P.E.R.C. NO. 85-106

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 holds that the State of New Jersey and the University of Medicine & Dentistry of New Jersey did not violate the New Jersey Employer-Employee Relations Act in certain aspects, but did violate it in others. The respondents did not violate the Act when they refused to negotiate over the criteria for determining which employees represented by University of Medicine and Dentistry of New Jersey, Council of Chapters of the American Association of University Professors would be allowed to pierce caps imposed on the salaries of the employees in fiscal years 1982 and 1983; negotiation over these criteria were preempted since the Chancellor of Higher Education and the Director of the Division of Budget & Accounting adopted them pursuant to statute and regulation. The respondents did, however, violate the Act when they refused to negotiate over which employees would be allowed to pierce the salary caps consistent with the discretion conferred upon the respondents by the criteria and subject to the ultimate approval of the Salary Adjustment Committee. The Commission finally holds that the respondents did not violate the Act when they denied exemptions to two particular teachers.

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Charging Party.

Appearances:

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

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

DECISION AND ORDER

On October 30, 1981, and July 23, 1982, respectively, the University of Medicine & Dentistry of New Jersey, Council of Chapters of the AAUP ("AAUP") filed an unfair practice charge and an amended charge against the State of New Jersey ("State") and the University of Medicine and Dentistry of New Jersey ("University") with the Public Employment Relations Commission.[1/] The charge, as amended, alleged that the State and the University violated

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1/ At that time, 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 this opinion for clarity. A similar change -- substituting University for College -- has occurred in the charging party's name.

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 capped the salaries of unlicensed doctors and dentists represented by AAUP. This cap prevented certain basic science faculty during fiscal years 1982 and 1983 from receiving salaries they otherwise were entitled to under a collective negotiations agreement. While some exemptions from the salary cap were granted, AAUP alleges that the State and University had an obligation, which they did not meet, to negotiate over the critera for these exemptions and who received these exemptions and that exemptions, in any event, were discriminatorily denied to employees represented by AAUP.[3/]

AAUP requested interim relief ordering the University and State to pay employees salary increases due them under the contract,

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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."

3/ The charge, as amended, contains twelve counts. Counts I-VI pertain to fiscal year 1982, Counts VII-XII to fiscal year 1983. A detailed description of the factual and legal allegations of each count, and of the respondents' answers to each allegation, may be found in an earlier Commission decision

(Footnote continued on next page)

but denied them pursuant to the salary cap guidelines. On August 25, 1982, Commission designee Alan R. Howe, after a hearing, denied the requested relief. I.R. No. 83-5, 8 NJPER 522 (Para. 13241 1982).

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. The University admitted almost all of AAUP's factual allegations, but denied all of AAUP's legal conclusions.4/ In addition, 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 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 & Accounting, based upon recommendations from the Chancellor of Higher Education."

(Footnote continued from previous page)
considering the propriety of a subpoena. P.E.R.C. No. 83-157, 9 NJPER 369 (Para. 14168 1983) (discussed infra). That description is incorporated here.

4/ Again, P.E.R.C. No. 83-157 sets forth the respondents' Answer to each count and is incorporated in the preceding footnote.

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 the 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. On June 2, 1983, the Commission issued a decision affirming the order to produce the requested documents, but vacating the subpoena to the extent it ordered the Chancellor to testify before the documents had been examined and the necessity of his testimony determined. P.E.R.C. No. 83-157, 9 NJPER 369 (Para. 14168 1983).

On October 17, 1983, after the documents had been produced, the hearing commenced. The Hearing Examiner admitted into evidence 29 exhibits offered by the charging party and then determined that the testimony of the Chancellor of Higher Education was necessary.

On October 19, 1983, the hearing continued and the Hearing Examiner admitted into evidence 12 joint exhibits, including a stipulation of facts, and two exhibits offered by the respondents. The charging party's executive director also testified.

On October 28, 1983, the last day of hearing was held. The Chancellor and the University's assistant vice-president testified. The parties waived oral argument, but submitted post-hearing briefs.

On October 18, 1984, the Hearing Examiner issued his report and recommended decision. H.E. No. 85-17, 10 NJPER 615 (Para. 15294 1984) (copy attached). The Hearing Examiner determined that the State and the University did not commit an unfair practice when they refused to negotiate over the criteria for piercing the salary cap and that these criteria were preemptive except to the extent they granted the University's president discretion to grant up to 30 salary cap exemptions to basic science faculty. To the extent, however, that such discretion existed, he found that it was an unfair practice to exercise that discretion concerning unit members without first engaging in good faith negotiations.[5/] He further found that the regulations entitled two doctors with M.D. or D.D.S. degrees to pierce the salary cap. As a remedy, the Hearing Examiner recommended an order requiring the University to negotiate with AAUP over granting retroactive salary cap exemptions for up to 18 basic science faculty for fiscal year 1983 and to pay the two doctors the salaries owed them under the collective negotiations agreement. He also recommended that a notice be posted.

On November 7, 1984, AAUP filed exceptions. It asserts that the Hearing Examiner erred in: (1) finding that the criteria

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5/ Administrators are not in the unit. 18 administrators received exemptions for fiscal year 1983.

had any preemptive effect; (2) finding that AAUP had not rebutted any presumptive preemptive effect the criteria might have; (3) not ordering negotiations with respect to all 30 exemptions; (4) not considering its allegations and finding violations with respect to fiscal year 1982; and (5) not finding that the University discriminated against AAUP unit members when it limited exemptions to administrators. AAUP concludes that all the University's basic science faculty should receive the salaries due them for fiscal years 1982 and 1983 under the parties' collective negotiations agreement.

On November 19, 1984, the respondents, after receiving an extension of time, filed exceptions. It asserts that the Hearing Examiner erred in: (1) finding that the criteria were not totally preemptive, and (2) finding that two doctors with medical or dental degrees were entitled to pierce the salary cap; and (3) recommending that these two doctors receive 12% simple interest on any amounts improperly withheld. The respondents request we dismiss the Complaint.

On November 26, 1984, AAUP filed cross-exceptions urging rejection of the State's exceptions.[6/]

We have reviewed the record. The parties stipulated these facts:

6/ AAUP has also requested oral argument. We deny that request.

1. The Council of Chapters of the American Association of University Professors at the University of Medicine and Dentistry of New Jersey (AAUP), the Charging Party, is the exclusive public employee representative under the Act for full-time members of the faculty of respondent University of Medicine and Dentistry of New Jersey (University). There are 700 members in the unit represented by the AAUP, 235 of whom are members of the basic science faculty.

2. The University is an agency of the State of New Jersey, also a respondent in this matter. The State and the University, public employers under the Act, have recognized the AAUP as the exclusive public employee representative under the Act for full-time faculty since 1972. The definition of the unit is contained in Article II of the 1981-83 Agreement between the parties. (Exhibit J-1).

3. From 1972 until the present time, the AAUP has entered into five (5) separate collective negotiations contracts with the State and/or University. The State, through the Governor's Office of Employee Relations, the University and the Department of Higher Education (DHE), has actively participated in and approved all such agreements, the latest one covering the period July 1, 1981 to June 30, 1983.7/

4. Under Appropriations Acts enacted prior to fiscal year 1982 and Agreements between the parties, the University has submitted to the State's Salary Adjustment Committee (SAC) requests for approval of faculty salaries in accordance with the provisions for exceptions to the salary limitations set forth in the Appropriations Acts. Upon such submission, SAC has approved such requested faculty salaries in accordance with the applicable Appropriations Acts.

5. Following negotiations leading to the Agreement between the parties covering the period July 1, 1979 to June 30, 1981 (Exhibit J-2), the University

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7/ Although this fact is not stipulated, each collective negotiations agreement makes compensation increases "subject to appropriations legislation and applicable elements of the State's compensation plan."

submitted to SAC requests for salary increases for "medical faculty," which included faculty members who were not licensed doctors and dentists. The requests were not processed pending receipt of a legal opinion requested by DHE through its Chancellor, T. Edward Hollander, from the Attorney General as to whether faculty who were not licensed doctors or dentists, were included within the definition of the term "medical faculty" in the Appropriations Act for that year. L.1979, c.119.

