Board of Education, P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984), aff'd App. Div. Docket No. A-5596-83T6 (decided 3/19/85) where the Commission found that the denial of an increment of non-teaching staff members was an appropriate subject for binding arbitration. It contends that East Brunswick refers to situations where increments are denied for just cause.

AFSCME contends that the denials of the merit increment may be submitted to binding arbitration because "they constitute part of the salary of the County's employees." It relies on, among other cases, Bd. of Ed. of Englewood v. Englewood Teachers Ass'n, 64 N.J. 1 (1973); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978) and In re IFPTE, Local 195 v. State, 88 N.J. 393, 412 (1982). AFSCME further asserts the denial of merit pay salary increments, at least under the circumstances of this case, constitute discipline within the meaning of N.J.S.A. 34:13A-5.3.

Discussion and Analysis

I first consider the County's motion to remand this matter to arbitration for an arbitrator to decide the following factual issue: whether the contractual merit pay clause limits merit pay to employees whose work is above average. I deny this motion. I do not believe his interpretation will aid my determination. In this regard, I deem it appropriate to note the Commission's limited jurisdiction:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement, or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978); In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975).

Further, I would note that the County's request that the arbitrator decide this limited factual issue prior to the Commission's determination is contrary to the Appellate Division's admonition that "...if scope of negotiability turns on a dispute of facts...the Legislature contemplated that PERC, not the arbitrator, resolve that factual dispute." Camden Cty. Voc. Sch. Bd. v. CAM/VOC Teachers, 183 N.J. Super. 206, 214 (App. Div. 1982). Indeed, it would appear that was the reason the Commission directed a hearing in this matter.[2/]

2/ I resolve this factual dispute to find that merit pay is to be paid to employees who "usually" meet the standards expected of

(footnote continued on next page)

The issue here is whether the denial of merit increments under the circumstances of this case may be submitted to binding arbitration. I first note, though, that the various labels used by the parties (and myself) to describe this case ("increments," "discipline," "merit evaluations," "managerial prerogatives," and "compensation"), although not lacking in use, cannot dispositively answer the question presented. As our Supreme Court said in In re IFPTE Local 195 v. State, 88 N.J. 393, 402 (1982) "the mere invocation of abstract categories [in making scope of negotiations determinations] is not helpful." Rather, the central issue in a scope of negotiations determination..." depends on careful consideration of the legitimate interests of the public employer and the public employees." Id. at 401.

I first consider whether the subject matter of the instant dispute involves "discipline" and therefore is arbitrable under the recent amendments to N.J.S.A. 34:13A-5.3. As amended, the statute now reads:

> ...the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith

---

(Footnote continued from previous page)
him. Conversely, merit pay is denied to those who do not usually meet the standards. I do not think it necessary to characterize such an employee as "average" or "above average." However, I simply cannot accept the County's characterization of an employee who does not usually meet the standards expected of him as an "average" employee. Such an employee would more appropriately be characterized as "poor."

> with respect to grievances, disciplinary disputes, and other terms and conditions of employment. Nothing herein shall be construed as permitting negotiation of the standards or criteria for employee performance.
>
> * * *
>
> Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes.
> (Emphasis added).

In East Brunswick Board of Education, P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984), the Commission held that a Board of Education's decision to withhold salary increments of non-tenured secretaries and custodians for "good cause" based upon the employees alleged unsatisfactory performance was arbitrable. It distinguished Bernards Tp., 79 N.J. 311 (1979) since that case involved the denial of a teacher's increment which the Legislature had delegated to the Board under N.J.S.A. 18A:29-14 and which was subject to the jurisdiction of the Commissioner of Education. With respect to whether the withholdings of increments constituted "discipline" within the meaning of the amended statute, the Commission said:

> The legislative history offers some immediate guidance on [this] question. The Sponsor's Statement to Assembly Bill No. 706 - which was later revised, enacted, and codified in N.J.S.A. 34:13A-5.3 - provided in part:

> The proposed legislation does not challenge the exclusive power of the employer to initiate discipline or discharge a public employee for misconduct, incompetency or inefficiency so as to maintain an adequate and effective work force. It merely assures organized public employees that procedures to review such important considerations as the fairness of disciplinary actions can be available to them through negotiations, and may be examined by an independent third party, if the parties so agree in their contract.
>
> This bill is not intended to deny any individual employee the right to elect to pursue a complaint over allegedly unjust discipline or discharge through procedures available under existing legislation, such as those procedures through which classified civil service employees may appeal disciplinary actions, denial of increments, etc. Nor is this bill intended to alter the existing procedures through which discharges or reductions in salary are sought against tenured personnel under N.J.S.A. 18A:6-10 et seq. or through which tenured or nontenured employees may appeal a denial of increments. It is intended to authorize the negotiation of binding arbitration merely as an alternative forum for the resolution of such disputes. Under the bill, the election of one forum will, however, preclude the employee from relitigating the grievances or disciplinary appeal through an alternative procedure. (Emphasis supplied).

