P.E.R.C. NO. 95-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CO-H-93-375

RUTGERS COUNCIL OF AAUP CHAPTERS,

Charging Party.

RUTGERS COUNCIL OF AAUP CHAPTERS,

Respondent,

-and- Docket No. CE-H-93-14

RUTGERS, THE STATE UNIVERSITY,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Consolidated Complaint based on an unfair practice charge filed by the Rutgers Council of AAUP Chapters against Rutgers, the State University and a charge filed by Rutgers against the AAUP. The Commission adopts the Hearing Examiner's conclusion that there was insufficient proof that either party had agreed to a grievance committee proposal of the other. Given its finding that there was no complete agreement between the parties, the Commission also concludes that the AAUP could have sought to insert qualifying language in other disputed articles.

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RUTGERS, THE STATE UNIVERSITY,

Charging Party.

Appearances:

For Rutgers, The State University, John B. Wolf, Employment and Labor Counsel

For Rutgers Council of AAUP Chapters, Reinhardt & Schachter, P.C. (Paul Schachter, before the Hearing Examiner; Denise Reinhardt, before the Commission)

DECISION AND ORDER

On April 20, 1993, the Rutgers Council of AAUP Chapters filed an unfair practice charge against Rutgers, the State University. The charge alleges that the public employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(5) and (6),[1/] by refusing to

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1/ These subsections prohibit public employers, their representatives or agents from: "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit.... (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

sign a successor collective negotiations agreement which includes the existing selection process for grievance pool members and by instead unilaterally implementing a random selection process.

On May 7, 1993, Rutgers filed an unfair practice charge alleging that the AAUP violated subsections 5.4(b)(1), (3) and (4) of the Act,[2/] by refusing to sign an agreement which includes random selection of grievance pool members. Rutgers also alleged that the AAUP violated the Act by trying to add new language to other articles that had been ratified.

On June 2, 1993, a Consolidated Complaint and Notice of Hearing issued. Each party filed an Answer denying that it had violated the Act.

On June 29 and 30, and July 12, 20 and 22, 1993, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On February 28, 1994, the Hearing Examiner issued his report and recommendations. H.E. No. 94-16, 20 NJPER 130 (¶25068 1994). As for the language concerning grievance pool selection, he

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2/ These subsections prohibit employee organizations, 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) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

found that Rutgers did not prove that the AAUP had agreed to its proposal to adopt new language, and he found that the AAUP did not prove that Rutgers had agreed to continue the prior language. Accordingly, he concluded that neither party violated the Act by refusing to sign an agreement with the other party's grievance pool language. The Hearing Examiner, however, found that the AAUP violated the Act by insisting on adding additional words to other articles already ratified.

Both parties filed exceptions and replies. Each urges that we credit the evidence supporting its claim that the other party agreed to its grievance pool language. In addition, the AAUP claims that if there was no meeting of the minds on the grievance pool language and therefore no contract, it could not have violated the Act by seeking to add language to other articles.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 4-37).

The parties' predecessor contract provides that half the potential grievance committee members for any given unit shall be selected by department chairpersons and the other half shall be elected by secret ballot among all faculty members in the unit. The AAUP sought to continue this practice. Rutgers sought to have all committee members selected at random from a pool that includes the unit in which the grievance arose.[3/]

3/ There were also interim proposals from both parties.

The Hearing Examiner rejected the AAUP's claim that Rutgers' negotiator agreed during mediation that the selection process would not be changed. The Hearing Examiner also rejected Rutgers' claim that an agreement on its language was evidenced by documents and non-verbal assent. He found insufficient proof that either party had agreed to the proposal of the other.

Much of this case turns on the Hearing Examiner's credibility determinations about what happened during negotiations and mediation for a successor contract. We will not disturb those determinations. See City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶11025 1980). Each party continues to argue its version of what happened and urges that its witnesses be credited and its view of the documentary evidence be accepted. Given the Hearing Examiner's overall findings, including his credibility determinations, and absent any persuasive showing that those findings should be rejected, we adopt his conclusion that neither party met its burden of proof on its allegations concerning the grievance pool language.[4/]

We next address whether the AAUP violated the Act by trying to add three words to other articles to "clean up" language it

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4/ To adopt that conclusion, we need not embrace all of the Hearing Examiner's characterizations of the testimony and documents, nor his view on the breadth of the mediator confidentiality rule.