6. The refusal to process requests for waivers of the salary caps in the Appropriations Act was the subject of an Unfair Practice Charge filed by the AAUP on December 10, 1979 and later amended on February 24, 1980, under Docket No. CO-80-159 (Exhibit J-3), which was resolved after the Attorney General, in April 1980, issued an opinion to the effect that "medical faculty," as that term was used in the Appropriations Act, included faculty members who were not licensed doctors and dentists (Exhibit J-4).

7. Negotiations for an Agreement to succeed the one that expired June 30, 1981 commenced on December 16, 1980. Eight negotiating sessions were held, the last on July 24, 1981. The AAUP attempted to negotiate the issue of the salary caps, but the State refused, stating that it was non-negotiable. As part of the consumation of the July 1, 1981 to June 30, 1983 contract, a side letter of agreement dated December 23, 1981 was executed, by which the AAUP and the University stipulated that nothing contained in the Agreement should be understood to constitute a waiver of the AAUP's position with respect to the salary caps (Exhibit J-5).

8. By cover memorandum dated March 3, 1981, the State promulgated a document, revised on February 27, 1981, entitled Criteria for SAC approval of CMDNJ Faculty and Administrators Salaries Above the Department Head Maximum (Exhibit J-6). This document was neither negotiated with the AAUP nor disclosed to it during negotiations. Pursuant to it, medical faculty could be considered for salary adjustments in excess of the statutory caps with limitations specified. There were also exempted from the statutory cap for fiscal 1982 the President, the Executive Vice-President, the Vice-President, Health Care Facilities, the Dean, New Jersey Medical School, the Dean, New Jersey Dental School, the Dean, Graduate

School of Biomedical Sciences, the Dean, Rutgers Medical School, the Dean, New Jersey School of Osteopathic Medicine and Department Chairpersons. Additionally, the administrators who held the titles of Associate Dean, Assistant Dean and Section Head, Vice-President and Executive Director-College Hospital were permitted to be considered for salary adjustments in excess of the cap as were administrators who held medical or dental degrees and ten administrators who did not have medical or dental degrees. The guidelines were retroactive to July 1, 1980.

9. Certain administrators referred to in paragraph 8 (who are excluded from the AAUP's negotiating unit and whose salaries are not determined through collective negotiations) received salary adjustments equivalent to those negotiated by the AAUP on behalf of its members.

10. Pursuant to the February 27, 1981 criteria, as of the onset of fiscal 1982, thirteen members of the Basic Science faculty were granted exemptions from the salary cap ($55,500 at the time). These faculty members received salaries in excess of $55,500 for fiscal year 1981, and their salaries were frozen at the 1981 level at the beginning of fiscal 1982.

11. As a result of legislation, Chapter 2 of the Laws of 1982 (codified at N.J.S.A. 18A:14B-15.107), which authorized the Governor to increase the salary of the Chancellor to $70,000, the Chancellor's salary was increased to $70,000 as of January 19, 1982. In November 1982, 53 basic science faculty members received lump sum payments for the period January 19, 1982 through June 27, 1982 pursuant to the increase in the Chancellor's salary. These lump sum payments resulted in 44 of these basic scientists on the faculty receiving more than $59,000 for fiscal 1982.

12. For fiscal 1983, a salary cap of $59,000 was imposed. This limitation was made through a memorandum of July 9, 1982 from Eugene J. McCaffrey, President of the Civil Service Commission, to all Cabinet Officers (Exhibit J-7).

13. Pursuant to Salary Administration Memorandum #8-83 (Exhibit J-8), salaries for faculty on the clinical salary scale (exclusive of faculty paid from the basis science salary scale) were increased to the level called for under the contracted agreement by

action of the President of UMDNJ. A total of 131 faculty members holding medical or dental degrees were thus released from the cap and allowed to receive the contracted for increases. No basic science faculty on the basic science salary scale were permitted to receive salaries above the $59,000 maximum.

14. Also pursuant to Salary Administration Memorandum #8-83 (paragraph III), 18 administrators, including two with medical degrees who had been on a basic science salary scale, were released from the cap and, with six exceptions, given salary adjustments equivalent to those received by faculty under the prevailing Agreement between the parties.

15. Also pursuant to Salary Administrative Memorandum #8-83 (paragraph II), administrators with medical or dental degrees other than those referred to in paragraph 14 were released from the cap and given salary adjustments equivalent to those received by the faculty under the prevailing Agreement between the parties.

The parties also introduced joint exhibits documenting these facts.

The parties introduced several documents relevant to the process used to formulate and implement salary cap criteria for fiscal years 1982 and 1983. The Chancellor also testified concerning this process.

The 1980 and 1981 appropriations acts specified that the University's medical faculty could be exempted from the salary cap. Any recommendations for upward salary adjustments were to be made in accordance with criteria promulgated by the Chancellor of Higher Education and the Director of the Division of Budget & Accounting ("Director of B&A"). Under previous appropriations acts, the Salary Adjustment Committee ("SAC") -- composed of the Treasurer, the Director of B&A, and the president of the Civil Service Commission -- considered any requested exemptions. The Chancellor of Higher

Education sought the change reflected in the 1980 and 1981 acts because he believed it conflicted with academic freedom to have State officials outside of the University making such decisions and because he wanted to ensure that University officials could grant salary cap exemptions necessary to hire or retain a teacher.[8/]

On June 17, 1980, a staff member in the Department of Higher Education wrote the Chancellor a letter concerning draft criteria under the 1981 appropriations act. That memorandum stated that the Director of the State's Office of Employee Relations ("OER") should be consulted in formulating the criteria since they might have collective bargaining implications; this statement apparently referred to the unfair practice charge described in stipulation 6. The memorandum further stated that the Department of Higher Education had a dual responsibility: insuring the University's salaries were competitive and equitable while not creating an undue strain on the State budget. The memorandum recommended that the proportion of UMDNJ's medical faculty receiving exemptions not exceed the percentage of comparable faculty receiving such salaries at comparable northeast medical schools. The staffs of the Chancellor and the Director of B&A discussed the draft

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8/ The Chancellor testified that he sought the opinion of the Attorney General referred to in stipulations 5 and 6 because he believed the purpose of the exemption was to allow the University to compete with other institutions for desirable teachers, and that purpose was most implicated with respect to licensed physicians and dentists who could command high salaries elsewhere.

criteria, but the Chancellor did not know of any changes suggested by the Director or his staff.

On July 3, 1980, the Chancellor wrote a memorandum concerning the criteria for salary exemptions to the directors of B&A and OER. That memorandum posed these alternatives: implementing the criteria immediately and undoubtedly having an unfair practice charge filed or making the criteria effective for the next fiscal year and negotiating a codicil to the collective negotiations agreement reflecting the salary footnote in the applicable appropriations act. The memorandum stated that the latter option would unfortunately allow faculty salaries to increase without restriction for one more year; the Chancellor testified that he was concerned that the criteria be implemented before the salaries of too many employees had already pierced the cap, thus making the cap and criteria ineffective. The Chancellor and the Director of B&A wanted to protect the discretion of University administrators to make, after receiving recommendations through the collegiality system and subject to review by the Board of Trustees, salary determinations without interference from officials outside the University. The Chancellor thus testified: "The University had the discretion. That is where we intended the discretion to be. We, being the budget director and myself."

On July 18, 1980, the Chancellor wrote another memorandum to the Directors of B&A and OER. This memorandum concerned salary adjustments for administrators, adjustments resulting from

interoffice discussions among the staffs of these three officials. The memorandum repeated the options in the previous memorandum and the Chancellor's preference for immediate implementation, despite the risk of an unfair practice charge. The memorandum further noted that the second option would mean that the general criteria would be used as a basis for upcoming negotiations.