Thus, this bill, as originally introduced, obviously considered increment withholdings to be discipline and specifically would have made increment withholdings and other disciplinary determinations - regardless of whether or not they could be otherwise reviewed through specific statutory procedures such as N.J.S.A. 18A:29-14 - reviewable through binding arbitration if the parties so agreed. The Legislature passed this bill, but the Governor vetoed it and suggested that it be amended to confirm the employer's right to establish unilaterally performance criteria and statutory appeal procedure or source of statutory protection existed. The Legislature accepted these conditions and the Governor then signed the amendment to Section 5.3

> From this legislative history, two points are clear. First, the Legislature from the beginning recognized that the denial of an increment constitutes discipline. Neither the Legislature nor the Governor ever made any subsequent statements to the contrary and instead their interchange focussed on the different question of the significance of whether or not other statutory appeal procedures or sources of statutory protection concerning such disciplinary determinations existed. Second, while the amendment to section 5.3 confirmed the employer's right to set performance criteria and standards without negotiations, it also recognized the disciplined employee's ability to challenge the fairness of the employer's application of these criteria and standards in his or her own case through binding arbitration when the parties had negotiated such a procedure for review of disciplinary determinations and there was no statutory appeal procedure or source of statutory protection available to that employee. In sum, decisions to withhold increments are disciplinary determinations which may be reviewed through binding arbitration (if the parties so agree), provided no other statutory appeal procedure or protection exists.
> (Emphasis added).

In affirming, the Appellate Division said: "It is self-evident that denial of increments constitutes discipline and the Sponsor's Statement attached to A-706 in the chain of legislation confirms that this is the intent of the Legislature." (Slip opinion at 2).

The County strenuously argues, however, that the employees involved in this proceeding have not been "disciplined." Rather, it asserts that they simply have not reached a level of performance that would merit an increment or bonus payment. A public employer's failure to award a merit increment arguably might not constitute discipline under certain circumstances. The employee is not punished. He continues to receive the same pay (indeed, he also receives cost of living increases) and apparently remains free to

continue working with the County. I cannot, however, accept this contention under the particular circumstances of this case. First, the County's claim (based upon the testimony of its supervisors) that only employees that perform "above average" receive increments is contrary to the plain language of the Merit/Increment Pay Program. Under it, employees who "usually" meet the standards expected of them receive increments. Conversely, employees who do not" usually" meet the standards do not receive increments. I simply do not believe that an employee who does not "usually" meet the standards expected of him is an average employee. It seems to me that he is a poor employee and by so labelling him as "not usually" meeting the standards constitutes "discipline" since it effectively amounts to a sanction.3/ Moreover, all employees have an expectation under the contract that they will reach maximum. The record reveals that most employees receive increments. The only way to get from minimum to maximum on the salary guide is through the receipt of the merit payments. Thus, in a practical sense, where most employees receive increments, the denial amounts to discipline within the meaning of N.J.S.A. 34:13A-5.3. It is not important that they are not automatic. What is significant is that they are negotiated incremental salary steps which the County has denied.

3/ I am not suggesting that this is the severest form of discipline that could be leveled. To the contrary, an employee who does not usually meet the standards expected of him could be subject to discharge.

Given this, I believe East Brunswick controls and I recommend the denial of increments, under the circumstances of this case, is disciplinary within the meaning of N.J.S.A. 34:13A-5.3.

I believe it appropriate to contrast this situation to that in which an employer grants discretionary salary payments to selected individuals for outstanding or above average performance based upon its evaluations of these employees. In other words -- a "bonus" increment payment. The County essentially argues this position, but the facts do not support this contention. Under such circumstances, I would agree that the failure to receive such payments would not be disciplinary within the meaning of N.J.S.A. 34:13A-5.3. Nevertheless, even if the County's factual position was accepted, it would still be a mandatory subject of negotiations since this compensation program is predicated upon a negotiated agreement concerning a term and condition of employment. Even were it not to be "discipline," I would still have to apply the Local 195, supra, test to determine its negotiability:

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

The first part of this test has been met. Compensation and rates of pay are, in the words of the Supreme Court, "prime examples of subjects that fall within this category." Bd. of Ed. of Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582, 589 (1980). The second test is not applicable. This subject has not been preempted by statute or regulation. I now consider the third test. It is true that submitting to an arbitrator the determination whether an employee has "usually" performed up to standards set by management will infringe, to some extent, on the determination of governmental policy. But, as our Supreme Court has stated "...most decisions of the public employer affect the work and welfare of public employees to some extent and that negotiation will always impinge to some extent on the determination of governmental policy. Local 195, supra at 404. Therefore, it is only those topics that significantly interfere that are non-negotiable. This "significant" limitation requires me to balance the interests of the public employer and the public employees, as stated in Local 195:

> The requirement that the interference be "significant" is designed to effect a balance between the interests of public employees and the requirements of democratic decision making. As Justice Schreiber wrote in Woodstown-Pilesgrove,
>
> > The nature of the terms and conditions of employment must be considered in relation to the extent of their interference with managerial prerogatives. A weighing or balancing must be made. When the dominant issue is [a governmental] goal, there is no obligation to negotiate and subject the matter, including its impact, to binding arbitration. Thus these matters may not be

> included in the negotiations and in the binding arbitration process even though they may affect or impact upon the employees' terms and conditions of employment
> [88 N.J. at 404].