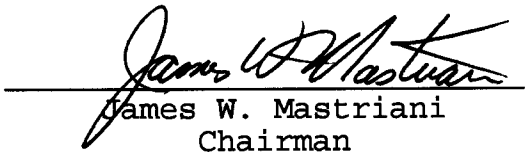
believed inaccurate. Given our adoption of the finding that there was no complete agreement, we conclude that the AAUP could have sought to insert qualifying language in the disputed articles.

Having found that neither party proved that the other violated the Act, we dismiss the Consolidated Complaint in its entirety.

ORDER

The Consolidated Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Klagholz, Ricci and Smith voted in favor of this decision. None opposed. Commissioner Wenzler was not present.

DATED: October 25, 1994
Trenton, New Jersey
ISSUED: October 26, 1994

H.E. NO. 94-16

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

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CO-H-93-375

RUTGERS COUNCIL OF AAUP CHAPTERS,

Charging Party.

RUTGERS COUNCIL OF AAUP CHAPTERS,

Respondent.

-and- Docket No. CE-H-93-14

RUTGERS, THE STATE UNIVERSITY,

Charging Party,

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the Rutgers Council of AAUP Chapters violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by insisting on adding additional words to contract language already ratified without those words. Neither Rutgers nor the AAUP, however, violated the Act by refusing to sign a collective agreement with grievance language each party argued the other side agreed upon. The Hearing Examiner found that Rutgers did not agree to language the AAUP wanted, and that there was no meeting of the minds on the language Rutgers wanted.

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. 94-16

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

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CO-H-93-375

RUTGERS COUNCIL OF AAUP CHAPTERS,

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RUTGERS COUNCIL OF AAUP CHAPTERS,

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-and- Docket No. CE-H-93-14

RUTGERS, THE STATE UNIVERSITY,

Charging Party.

Appearances:

For Rutgers, The State University
John B. Wolf, attorney

For Rutgers Council of AAUP Chapters
Reinhardt & Schachter, P.C.
(Paul Schachter, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On April 20, 1993, an unfair practice charge was filed with the Public Employment Relations Commission by Rutgers Council of AAUP Chapters ("AAUP"), alleging that Rutgers, the State University ("Rutgers") violated subsections 5.4(a)(5) and (6) of the New Jersey

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/] The AAUP alleged that in negotiations for a new collective agreement, the parties agreed to continue the pre-existing method for the selection of grievance pool members (half selected and half elected) under Article 10, the Faculty Personnel Grievance Procedure for grievance committees hearing grievances arising from evaluations regarding reappointment, promotion, and/or tenure, but that Rutgers refused to sign a new agreement which included the former selection process, and instead, unilaterally implemented the process of random selection of all grievance pool members.

On May 7, 1993, Rutgers filed an unfair practice charge with the Commission alleging that the AAUP violated subsections 5.4(b)(1), (3) and (4) of the Act.[2/] Rutgers primarily alleged that the parties had agreed to a process of random selection of grievance pool members; that the AAUP membership ratified an

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1/ These subsections prohibit public employers, their representatives or agents from: "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

2/ These subsections prohibit employee organizations, 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) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

agreement which included random selection, but that the AAUP subsequently sought to change the agreement regarding random selection, refused to sign an agreement including random selection, and thereby refused to negotiate in good faith.

Rutgers also alleged that the AAUP violated the Act by attempting to add the language "the time of" into parts of Articles 9 and 10 after the language of those articles had been ratified without the disputed language.

A Consolidated Complaint and Notice of Hearing was issued on June 2, 1993. Each party seeks a decision requiring the other party to sign an agreement that contains the grievance pool selection process that it alleged had been agreed upon; and Rutgers also sought a finding preventing the inclusion of "the time of" language in Articles 9 and 10.