On July 21, 1980, the Director of OER wrote a memorandum to the Chancellor. That memorandum recommended against the immediate implementation of the criteria because such implementation would establish an unfair practice charge, given the conflict with the contract, and because it would prejudice the State's ability to negotiate towards that goal.

Between July 30, 1980 and March 3, 1981, the Chancellor consulted and exchanged memoranda with the president of UMDNJ and the Director of B&A concerning the criteria for salary cap exemptions. The president of UMDNJ pressed for open-ended guidelines which would give the University more flexibility to make exemptions and also asked that exemptions be based on negotiated salary schedules. The second and third paragraphs of a December 31, 1980 memorandum from the Chancellor to UMDNJ's president articulated the Chancellor's reasons for opposing that request and supporting the draft guidelines:

> We clearly recognize our important responsibility to safeguard the CMDNJ's competitive status in the hiring market for medical school faculty and administrators and fully support the necessity of permitting the College to offer salaries in excess of the

> statutory cap on State employee compensation for certain faculty and administrative positions. However, as public officials it is equally our responsibility to insure that salaries paid to UMDNJ personnel do not create an undue burden upon the taxpayer and are not inequitable or inconsistent with treatment accorded to the many other State employess who are subject to the statutory salary cap. At the same time, we are concerned that the implementation of criteria governing these salary adjustment decisions not interfere in any way with the authority of CMDNJ Trustees and Administration to make personnel decisions with regard to individual faculty members and administrators in accordance with the College's own priorities.
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> We remain convinced that the draft criteria and review process we proposed will satisfy these many concerns. These criteria will promptly accord the College the privilege to offer salaries exceeding the legislated cap to the extent required to remain competitive in the relevant hiring markets. At the same time, these criteria set clearly defined, reasonable limits upon the number and kinds of positions eligible to receive this level of compensation based upon the marketplace value of these personnel. Further, unlike the revisions proposed in the College's response, the criteria and review process we propose will avoid the kind of case by case review of the merits of each CMDNJ salary adjustment request which may result in a serious infringement upon the College's internal prerogatives in these matters. We continue to believe that our criteria will achieve the objectives we all support, namely, to provide your Trustees and Administration with the most flexibility possible while setting clear and reasonable limits on the total number of positions exempt from the overall State salary limitation.

The memorandum further noted that once the number of salary cap exemptions was set, the University could make its own personnel decisions.

A January 30, 1981 memorandum to the Chancellor from a staff member discussed the president's request for greater

exemptions and noted that permitting an additional 13 faculty exemptions might dull faculty/union opposition to the criteria. In addition, the memorandum noted that the Director of OER agreed that the criteria were not negotiable, but thought AAUP should be informed of them during the upcoming negotiations.

On March 3, 1981, the criteria for exemptions for fiscal year 1982 were promulgated.[9/] These criteria are contained in Joint Exhibit J-6 and described in stipulation 8. In pertinent part, they tied the percentage of UMDNJ's clinicial science faculty receiving salary cap exemptions to the percentage of comparable[10/] faculty at northeastern public medical schools compensated at or above that level, but exempted 13 basic science teachers from the salary cap because their salaries already exceeded those of teachers at comparable northeastern schools and it would have been unfair to roll back their salaries. The criteria also required the University to provide documentation to the Department of Higher Education for all requested salary cap exemptions; the department would then forward all requests to SAC for approval or disapproval.

In May, 1981, the president of the Civil Service Commission asked the Director of B&A whether under the criteria the Salary

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9/ These guidelines were retroactive to July 1980 and also covered fiscal year 1981, but we are primarily concerned, for purposes of this litigation, with fiscal year 1982. In any event, what we say and hold about fiscal year 1982 would also pertain to fiscal year 1981.

10/ The criteria defined comparable in terms of academic credentials, faculty rank and discipline.

Adjustment Committee would retain final authority to approve or disapprove salary adjustments. The Director responded yes.

The 1982 appropriations act did not set a salary cap. Instead, that act allowed the president of the Civil Service Commission and the Director of B&A to make regulations to implement salary increases for State employees. These officials adopted regulations imposing a salary cap of $59,000 on State employees, but allowed the salaries of administrators and faculty at UMDNJ, Rutgers and NJIT to exceed that cap in accordance with criteria set by the Chancellor and the Director of B&A.

The Chancellor discussed these regulations with the president of the Civil Service Commission and confirmed that the educational institutions would retain the same flexibility needed to remain competitive as they had in fiscal year 1982. He also discussed these regulations with the presidents of the educational institutions; UMDNJ's president noted the difficulty of explaining to faculty why their salaries remained capped while the Chancellor's salary had been raised to $70,000 and asked that the University's trustees be allowed to raise the cap. The Chancellor in response stressed the "clearly restrictive intent" of the regulations, especially in light of the Governor's efforts to cap salaries at $59,000 and limit raises of managerial employees to $3,000; but he indicated he would try to persuade the budget director to adopt liberal criteria for exemptions. The Chancellor and the Director of B&A decided that up to 30 (instead of 13) exemptions would be

allowed in fiscal year 1983 for Rutgers and UMDNJ and up to 10 for NJIT.

On August 25, 1982, the president of the Civil Service Commission and the Director of B&A promulgated the criteria for fiscal year 1983. These criteria are contained in joint exhibit 8 and described in stipulations 13-15. In pertinent part, they allowed the maximum salaries for faculty and administrators at UMDNJ holding medical or dental degrees to increase to the level set in the collective negotiations agreement, but limited exemptions for other UMDNJ faculty to 30. Again, the University had to provide documentation to the Department of Higher Education for each requested exemption and the department was then to forward that documentation, if sufficient, to SAC for approval or disapproval.

The Chancellor also testified that in drafting the criteria for exemptions, he had not intended to avoid negotiations or to hurt AAUP.[11/] The Hearing Examiner credited the Chancellor's testimony. So do we.

The parties had a dispute over whether two doctors were entitled to exemptions from the salary cap for fiscal year 1983. According to the AAUP's executive director, two basic science teachers -- Dr. George Kozan from the dental school and Dr. Duncan Hutcheon from the medical school -- had MD or DDS degrees. She

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11/ The Chancellor was once nominated to be the executive director of AAUP.

asked a University official why their salaries were capped and was told that these employees were in basic science departments and therefore paid pursuant to the basic science salary scale. The University's vice-president confirmed that Drs. Kozan and Hutcheon taught basic science courses in, respectively, anatomy and pharmacology and that their advanced degrees in anatomy and pharmacology, and not their other advanced degrees, determined their appointments and compensation.

Administrators who have responsibilities in clinical science departments did not have their salaries capped. Administrators who have responsibilities in basic science departments generally did have their salaries capped. Two chairpersons of basic science departments, however, received exemptions which were charged against the total of 30 for non-clinicians.

Finally, as part of the background of this litigation, we note the Appellate Division has affirmed a summary judgment against AAUP in a suit claiming that the application of the salary cap to the employees it represented violated the parties' contract. Council of Chapters of the American Association of University Professors v. State, App. Div. Dkt. No. A-3179-82T2 (Feb. 16, 1984). The Court specifically rejected AAUP's claim that the regulations and cap fixed by the State Treasurer, president of the Civil Service Commission and Director of B&A were illegal. The Court also approved the discretion delegated to the Chancellor and

the Director of B&A to increase salaries beyond $59,000 for certain University administrators and faculty. The Court, however, did not consider the reasonableness or validity of the application of the criteria and regulations.

We first consider whether the respondents violated subsections 5.4(a)(5) and (1) when they refused to negotiate over the criteria for salary cap exemptions for fiscal years 1982 and 1983. We hold they did not. We also hold, however, that the respondents did violate these subsections to the extent they refused to negotiate with AAUP about how to use their discretion under these criteria to grant exemptions.