Balancing these interests under the circumstances of this case convinces me that the employees' interest predominates. First, as already stated, compensation vitally affects all employees. No one would deny that. This must be balanced against the employer's interest in unilaterally determining whether to give the employee a merit increase. That determination affects governmental policy to some extent. See Bd. of Education Bernards Tp. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311 (1979). In this regard, I note that the underpinning of the County's argument is that since the determination to award the increases is dependent upon evaluations, it must be non-negotiable. It is true that public employers have the managerial prerogative to evaluate employees, to determine who is the evaluator, to determine the evaluation criteria and to use evaluations to promote and transfer employees. e.g., Bethlehem Twp. Bd. of Ed. v. Bethelehm Tp. Ed. Ass'n, 91 N.J. 38 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978); State v. State Troopers NCO Ass'n, 179 N.J. Super. 80 (App. Div. 1981); Fair Lawn Bd. of Ed. v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554 (App. Div. 1980); In re Byram Tp. Bd. of Ed., 152 N.J. Superl 12 (App. Div. 1977); Brookdale Community College, P.E.R.C. No. 84-84, 10 NJPER 111 (¶14048 1984); Tenafly Bd. of Ed., P.E.R.C. No. 83-51, 8 NJPER 62 (¶13297 1982); Willingboro Tp. Bd. of Ed., P.E.R.C. No. 82-67, 8

NJPER 104 (¶13042 1982); Township of Edison Bd. of Ed., P.E.R.C. No. 83-40, 8 NJPER 599 (¶13281 1982); Rutgers, P.E.R.C. No. 82-47, 7 NJPER 671 (¶12303 1981). But, this program is part of a negotiated compensation package. The County retains the sole authority to evaluate employees to determine where the employee should be assigned; whether he should be promoted or even the standards to determine whether he should be retained. The Commission has never held, however, that an evaluation of an employee's work product can be used to unilaterally determine whether an employee will receive a scheduled increment payment and thereby unilaterally determine his place on the salary range set for his position. I do not believe it would so hold. Bernards Tp., supra, is some support for that position, but I believe it is distinguishable because it relied on a specific statutory provision and was issued prior to the disciplinary amendments evidencing a clear legislative intent that increment denials were appropriate subjects for negotiation and arbitration where there was not, unlike Bernard's, an alternate statutory appeal mechanism. The County's position goes too far. It asserts that it has the prerogative to determine compensation based upon its evaluation of the employees' work product. In short, good employees would receive salary increases; average and poor employees would not. I have no quarrel with that ultimate goal. Indeed, in this case neither does the union because it has specifically agreed to such a program. But the County's argument is more than that. It would unilaterally determine who is good and bad for purposes of

awarding salary increases. Further, this appears to be the County's primary goal -- these decisions could not be submitted to a neutral arbitrator for review even though the County has specifically agreed with the majority representative that such decisions were subject to arbitration. I do not doubt that a public employer has an interest in determining salaries unilaterally. It would be easier to pay those employees it wants to reward and not pay those it wants to penalize without the constraints of negotiations and binding arbitration, if it had so agreed. The essential and only relevant point is that our Legislature has determined otherwise. N.J.S.A. 34:13A-5.3. What our Supreme Court said in Lullo v. Intern. Assoc. of Fire Fighters, 55 N.J. 409 (1970) concerning collective negotiation is applicable here:

> ...the wholesome purpose is to supersede the possible terms of individual agreements of employers with terms which reflect the strength and bargaining power and serve the welfare of the group. The terms and advantages of the collective agreement become open to every employee in the represented unit. It has been said that advantages to an employee through an individual contract "may prove as disruptive of industrial peace as disadvantages." Individually negotiated agreements constitute "a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole." (Emphasis added) [Id. at 428].

The point is that our Legislature has determined that even though increased compensation may be individually deserved, it may result

in "breaking down some other standard." That is why collective negotiations exist in New Jersey. The flaw in the County's argument is that it looks only to the interests of the public employer. Indeed, to permit it to unilaterally decide merit increment increases, with no review of that decision whatsoever, would swallow what has been basic to mandatory negotiability. But our Supreme Court has directed us to balance the interests. Here, since compensation is dominant, I have no hesitancy in concluding that, even if the dispute is not "disciplinary," it nevertheless may be submitted to binding arbitration since it is a mandatory subject of negotiations.

Recommended Order

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

David F. Corrigan
Hearing Examiner

DATED: Trenton, New Jersey
November 4, 1985