Both parties filed Answers by June 24, 1993. While admitting certain facts, both parties denied violating the Act.

Hearings were conducted on June 29 and 30, July 12, 20 and 22, 1993, in Trenton, New Jersey.[3/] Both parties had the opportunity to present, examine and cross-examine witnesses; present

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3/ The transcripts in this case were prepared using continuous pagination from the first through the fifth day of hearings, thus, the transcript citations will be referred to only as "T" followed by the appropriate page number. The individual transcripts include the following pages; June 29, pp. 1-108; June 30, pp. 109-244; July 12, pp. 245-390; July 20, pp. 391-580; and July 22, pp. 581-679. The documents designated with a "U" were AAUP exhibits, the "E" designations were Rutgers exhibits, and "J" documents were joint exhibits.

documentary evidence, argue orally, and file post hearing briefs. Both parties filed briefs by September 21, 1993 and reply briefs by November 3, 1993.

Based upon the entire record I make the following:

FINDINGS OF FACT

1. Rutgers and the AAUP were parties to a collective agreement effective from July 1, 1989 - June 30, 1992 (J-1). Article 10 of J-1 was the Faculty Personnel Grievance Procedure designed to review evaluations of faculty members which resulted in failure to award reappointment, promotion, and/or tenure. Article 10, Section I.E. of J-1 provides that grievances concerning original evaluations be brought before "Grievance Committees." Article 10, Section IV of J-1 provides for the composition and selection of Grievance Committees. Article 10, Section IV.A.1. provides that a Grievance Committee be composed of three tenured faculty members who are from the unit in which the grievance arises, and Article 10, Section IV.A.2. provides that the parties may combine two or more small units into a single pool for this grievance procedure.

Article 10, Section IV.A.3. and 4. provide how the pools shall be selected. Subsection 3. provides that half the pool be selected by chairpersons, and subsection 4. provides that half the pool be elected by faculty members. Those subsections from J-1 provide as follows:

> Article 10, Section IV.A.3.
>
> Half the pool of potential Grievance Committee members for any given unit shall be selected by

> the chairpersons (or other similar division heads) of the unit no later than March 15. The University shall provide in writing to the AAUP a description of the selection process utilized by the chairpersons for each unit that has selected a pool.
>
> Article 10, Section IV.A.4.
>
> The other half of the pool of potential Grievance Committee members for any given unit shall be elected by secret ballot among all faculty members in that unit no later than April 30 in the 1990-91 and 1991-92 academic years. Nominations to this ballot may be made by any faculty members in the unit and shall be made in writing no later than April 10 in the 1990-91 and 1991-92 academic years. If the AAUP so desires, a representative of the AAUP may be present at the opening of the nominations and at the counting of the ballots.

Subsection 5. of Article 10, Section IV.A. then provides that each Grievance Committee member be selected by random, that is, randomly selected from the pool that was already selected/elected.

Early in negotiations for a new collective agreement, the parties had exchanged numerous proposals. The AAUP's last proposal U-10, was made on November 10, 1992. Thereafter, the parties agreed that Rutgers' proposals would be used as the basis from which discussions occurred (T141). Rutgers, on December 22, 1992, made a proposal for a new Article 10, Faculty Personnel Grievance Procedure (E-1), which would change the method for determining the pool of

employees from which the Grievance Committee(s) were selected.[4/] Section F.2.a. of Rutgers proposed Article 10 took the place of Sections IV.A.1., 2., 3. and 4. of Article 10 of J-1. Section F.2.a. of E-1 primarily provided that grievance committee members be selected at random from a pool that included the unit in which the grievance arose, with certain specific exceptions. That section then ended with the provision that each unit should elect, during regular faculty elections, an agreed upon number of individuals to serve in the grievance pool. The actual wording of Section F.2.a. of E-1 provides:

> Grievance Committees shall be composed of 3 tenured faculty bargaining unit members who are 100% in bargaining unit titles, selected at random from the pool that includes the unit in which the grievance arose, except that no person shall serve on a Grievance Committee for a case in which he/she has participated in the evaluation process, nor shall he or she serve more than once every three years. The AAUP shall notify the grievant of the committee's membership.
>
> The University and the AAUP shall jointly agree to the units compromising each of the grievance pools.