In State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978) ("State Supervisory"), the Supreme Court first considered when a statute or regulation would preempt negotiation over an otherwise mandatorily negotiable term and condition of employment. The Court stated:

> The adoption of any specific statute or regulation setting or controlling a particular term or condition of employment will preempt negotiations on that subject. This preemption doctrine applies to any validly adopted regulations, regardless of which agency or department promulgated it, provided the regulation definitively and specifically fixes a term or condition of employment. 78 N.J. at 80-81.
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> Furthermore, we affirm PERC's determination that specific statutes and regulations which expressly set particular terms and conditions of employment, as defined in Dunellen, for public employees may not be contravened by negotiated agreement. For that reason, negotiations over matters so set by statutes or regulations is not

> permissible. We use the word "set" to refer to statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer.
> 78 N.J. at 80.

The Court also held that some statutes or regulations would only partially preempt negotiation since they would allow the public employer to retain and exercise some discretion over a particular term and condition of employment. The Court stated:

> It is implicit in the foregoing that statutes or regulations concerning terms and conditions of public employment which do not speak in the imperative, but rather permit a public employer to exercise a certain measure of discretion, have only a limited preemptive effect on collective negotiation and agreement. Thus, where a statute or regulation mandates a minimum level of rights or benefits for public employees but does not bar the public employer from choosing to afford them greater protection, proposals by the employees to obtain that greater protection in a negotiated agreement are mandatorily negotiable. A contractual provision affording the employees rights or benefits in excess of that required by statute or regulation is valid and enforceable. However, where a statute or regulation sets a maximum level of rights or benefits for employees on a particular term and condition of employment, no proposal to affect that maximum is negotiable nor would any contractual provision purposing to do so be enforceable.
> State Supervisory at 81.

See also Old Bridge Bd. of Ed. v. Old Bridge Ed. Assn, __ N.J. __ (March 21, 1985); Local 195, IFPTE v. State, 88 N.J. 393, 403-404 (1982).

In Council of New Jersey State college locals v. State Bd. of Higher Ed., 91 N.J. 18 (1982) ("Council",) the Court held that regulations are not entitled to absolute preemptive effect without

further inquiry when the regulating agency also performs certain employer functions regarding the same employers whom it regulates. There, the Chancellor of Higher Education formulated, and the Department of Higher Education approved, regulations governing staff reductions at State Colleges during fiscal emergencies. The Chancellor and the Department of Higher Education, however, also performed employer functions concerning the employees the regulations covered: the Chancellor and the Department participated on management's collective negotiations team, signed agreements, and helped resolve 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, 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. It 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 our earlier decision concerning the subpoena duces tecum, we held that the criteria for salary cap exemptions in fiscal years 1982 and 1983 were entitled to presumptive rather than absolute preemptive effect; it was that holding that necessitated the production of documents and ultimately led to the Chancellor's testimony. 9 NJPER at 372. We incorporate that discussion here[12/] and now analyze the factors set forth in the Council case for determining whether the presumption of preemption has been rebutted.

12/ In AAUP v. State, we rejected the respondents' argument that the criteria for salary cap exemptions for fiscal years 1982 and 1983 were entitled to absolute preemptive effect without further inquiry. We now reject AAUP's argument that these criteria are not entitled to any preemptive effect, absolute or presumptive, because they are not technically statutes or regulations. The 1981 appropriations act, covering fiscal year 1982, specifically directed the Chancellor and the Director of B&A to promulgate criteria for salary cap exemptions. The 1982 appropriations act, covering fiscal year 1983, specifically directed the State Treasurer, the president of the Civil Service Commission and the Director of B&A to establish rules and regulations governing salaries; these officials then issued regulations empowering the Chancellor and the Director of B&A to promulgate criteria for salary cap exemptions. The Appellate Division has already approved these delegations of authority to the Chancellor and Director of B&A, AAUP v. State, supra. Given that determination, we must accord these criteria a presumption of preemptive effect and AAUP must bear the burden of demonstrating that they were arbitrary, adopted in bad faith, or passed primarily to avoid negotiations on terms and conditions of employment.

Applying the Council factors under all the circumstances of this case, we are not convinced that the criteria for salary cap exemptions in fiscal years 1982 and 1983 constituted an abuse of the regulatory power of the Chancellor and Director of B&A designed to insulate the respondents from negotiations. With respect to factors one and two, the Chancellor and the Director of B&A were specifically directed to prepare these criteria. This is not a case where an agency had general regulatory power which it could either exert or not exert over a subject and which it only used when it perceived that negotiations on that subject might lead to an unfavorable result. Here, given the legislative and administrative commands, the Chancellor and the Director of B&A were obliged to adopt criteria. With respect to factor three, as in the Council case, the employer role of the Chancellor and the Director of B&A, while considerable in certain respects, was basically secondary in comparison with their obligation to adopt criteria. With respect to factor four, the Chancellor's rationale for adopting these criteria -- protecting the University's discretion and freedom from outside interference to offer competitive and equitable salaries while not creating an undue strain on the State budget -- is not arbitrary or discriminatory. With respect to factor five, the circumstances under which the regulation was adopted include knowledge of the ongoing negotiations, but do not evidence hostility to these negotiations. With respect to factor six -- the scope and composition of the class of affected employees -- this factor cuts

both ways. In general the criteria favor clinical science faculty over basic science faculty, apparently because of a belief that the University needs to offer clinicians higher salaries in order to compete for their services with other northeastern medical schools. AAUP represents both groups of faculty so the advantage of one group over another does not suggest any improper motivation or hostility. In general, the criteria also favor administrators over basic science faculty, although administrators in basic science departments, with the exception of two chairpersons, did have their salaries capped. AAUP does not represent administrators so the advantage of the unrepresented group over the represented group does raise a question concerning their disparate treatment. Again, however, we do not believe that this disparity, standing alone, is sufficient to prove illegal motivation or hostility, especially since some basic science administrators were treated like basic science teachers and since it is not inherently illogical or unfair for employees in high-level, administrative positions to receive more money than employees in lower-level, non-administrative positions. With respect to factor seven, we do not believe that the criteria are basically unfair and will not substitute our judgment for that of the decisionmakers concerning what criteria might have been more fair.[13/] With respect to factor eight, we note that,

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13/ In this regard, we note that several exemptions were allowed in
(Footnote continued on next page)

despite the contrary recommendation of the OER's Director, the proposed criteria were not disclosed during negotiations so that AAUP would have had a chance to express its views as an employee representative on their fairness. We regret this failure and weigh it against the respondents.

Considering all these factors together and recognizing that some weigh against the criteria while others weigh in their favor, we hold that AAUP has not rebutted the presumptive validity of the criteria. Instead it appears to us that certain officials were specifically entrusted to adopt these criteria and that they did so without an intent to evade collective negotiations or to discriminate against employees represented by AAUP.14/

Given that the criteria for fiscal years 1982 and 1983 must be accorded preemptive effect, we must next determine whether they are wholly or partially preemptive. We hold that these criteria are

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(Footnote continued from previous page)
each fiscal year and that employees were protected against salary rollbacks in fiscal year 1982. While some basic science faculty did have their salaries rolled back to $59,000 in fiscal year 1983, that rollback cannot be considered unfair in and of itself since SAC had established a salary cap of $59,000 and thus these teachers were treated similarly to many other State employees.

14/ Even if these criteria were not entitled to any preemptive effect as a matter of law, there would be a question of what effect they were entitled to as a matter of contractual interpretation. Faculty represented by AAUP were not entitled automatically to receive negotiated salary increases; instead salary adjustments were subject to appropriations legislation and applicable elements of the State's compensation plan. Compare, State v. State Troopers Fraternal Assn, 91 N.J. 464 (1982). We do not reach this question of contractual interpretation.

only partially preemptive and that their very rationale -- insuring the University's freedom from outside interference and discretion over personnel matters -- is fully consistent with finding a negotiations obligation over compensation questions not preempted by these criteria.

Under State Supervisory, negotiation of a term and condition of employment is wholly preempted only if a statute or regulation speaks in the imperative and leaves nothing to the discretion of the public employer. Id. at 80. The Council case and Bethlehem Twp. Bd. of Ed. v. Bethlehem Ed. Ass'n, 91 N.J. 38 (1982) repeated and strengthened that test: under those cases, negotiation is preempted only if the regulation fixes a term and condition of employment "expressly, specifically and comprehensively." See, respectively, 91 N.J. 18 at 30; 91 N.J. 38 at 44. In this case, the criteria set the number of exemptions and that number cannot be altered throughy negotiations. Given that constant, however, the criteria were intended to leave and did leave considerable discretion in the University as a public employer to grant or deny salary cap exemptions to its faculty. In fiscal year 1982, the criteria allowed 13 exemptions for basic science faculty; the determination of which employees would receive these exemptions was left to the University, subject to the submission of appropriate documentation to the Department of Higher Educaton and ultimate approval of SAC. In fiscal year 1983, the criteria allowed 30 exemptions for basic science faculty; the determination of which

employees would receive these exemptions was again left to the University, subject to the same documentation and approval requirements as in 1982.[15/] The Chancellor repeatedly testified that he desired the University to have this discretion. Rather than attempting to avoid negotiations, he was attempting to increase the sphere of University autonomy over personnel practices and to reduce the role of the Salary Adjustment Committee in salary determinations. In response to a question concerning AAUP's role in negotiating which employees could receive salary cap exemptions pursuant to the criteria, he testified further that the University should make those decisions "...in accordance with whatever lawful authority existed within the institution to make those decisions" and that how those decisions were made was not a matter of primary concern to him. Consistent with State Supervisory and the Chancellor's testimony, we believe that the University's discretion to grant or deny salary cap exemptions to basic science faculty could have been exercised through collective negotiations.[16/]

15/ AAUP has not protested the propriety of granting or denying exemptions to the clinical science faculty it represents. In fiscal year 1982, exemptions for these teachers were apparently granted in proportion to the percentage of comparable faculty at northeastern public medical schools receiving salaries above this State's cap amount. In 1983, all these teachers apparently received exemptions.

16/ Had the Chancellor intended that the discretion delegated to the University could only be exercised unilaterally, thus avoiding collective negotiations altogether, we would have weighed the Council factors differently and might have reached a different result.

In State of New Jersey and Local 195, IFPTE, P.E.R.C. No. 84-77, 10 NJPER 42 (Para. 15024 1983), aff'd App. Div. Dkt. No. A-2408-83T3 (Feb. 8, 1985) ("Local 195"), we found that certain statutes did not preempt negotiations over compensation for overtime. These statutes vested discretion in the public employer to determine the method of compensation -- cash or time-off -- for employees working overtime, subject to approval or disapproval by a legislatively-created Overtime Committee. We stated:

> Based upon the record before us, we do not believe that the statutes and regulations should be applied to preempt arbitration in this case. Local 195 has alleged that the public employer has exercised its statutory discretion by agreeing to pay cash to employees working overtime if they prefer pay to compensatory time off; under State Supervisory and Bethlehem, that discretion could be properly exercised through negotiation. No statute or regulation specifically bars such an agreement if proved at arbitration, and there is nothing in the record to indicate that the Overtime Committee has specifically held that the Department of Transportation may not pay its employees working overtime instead of giving them compensatory time off. Given an allegation that the public employer has exercised its statutory discretion through negotiations, and in the absence of any indication that the President of the Civil Service Commission and the Overtime Committee have exercised their statutory review powers to the contrary, we believe that the statutory system does not preempt negotiation or binding arbitration concerning the meaning of the contractually agreed-upon article.

The Appellate Division affirmed for the reasons stated in the Commission's decision and quoted this passage with approval. See also, State of New Jersey, Department of Human Services and CWA, P.E.R.C. No. 82-23, 8 NJPER 209 (Para. 13088 1982).

Local 195's reasoning and result apply here to the extent the criteria for fiscal years 1982 and 1983 left discretion over exemptions to the public employer. As in Local 195, that discretion can be exercised initially through collective negotiatoins. At the same time, however, a negotiated agreement cannot preclude subsequent agency review authorized by statute or regulation and entrusted to designated agencies or officials. Thus, in the instant case, any negotiated agreement to grant or deny exemptions allocated to the basic science faculty would still be subject to documentation and SAC approval.

Accordingly, we hold that the respondents' refusal to negotiate over which basic science faculty would receive allocated salary cap exemptions for fiscal years 1982 and 1983 violated subsections 5.4(a)(5) and, derivatively, (a) (1), even though the adoption of the applicable criteria did not. Lullo v. IAFF, 55 N.J. 409, 428 (1970); Local 195.[17/] With respect to fiscal year 1983, we will adopt, with one modification, the Hearing Examiner's recommended remedy; the modification is that any exemptions allowed through collective negotiations must, consistent with the preemptive

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17/ The Hearing Examiner erred in failing to consider AAUP's allegations concerning fiscal year 1982. He similarly erred in failing to consider AAUP's allegations that the respondents violated subsection 5.4(a)(3) of the Act. We remind our Hearing Examiners to make recommendations on each alleged violation set forth in the Complaint and each alleged defense set forth in the Answer.

criteria, be documented and submitted to SAC for approval.[18/] With respect to fiscal year 1982, we will require the respondents to cease and desist from such violations and to post a notice of this illegality, but will not order affirmative relief since the 13 exemptions for basic science faculty have already been used and AAUP apparently does not wish these exemptions rescinded and since the salary cap for basic science faculty was lifted in November, 1982, retroactive to January, 1982.

We next consider whether the respondents violated subsections 5.4(a)(5) and (1) when they refused to grant salary cap exemptions to Drs. Kozan and Hutcheon. We hold they did not.

This issue essentially turns on an interpretation of an ambiguity in the criteria for fiscal year 1983. AAUP asserts that the criteria literally entitle all faculty with medical or dental degrees to exemptions; the respondents assert that these criteria were meant to distinguish between clinical science faculty, who must hold such degrees, and basic science faculty, who need not.[19/] Under AAUP's interpretation, the two doctors are entitled to

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18/ We reject AAUP's request that we invalidate the exemptions granted to administrators for fiscal year 1983. We also note that the Hearing Examiner erred in finding that the University had granted 12 exemptions to administrators; as the parties stipulated, 18 exemptions were granted.

19/ The criteria for fiscal year 1982 draw a clear line between clinical science faculty and basic science faculty. The respondents are essentially arguing that the criteria for fiscal year 1983 draw the same line by substituting the phrase "faculty...holding medical or dental degrees" for the phrase "clinical science faculty."

exemptions for fiscal year 1983 because they hold medical or dental degrees; under the respondents' interpretation, the two doctors are not entitled to exemptions because they are basic science professors whose medical or dental degrees are irrelevant to their appointments or compensation. We believe that both parties' interpretations are reasonable and honest. Under all the circumstances of this case, we cannot say that the respondents' interpretation, even if mistaken, rises to the level of a refusal to negotiate in good faith. Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (Para 15191 1984). Instead, we believe that the two teachers must seek clarification from the Department of Higher Education and SAC concerning the meaning of the criteria and their possible entitlement to exemptions for fiscal year 1983.20/

We finally consider whether the respondents violated subsections 5.4(a)(3) and, derivatively, (a)(1) by their administration of the salary cap exemptions in fiscal years 1982 and 1983. We hold they did not.

In our discussion of the preemption issue, we have already considered some of the evidence and concerns relevant to this contention. There is no direct evidence of anti-union animus motivating the administration of the salary caps. Instead, we are

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20/ While we will not order such clarification, we urge these governmental bodies, in the interests of fairness, to settle this dispute if they are asked to do so. We also note that these doctors may be able to receive exemptions through the negotiations we have ordered, even if they are not otherwise entitled to exemptions.

asked to draw an inference of anti-union motivation from the fact that certain (but not all) administrators received salary cap exemptions while basic science faculty (unlike clinical science faculty) did not.21/ We do not believe that this single fact establishes a prima facie case of anti-union motivation nor do we believe that this single fact is inherently destructive of employee rights protected under our Act. Accordingly, we dismiss these allegations.