4/ The parties had been in negotiations since the summer of 1992. The AAUP submitted its first proposal that covered Article 10 on or about August 28, 1992 (T134). Rutgers responded with a proposal on October 23, 1992 (U-16), and the AAUP submitted a new proposal on November 10, 1992 (U-10). Rutgers followed with another proposal on November 18, 1992 (U-17), and then with E-1 on December 22, 1992. The earlier proposals, U-10, U-16 and U-17 provide background information, but are not particularly relevant to the issue of whether the parties reached agreement on February 6, 1993, or thereafter.

> Each unit shall elect a number, to be decided upon between the University and the AAUP, of individuals to serve in the relevant grievance pool. Such election shall take place in the ordinary course of the regular faculty elections for the unit.

By January 1993, the parties were nearing impasse in their negotiations. On January 25, 1993, Richard Norman, Rutgers chief negotiator, prepared a memorandum (U-12) for his bargaining team summarizing Rutgers position on disputed articles. He noted three unresolved issues in Article 10 including two problems with the language concerning the composition of the grievance committees. Norman wrote in pertinent part:

> The union disagrees with the election of the grievance pools as part of the regular faculty elections for the unit. They also disagree with the limitation of service on a committee to once every three years (U-12).

On January 26, 1993, the parties signed a formal written agreement (E-3) to submit the unresolved issues, including Article 10, to mediation. Dan O'Connor, the AAUP's chief negotiator, acknowledged that Norman's above comment stated all of the disagreements the AAUP had with Article 10 regarding selection of grievance committees (T146).

On January 27, 1993, Norman submitted a memorandum (U-1) to the appointed mediator listing the items Rutgers believed should be mediated, including Article 10. As part of U-1, Rutgers attached a new proposal for Article 10. By bracketing the last paragraph of Section F.2.a. of U-1, Rutgers eliminated what had been the last paragraph of Section F.2.a. of E-1, thereby eliminating the election

language regarding the grievance pools which it thought the AAUP opposed.[5/]

Rutgers language in Article 10 of U-1 also proposed at Section B.2.p. a change in the language that appears in Article 10, Section II.B.16. of J-1. But Section B.2.p. of U-1 retained the same language as in Article 10, Section II.B.17. of J-1.[6/]

5/ Section F.2.a. of U-1 appeared as follows:

> Grievance Committees shall be composed of 3 tenured faculty bargaining unit members who are 100% in bargaining unit titles, selected at random from the pool that includes the unit in which the grievance arose, except that no person shall serve on a Grievance Committee for a case in which he/she has participated in the evaluation process, nor shall he or she serve more than once every three years. The AAUP shall notify the grievant of the committee's membership.
>
> The University and the AAUP shall jointly agree to the units compromising each of the grievance pools.
>
> [Each unit shall elect a number, to be decided upon between the University and the AAUP, of individuals to serve in the relevant grievance pool. Such election shall take place in the ordinary course of the regular faculty elections for the unit.]

6/ Article 10, Section II.B.16. and 17. of J-1 provide as follows:

> 16. Any individual or any representative of a body against whom allegations are brought may be present at the hearing, unless the grievant objects. If, however, the grievant is represented or assisted by a member of his/her own department, he/she may not object to the presence of a department member or any other member of the bargaining unit against whom an

Footnote Continued on Next Page

On January 28, 1993, O'Connor and AAUP President, Wells Keddie, submitted the AAUP's memorandum (U-2) to the mediator listing what it considered to be unresolved items for mediation. With respect to the Article 10 grievance pool creation language, the AAUP, in U-2, listed the language from Article 10, Section IV.A.3. and 4. of J-1 as its position on that issue, and listed Section F.2.a. from U-1 as Rutgers' position on that issue. The AAUP, in Exhibit U-2, also noted that the parties had a dispute over the language in Article 10, Section II.B.16. and 17. of J-1. But despite its position on the grievance pool language, the AAUP, nevertheless, agreed to work off the Article 10 language in Section F.2.a. of Rutgers January 27 proposal as the basis for negotiations. The parties never went back to work off the language in the AAUP proposals (T314-T315).