ORDER

The State of New Jersey and University of Medicine and Dentistry of New Jersey are ordered to:

I. Cease and desist from:

A. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relationis Act by refusing to negotiate in good faith with AAUP over which basic science faculty at the University will receive salary cap exemptions; and

B. Refusing to negotiate in good faith with AAUP over which basic science faculty at the University will receive salary cap exemptions.

21/ Again, AAUP represents both clinical science faculty and basic science faculty. The former group of 131 employees was treated favorably, the latter group of 53 employees unfavorably. This disparate treatment cannot be attributed to animus against AAUP.

II. Take the following action:

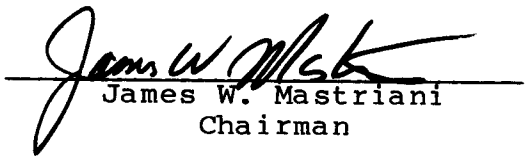
A. Negotiate in good faith with AAUP over allowing up to 12 basic science faculty to receive salary cap exemptions for fiscal year 1983; any exemptions allowed through negotiations are subject to the submission of proper documentation to the Department of Higher Education and the approval of the Salary Adjustment Committee.

B. Post in all places where notices to University employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent University to insure that such notices are not altered, defaced or covered by other materials.

C. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent University has taken to comply herewith.

The remaining allegations of the Complaint are dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hipp, Suskin and Wenzler voted in favor of this decision. None opposed. Commissioner Graves was not in attendance.

DATED: Trenton, New Jersey
April 25, 1985
ISSUED: April 26, 1985

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

The Public Employment Relations Commission has determined that the State of New Jersey and the University of Medicine & Dentistry of New Jersey violated the New Jersey Employer-Employee Relations Act when they refused to negotiate in good faith over which basic science faculty would receive salary cap exemptions. To remedy this violation, the Commission has ordered us to to post this notice; to negotiate over which basic science faculty (up to 12 doctors) should receive salary cap exemptions for fiscal year 1983 (subject to appropriate documentation and the approval of the Salary Adjustment Committee); and to negotiate in good faith (within criteria established by law) over future salary cap exemptions for employees in negotiations units represented by AAUP.

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

(Public Employer)

Dated _____ By _____

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830

H.E. NO. 85-17

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

In the Matter of

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

Respondent,

-and-

DOCKET NO. CO-82-92-41

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

Charging Party.

SYNOPSIS

A Hearing Examiner for the Public Employment Relations Commission recommends that the Commission find that the University of Medicine and Dentistry committed an unfair practice when it declined to negotiate over which of its faculty members may have their salaries rise above a salary cap when regulations promulgated, pursuant to the Appropriations Act, granted discretion to the President of the University to determine which of its faculty members may have their salaries rise above the salary cap. The Hearing Examiner relied on State v. State Supervisory Employees Assn., 78 N.J. 54 (1978) which holds that, the adoption of any specific regulation controlling a particular term or condition of employment will pre-empt negotiations on that subject only to the degree the regulation speaks in the imperative and leaves nothing to the discretion of the public employer.

It was also recommended that the Commission find the State further violated the Act when it failed to grant salary increases which were directed by regulation. All regulations which are applicable to employees within a particular unit are effectively incorporated by reference as terms of any collective agreement covering that unit (State Supervisory, supra at pg. 80) and the alteration of a term of a contract without negotiations constitute a violation of the Act.

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. 85-17

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

In the Matter of

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

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-and-

DOCKET NO. CO-82-92-41

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

Charging Party.

Appearances:

For the Respondent
Melvin E. Mounts, D.A.G.

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

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On October 30, 1981, The University of Medicine and Dentistry of New Jersey, Council of Chapters of the American Association of University Professors ("Association or AAUP") [1/] filed an Unfair Practice Charge with the Public Employment Relations Commission ("PERC") alleging that the State of New Jersey and the University of Medicine and Dentistry ("University") [2/] violated the New Jersey Employer-Employee

1/ At the time of the filing of the charge, the Association was the College of Medicine & Dentistry, Council of Chapters of the AAUP.

2/ At the time of the filing of the charge the institution was the College of Medicine and Dentistry.

Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsection 5.4(a)(1), (3), and (5) [3/] when the College failed to pay certain professors at the College their full salaries pursuant to the collective negotiations contract between the parties. It was alleged that this action constituted a unilateral change in terms and conditions of employment. The charge itself is very detailed and relates the history of bargaining between the AAUP and the University as well as the Cap laws and its impact upon their negotiations. Much of this history is not in dispute and the parties have stipulated most of the following facts.

From 1972, until the filing of the charge, the AAUP has been the exclusive majority representive for full time faculty at the University and has entered into five separate collective negotiations contracts with the University and the State. The State, University and Department of Higher Education actively participated in, and approved, all said agreements, including the one under which this dispute arose, which was for July 1, 1981 to June 30, 1983.

From July 1, 1973 to the filing of the charge, the annual Appropriations Acts adopted by the legislature have provided that employees of the State, including those employed by the University, could not receive more in salary than $500 less than the head of their respective departments. Those Appropriations Acts, however, exempted

3/ 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; (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."

from this limitation the "medical faculty" of the University as well as certain employees of the State.

However, also pursuant to the appropriation acts, such exemptions had to be approved by the State's Salary Adjustment Committee (the S.A.C.) which is comprised of the State Treasurer, the President of the Civil Service Commission and the Director of the Division of Budget and Accounting. Prior to the instant dispute, the S.A.C. uniformly approved faculty salaries in excess of the limits set forth in the annual Appropriations Act.

There are two faculty groups at the University, The Basic Science Faculty, who hold degrees in, and teach, the basic science curriculum and the Clinical Science Faculty who hold medical and dental degrees and teach the clinical curriculum.

Following the negotiations for the July 1, 1979 to June 30, 1981 contract, the College submitted requests for salary increases for medical faculty (including those who were not licensed doctors or dentists) to the Salary Adjustment Committee. T. Edward Hollander, Chancellor of the Department of Higher Education sought a legal opinion from the Attorney General as to whether those who were not licensed doctors or dentists were included within the medical faculty classification in the Appropriations Act. Accordingly, the Salary Adjustment Committee deferred action on the request until the Attorney General rendered his opinion. This deferral was the subject of another, earlier, unfair practice charge, which was filed on December 10, 1979 (CO-80-159). This charge was resolved when the Attorney General, in April 1980, issued his opinion finding that the term "Medical Faculty" included faculty members who were not licensed physicians and dentists.

In 1980 and again in 1981, the Appropriations Acts provided that:

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

The 1981-83 contract, under which the instant controversy arose, was ratified on August 4, 1981. The contract includes a side bar letter of agreement providing that the Association reserved the right to later challenge any limitations that might exist or be imposed on the salaries of members of the unit.

Certain administrators, who are excused from the AAUP's negotiating unit and whose salaries are not determined through collective negotiation, received salary adjustments equivalent to those negotiated by the AAUP on behalf of its members.

During the negotiations for the 1981-83 contract, the Association demanded to negotiate salary caps but Frank Mason, Director of the Governor's Office of Employee Relations, stated that the guideline for piercing the salary cap would not be the subject of negotiations and would be determined only by the State.

While the negotiations were in progress, on March 3, 1981, before ratification of the successor agreement, the State, without consultation with the AAUP, imposed salary cap guidelines via a document entitled, "Criteria for S.A.C. approval of CMDNJ Faculty and Administrator Salaries Above the Department Head maximum." The Document was dated February 27, 1981. These criteria were developed soley by the State, through its agencies. It affected individuals represented by the charging party by limiting their salaries.

Pursuant to the February 27, 1981, criteria, 13 members of

the Basic Science Faculty were granted exemptions from the salary cap. The Contract provided that the salaries of these faculty members would be in excess of $55,500 for fiscal year 1981 (but their salaries initially were frozen at the 1981 level at the beginning of fiscal 1982).

In November of 1982, the 53 basic science faculty members received lump sum payment for the period January 19, 1982 through June 27, 1982 after the Legislature increased the Chancellor's salary. 4/ These lump sum payments resulted in 44 of these basic scientists on the faculty receiving more than $59,000 for fiscal 1982.

For fiscal 1983, the state imposed a salary cap of $59,000. The S.A.C. promulgated a Memorandum, #8-83, which provided that all 131 faculty members paid from the clinical salary scale were exempted from the cap and were increased to the level called for under the contract agreement. This action affected one hundred thirty one faculty members.

In addition, of 18 administrators, including 2 with medical degrees who had been on the basic science salary scale, 12 were released from the salary caps and were given salary adjustments equivalent to those received by faculty members under the prevailing agreement. Further, administrators with medical or dental degrees, who were not on the basic science salary scale, were released from the cap and given salary adjustments equivalent to those received by the faculty under the prevailing collective negotiations contract between the parties.

The salaries of the 53 faculty members who are paid on the basic science salary scale were not exempted from the cap. These faculty members therefore did not receive their negotiated salaries.

4/ N.J.S.A. 18A-14B-15-107, authorized the Governor to increase the Chancellor's salary. The Governor did so in January 1982.

Of these employees, 2 have M.D. or D.D.S. degrees, Doctors George Kozan and Duncan Hutcheon.

The University refused to negotiate over the implementation and continuation of a salary cap on these faculty members on the basic science salary scale.

It is the contention of the Association that the freeze of the basic science faculty salaries constitute an unfair practice.

The University argues that there was no unfair practice. It acted pursuant to specific mandate of legislation, 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 certain regulations approved and issued by the Civil Service President and the Director of Budget and Accounting. It maintains the legislation specifically pre-empted the subject of how individual salaries may pierce established salary caps when it enacted appropriations legislation which directs, in the imperative, that such determination are to be made in accordance with criteria established by the Chancellor and the Director of Budget and Accounting. Specifically, it claimed that the criteria were issued as Memorandum #8-83, (discussed infra at pg. 10).

In State v. State Supervisory Employees Assn., 78 N.J. 54 (1978) the Supreme Court of New Jersey first addressed the question of what happens when the regulatory power of a public employer is in conflict with an employee's right to negotiate terms and condition of employment. 6/

6/ It is not in dispute here and has long been held that the issue of compensation is a term and condition of employment. Compensation intimately and directly affects employees and does not interfere with the determination of governmental policy. See Bd. of Ed. of Englewood v. Englewood Teachers Ass'n, 64 N.J. 6-7 (1973).

Although employees have the right to engage in collective negotiations on terms and conditions of employment, that right is limited when the subject matter sought to be negotiated is already addressed by legislation.

> The adoption of any specific statute or regulation setting or controlling a particular term or condition of employment will pre-empt negotiations on that subject. This pre-emption doctrine applies to any validly adopted regulation, regardless of which agency or department promulgated it, provided the regulation definitively and specifically fixes a term or condition of employment. 78 N.J. at 80-81

> Furthermore, we affirm PERC's determination that specific statutes and regulations which expressly set particular terms and conditions of employment, as defined in Dunellen, for public employees may not be contravened by negotiated agreement. For that reason, negotiations over matters so set by statutes or regulations is not permissible. We use the word "set" to refer to Statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer. 78 N.J. at 80 (Emphasis supplied)

However, negotiations over a subject is only partially pre-empted where a statute allows a range of permissible approaches to the subject.

> It is implicit in the foregoing that statutes or regulations concerning terms and conditions of public employment which do not speak in the imperative, but rather permit a public employer to exercise a certain measure of discretion, have only a limited pre-emptive effect on collective negotiation and agreement. Thus, where a statute or regulation mandates a minimum level of rights or benefits for public employees but does not bar the public employer from choosing to afford them greater protection, proposals by the employees to obtain that greater protection is a negotiated agreement are mandatorily negotiable. A contractual provision affording the employees rights or benefits in excess of that required by statute or regulation is valid and enforceable. However, where a statute or regulation sets a maximum level of rights or benefits for employees on a particular term

> and condition of employment, no proposal to affect that maximum is negotiable nor would any contractual provision purposing to do so be enforceable. State Supervisory at 81.

In IFPTE Local 195 v. State, 88 N.J. 393 (1982) the Court held that, to the extent a regulation is consistent with, and effectuates, the authority delegated to the regulator by statute, it is to be given the same binding and pre-emptive effect that would be accorded to a statute directly establishing the requirement contained in the regulation. Id at 403-404.

However, in Council of New Jersey State College Locals v. State Board of Higher Ed., 91 N.J. 18 (1982), the Supreme Court held that in order to bar a negotiated agreement on a given term and condition of employment, a regulation or enactment must regulate the term "expressly, specifically and comprehensively." Id at 30.

In State College Locals, (supra) the court addressed the issue of what happens when the regulating agency also performs certain employer functions regarding the same employees that it regulates. The regulator-employer in State College Locals was also the Department of Higher Education. There, as here, the Department is not the primary employer but does serve as both regulator and employer. In such a situation, the regulator's right of pre-emption over negotiation is only presumed. Said presumption can 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. When such a showing is made, the regulation will not be given preemptive effect. The Court listed eight relevant factors to be considered in rebutting the presumption:

> (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 effected 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 informative stages. (Pgs. 28-29)

The Association here argues that it is not necessary to apply the eight factors test of State College Locals, supra, to reach the conclusion that the University here committed an unfair practice. (Although the argument is made in the alternative) It argues that the regulations, promulgated by the S.A.C. do not satisfy the test of a preemptive regulation. That is, the term or condition of employment herein, salaries, were not regulated "expressly, specifically and comprehensively".

To explore this argument, one must re-trace the steps of the enactments in the regulatory process.

The Appropriations Act for fiscal year 1983, L. 1982, c.2, unlike prior years, contain no express salary cap, rather it provides in connection with the salaries of State employees:

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

One can see power is vested in the S.A.C. to create regulations concerning the salary of the University faculty. [7/] Such Regulations

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7/ The Association attacked the validity of the statue in Superior Court to no avail. See Council of Chapter of AAUP at UMDNJ v. State of New Jersey at UMDNJ, App. Div. Dkt. Number A3179 82T2 (1984).

were promulgated by the President of the Civil Service Commission, the State Treasurer and the Director, Division of Budget and Accounting when they issued joint regulations for fiscal year 1982-83, effective June 26, 1982, which included these provisions:

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

The Department of Higher Education promulgated criteria in Administrative Memorandum #8-83 which provides in pertinent part:

> The President of the Civil Service Commission and the Director, Division of Budget and Accounting have approved the following criteria concerning salaries at the University of Medicine and Dentistry of New Jersey; Rutgers, the State University; and the New Jersey Institute of Technology effective June 26, 1982.
>
> Faculty at UMDNJ $59,000***
>
> ***Person holding MD, DO, DDS, DMD exempt as in II below:
>
> II. The maximum salaries for faculty and administrators at UMDNJ holding medical or dental degrees (M.D., D.O., D.D.S., D.M.D.) may be increased to the level called for under contracted agreement for faculty, or justified by the President for administrators.
>
> III. For other faculty at UMDNJ, Rutgers, and NJIT, the Presidents are authorized to grant exceptions to the $59,000 maximum as follows:
>
> > Up to 30 at UMDNJ, up to 30 at Rutgers, and up to 10 at NJIT. Within these fixed limits, the Presidents are authorized to exceed the maximum salary specified for selected Chief subordinates, thereby reducing the remaining number of faculty exemptions.