6/ Footnote Continued From Previous Page

> allegation has been made. In addition, other observers of the hearing are permitted with the consent of the grievant and the University Representative.
>
> 17. Either party may tape record the proceedings of the hearings, but the tape shall not constitute an official record. The tape may be used only in the grievance hearing or for the purpose of preparing the case and may not be used for any other purpose or in any other forum.

Rutgers proposal for the language in Section B.2.p. of U-1 provides:

> p. Any individual or any representative of a body against whom allegations are brought may be present at the hearing. In addition, observers other than those against whom allegations are brought are permitted with the consent of the grievant and the University Representative.

3. The first mediation session was held on Friday, January 29, 1993. The parties discussed several articles including Article 10, and identified the sticking points in Article 10 as the dual venue issue, EEOC, witness preparation, and the creation of grievance pools and selection of grievance committees (T154). The mediation continued on Saturday, January 30, 1993. Norman explained to O'Connor that Rutgers, in its January 27 proposal, eliminated the last paragraph of Section F.2.a. of E-1 because he thought that the AAUP was troubled by that language (T59). Norman did not assume that the AAUP had accepted F.2.a. of U-1, but believed O'Connor would verify that the last paragraph was deleted and thought that might be sufficient for an agreement (T60).

On February 1, 1993, Norman prepared a memorandum (E-8) for his bargaining team updating them on the progress of negotiations. He noted some problems regarding Article 10, but with respect to the selection of grievance hearing committees he said:

> ...Dan had not recognized we had taken out of our proposal that these elections would take place in the regular faculty elections. If they agree with that deletion the only small item left is the ability of a bargaining union member to serve more than once every three years (E-8).

4. The next mediation session occurred on Tuesday, February 2, 1993. During the first half of that session, between Norman, O'Connor and the mediator, O'Connor prepared a document listing what he believed to be were the outstanding issues. The document was divided in half showing "AAUP" on the left side and

"Admin" on the right. The base document (see U-3 and U-13)[7/] contained the following entries in the Article 10 row:

Fac Personal Grievance	DUAL VENUE/EEOC WITNESSES NO TAPES PREP	INDEMNIFICATION, NO EEOC WITNESSES TAPES PREP (NEED TO SUBSTITUTE OLD LANG TO REPLACE REMOVED ¶'s)

Norman's copy of the base document was U-3, and O'Connor's copy was U-13. O'Connor testified that what he was referring to by the language in parentheses "Need to substitute etc..." was paragraphs 3. and 4. of Article 10, Section IV.A. of J-1 which concerned the creation of grievance pools (T162). That testimony was not directly challenged and I credit O'Connor that that is what he meant by that language.

The parties reviewed U-3/U-13 during the first half of the February 2 mediation. Norman agreed that on February 2nd the base items in U-3/U-13 were the issues to be discussed (T63), but he had a different interpretation of what the "Need to substitute..." language referred to. O'Connor and Norman, however, did not explain to each other their different interpretations of the "need to substitute language."

7/ Exhibit E-7 is also the same base document as U-3 and U-13, but E-7 was not introduced with respect to Article 10, thus is not particularly relevant here. Both U-3 and U-13 are relevant, but they both contain additional markings on them that were added after the February 2nd mediation and are not relevant for what occurred on February 2 (T62-T63, T178).

Norman was asked on direct-examination by the AAUP if he knew what the "Need to substitute..." language meant. He testified it meant paragraphs 16. and 17. of Article 10, Section II.B. of J-1 (T64). 8/ Norman further explained that as evidenced by the language in Exhibit U-2, the parties had different opinions on the language for the new paragraphs 16. and 17. of Section II.B. and, therefore, he thought those were the paragraphs U-3/U-13 was referring to (T64). The AAUP did not question Norman any further regarding the meaning of the "Need to substitute..." language.

In its post-hearing brief, however, the AAUP argued that Norman's explanation of the meaning of the "Need to substitute..." language was "fallacious." I do not agree. Exhibit U-3 contains Norman's handwritten notation "OK? 1¶" to the right of the words "Need to substitute...." The notation was placed on there after February 2nd. The AAUP contends that U-3, with Norman's notation, is an admission that the "Need to substitute..." language refers to paragraphs 3. and 4. of Article 10, Section IV.A. of J-1 rather than paragraphs 16. and 17. of Section II.B. The AAUP further contends that Rutgers did not propose the removal of paragraphs 16. and 17., thus, they could not be the "removed" paragraphs referred to in the "Need to substitute..." language.

It is true that Rutgers, in its January 27 proposal (U-1), did not propose the removal of paragraphs 16. and 17. of Article 10,

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8/ Paragraphs 16. and 17. of Article 10, Section II.B. of J-1 are set forth in note 6 above.

Section II.B. of J-1. At Section B.2.p. of U-1, however, Rutgers did propose a change in the language of paragraph 16. of Section II.B.,[9/] but in Section B.2.q. of U-1, Rutgers proposed the continuation of the language in paragraph 17. of Section II.B. The AAUP, however, in U-2, its January 28th listing of unresolved issues, indicated that there was a dispute in the language of paragraph 17., as well as paragraph 16. of Article 10, Section II.B. of J-1.

When Norman was asked if he knew what the "Need to substitute..." language meant he responded it was paragraphs 16. and 17., then he paused for a moment and indicated that on the third page of U-2 there were different opinions on the language for paragraphs 16. and 17., and he, therefore, concluded that those were the two paragraphs referred to by the language in U-3/U-13 (T64).

I paid careful attention to Norman while he testified on this issue. His response was relatively spontaneous with an appearance of certainty, rather than appearing as if it was a constructed answer. He gave that testimony as an AAUP witness, and the AAUP did not pursue the matter, nor take any action in an attempt to impeach its own witness. Thus, I credit Norman's testimony and find that regardless of O'Connor's intent, Norman

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9/ Article 10, Section B.2.p. of U-1 is set forth in note 6 above.

thought the "Need to substitute..." language referred to paragraphs 16. and 17. of Section II.B.[10/]

Consistent with that finding, I also credit Norman's testimony that during the first half of the February 2 mediation session and the review of U-3, he did not believe the AAUP raised the issue regarding the selection of grievance pools (T65, T632).

The second half of the February 2 mediation session included AAUP President Wells Keddie. During that session Keddie raised the grievance pool issue and informed Norman that the AAUP wanted to retain the procedure set forth in paragraphs 3. and 4. of Article 10, Section IV.A. of J-1. Norman did not agree to the AAUP's proposal, but he agreed to take that proposal back to his negotiations team (T66, T73, T164). Norman did present Keddie's proposal to his team, but they rejected the proposal (T87).

O'Connor had testified that during the second half of the February 2 mediation session the parties went over U-3/U-13 with the mediator. O'Connor explained that they went through each element of the document and each side articulated its position. But the parties did not review each other's document. It was at some point during that discussion that Keddie explained the AAUP's position regarding selection of grievance pools (T163-T164). Even if I

10/ Norman's notation ("OK? 1¶") on U-3 is not inconsistent with that finding since that notation could mean ok, but with a question on one paragraph. The ok could be because Rutgers did not propose a change of one paragraph, but had a question on the other because of the proposed change.

credited O'Connor's testimony that the parties went over U-3/U-13 and articulated their positions during the second half of the February 2nd mediation session, I would not infer from that testimony that Norman understood that the "Need to substitute..." language referred to paragraphs 3. and 4. of Section IV.A. rather than paragraphs 16. and 17. of Section II.B. Neither O'Connor nor Keddie testified that Norman made any remarks during that session to demonstrate he understood what O'Connor intended by the "Need to substitute..." language. Since Norman's testimony on that issue was given as an AAUP witness, and was not subsequently impeached, nor directly contradicted by other witnesses, I credit it as both believable and reliable to show Norman's understanding of that specific language.