The senior public institutions will be responsible for providing the following documentation to the Department of Higher Education for all requested faculty and administrative salary adjustments in excess of $59,000.

1. For faculty, documentation shall include each individual's name, academic credentials, faculty rank, academic discipline/department, current and proposed salary, range and step; plus the resulting number of faculty positions eligible for increases in excess of $59,000 maximum.

V. Process

The Department of Higher Education will review all documentation prior to transmittal to the Salary Adjustment Committee. The Department will consult with the institutions where there appears to be insufficiency of documentation and indicate those requested salary actions where further justification is warranted consistent with the criteria enumerated above. The Department of Higher Education will forward to the Salary Adjustment Committee for its consideration, all applications for salary authorization above the mandated limit, with indication of those applications that qualify to meet the criteria established by the Chancellor and the Director of Budget and Accounting.

As one reviews this three tiered regulatory process, it is evident that discretion is continually passed on to a lower level in the state hierarchy. The legislative enactment, the Appropriations Act speaks in the imperative but does grant regulatory authority to the President of Civil Service and the Director of the Division of Budget and Accounting. Such delegation does not, by itself, vitiate the potential pre-emptive nature of rules which otherwise satisfy the criteria of State Supervisory, supra. The regulations promulgated by the President of Civil Service and Director of the Division of Budget and Accounting, pursuant to the statute, again delegate rule-making authority. Again, the delegation does not vitiate the pre-emptive potential of such rules.

The rules which were finally adopted, however are something less than pre-emptive, for they again delegate authority, this time to the President of the University, clearly the employer. He has discretion in deciding which faculty members in the Basic Science Faculty may have their salaries pierce the cap. This discretion does not conform with the holding of State Supervisory that regulations, to be pre-emptive, "speak in the imperative and leave nothing to the discretion of the employer." (supra). Regulation #8-84 allows a range of permissible actions and is pre-emptive only to the extent it limits the number of basic science faculty members who may pierce the cap to thirty.

When #8-84 was promulgated, granting discretion in its application to the University President, a contemporaneous, co-extensive obligation to negotiate over terms and conditions of employment arose within that very area of discretion.

Admittedly, the regulations require that the President of the University provide documentation to support his decision to the S.A.C. Although such justification is commendable, it is no substitute for the requirements of State Supervisory.

In failing to negotiate with the AAUP over which faculty members would receive their full salaries under the contract, [8/] the

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8/ It must be emphasized that the Department of Higher Education was delegated authority to create regulations which could be pre-empt negotiations if the regulations contain specifically detailed criteria.

Moreover, requiring negotiations over these 30 positions does not mean the University could not save some of these positions to attract quality people to the University, nor does it mean the University must necessarily accede to the demands of the Association, in negotiations, as to which faculty member will pierce the cap. Rather the University must sit down with the Association and attempt to reach an agreement over these matters in good faith.

University committed an unfair practice.

Moreover, the regulations in #8-84 which provide that "faculty and administrators holding medical or dental degrees may be increased to the level called for under contractual agreement" is ambiguous. Standing by itself, the term, "May be increased" does not speak in the imperative. The past history of the University is clear, however, Doctor and Dentists salaries have uniformly been allowed to rise above the salary cap. If this regulation is construed to be read in the imperative, consistent with past history, the University has failed to follow this regulation when it declined to allow the salaries of two members of the basic science faculty who hold M.D. or D.D.S. degrees, specifically, Drs. Kozan and Hutcheon, to rise above the cap. The University argues that this regulation applies only to those members of the clinical faculty staff. However, there is nothing in the regulation which makes such a distinction.

Since all "statutes and regulations which are applicable to the employees who comprise a particular unit are effectively incorporated by reference as terms of any collective agreement covering that unit" (State Supervisory, supra at pg. 80) and, since a simple reading of the regulation demonstrates that Drs. Kozan and Hutcheon were entitled to have their salaries rise above the cap, the University effectively, unilaterally altered a term and condition of the contract and, therefore, committed an unfair practice when it declined to pay the two Doctors their negotiated salary. New Brunswick Bd. of Ed. 4 NJPER 84 (¶ 4040 1978) affrd. App. Div. No. A-2450-77 (4/2/79).

However, the promulgation of the regulations, per se, was not an unfair practice under the test of State College Locals.

The Chancellor of Higher Education testified as to the recent history of the cap at the University and, more particularly, as to the creation of the regulations in question. He testified that he was aware that the preclusion of negotiations would probably result in the filing of the instant unfair practice charge but he was also aware that the legislation creating the cap, vested in him, in conjunction with S.A.C., the authority to promulgate rules determining which employees may pierce the cap. He testified that he percieved that the CAP law took precedence over negotiations and, therefore, believed he had no obligation to negotiate. His testimony was given in a forthright and credible manner. There is nothing in the record which convinces me that the State College Locals presumption of pre-emption has been rebutted and can see no unfair practice in the failure of the State or the University to negotiate the promulgation of regulations limiting the total number of basic science faculty who may pierce the cap.

In fashioning a recommended remedy, it must be kept in mind that although the regulation allows up to 30 of the 53 members 9/ of the basic science faculty to have their salary caps lifted, not one of these faculty members was so benefited.

Of 30 allocated salary cap exemptions, the University has granted 12 of them to administrators. This leaves 18 exemptions which under the then current regulation, could have been negotiated. 10/

9/ Or 51 if one places Drs. Kozan and Hutcheon in separate categories.

10/ Although it is within the employers power to restore the status quo ante by temporarily rescinding the cap exemption to the twelve administrators, I do not believe such a remedy is in the best interest of the labor stability nor would it be truly meaningful. It is unrealistic to assume that the University would ever accede to a demand in negotiations that the 12 exceptions which were granted to administrators be retroactively granted to faculty.

It is therefore recommended that the Commission order that the University negotiate with the Association over granting retroactive salary cap exemptions to up to 18 faculty members on the basic science pay scale for fiscal year 1983.

Also, I will recommend that Drs. Kozan and Hutcheon be reimbursed for fiscal year 1983 in compliance with the regulation imposed by the President of the University pursuant to Administrative Memorandum #8-83.

The salaries of the Doctors should not be included as part of the 18 positions on the basic science pay scale, discussed above as their obligation to reimburse Drs. Kozan and Hutcheon were out of the express wording of the regulations and not out of the discretion granted to the University President.

RECOMMENDED ORDER

It is hereby recommended that the Commission issue the following ORDER:

A. That the respondent University cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act by (a) refusing to negotiate with the AAUP over which basic science faculty member's salaries may rise above the salary cap and (b) refusing to allow the salaries of Drs. Kozan and Hutcheon to rise above the salary cap.

B. Take the following action:

1. Negotiate with the Association over allowing up to 18 faculty on the basic science faculty pay scale of their salaries rise above the salary cap to the proposed salaries indicated on the

collective negotiation agreement between the parties for fiscal year 1983.

2. Pay to Drs. Kozan and Hutcheon their full salaries in accordance with the collective negotiations agreement for fiscal year 1983 together with interest computed at 12% per annum.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent University to insure that such notices are not altered, defaced or covered by other materials.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent University has taken to comply herewith.

Edmund G. Gerber
Chief Hearing Examiner

DATED: October 18, 1984
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by this Act by (a) refusing to negotiate with the AAUP over which basic science faculty member's salaries may rise above the salary cap and (b) refusing to allow the salaries of Drs. Kozan and Hutcheon to rise above the salary cap.

WE WILL negotiate with the Association over allowing up to 18 faculty on the basic science faculty pay scale of their salaries rise above the salary cap to the proposed salaries indicated on the collective negotiations agreement between the parties for fiscal year 1983.

WE WILL pay to Drs. Kozan and Hutcheon their full salaries in accordance with the collective negotiations agreement for fiscal year 1983 together with interest computed at 12% per annum.

_____
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with James Mastriani, Chairman, Public Employment Relations Commission, 429 East State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830