5. The next mediation session was Wednesday, February 3, 1993, at the mediator's home. The parties did not discuss the grievance pool issue (T67, T165-T166). When the mediation concluded that day, Norman stayed at the mediator's home for a Chinese dinner, O'Connor did not (T625).

6. The next mediation session was Saturday, February 6, at the mediator's home. The parties agreed that it had snowed earlier that day but otherwise they have two dramatically different versions of what and when things transpired on February 6 through February 8.

Norman testified that on February 6 he arrived at the mediator's home at 1:00 p.m. and joined the mediator in watching a

Rutgers basketball game. Norman explained that O'Connor first arrived at 1:15 or 1:30 p.m., but he immediately left to return home to get his negotiations materials which he had forgotten. Norman said O'Connor arrived the second time at approximately 1:45 p.m. (T634-T635).

Norman also testified that at the February 6 mediation he sat across the table from O'Connor and placed what he thought were the five remaining articles (or parts thereof) in dispute on the table. Norman said he offered O'Connor the language the AAUP wanted in Articles 19, 26 and what he thought was left in Article 10 (who can listen to the tapes as set forth in U-2) in exchange for the language Rutgers wanted in Articles 9 and 16. Norman did not lay out any language on the table concerning the selection of grievance committees because he did not think that was an issue (T88). Norman said he had told O'Connor that he thought those five items were the only things in dispute, and that O'Connor did not indicate there was anything else in dispute (T89).

Norman further testified that O'Connor rejected his proposal for an agreement on the exchange of articles, and that he (Norman) never agreed to continue the prior method for the creation of grievance pools (T177, T618). Norman further testified that the grievance committee issue was not discussed on February 6, that Professor Keddie was not present during that mediation session, and that when the parties reached an agreement it was to be implemented as a package, not article by article (T618). Norman also explained

that he was not shown U-13 on February 6 or anytime before the hearing, and that no one told him about the additional markings on U-13 on February 6, 1993 (T639-T640).

Norman also testified that when the mediation ended that day he left the mediator's home between 4 and 4:30 p.m. February 4, 1993, had been Norman's wedding anniversary and he and his wife celebrated that event by going to dinner at the Stage Left Restaurant the evening of February 6 (T635-T638, E-9). On Sunday morning, February 7, 1993, Norman went to his office and dictated to his secretary a memorandum (U-4) for his negotiations team. He said there was no mediation session that day (T641-T642).

In U-4, which was dated Monday, February 8, 1993, Norman told his team what occurred at the February 6 mediation session. He reviewed the five articles (or parts thereof) he dealt with on February 6, and explained the proposal he made. He did not discuss in U-4 the grievance pool topic because he said it was not discussed on February 6 (T649). Finally, Norman testified that he did not meet with O'Connor or the mediator on February 8. Between 3:45 p.m. - 5:45 p.m. on February 8, Norman was in a meeting with Rutgers' attorneys (T582-T583).[11/]

O'Connor's and Keddie's version of the February 6 through February 8 events differed substantially from Norman's. O'Connor

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11/ The parties stipulated that Norman had that meeting on February 8 with Rutgers' attorneys (T582-T583) and I accept it and find it as a fact.

was confused about what time the February 6 meeting was scheduled to begin. He first testified it was scheduled to begin around 11:00 or 11:30 a.m. (T410), then he testified it could have been scheduled for 10:00 a.m., then he said he was uncertain (T412).

O'Connor testified on direct exam that he arrived at the mediator's home around noon, and was late (T410-T411). On cross-examination, however, O'Connor testified he arrived at the mediator's home by late morning sometime (T415). Upon arriving, he realized that he had forgotten his materials and in less than 15 minutes of his arrival he left to return home (T412). It took O'Connor at least 12 minutes to return home, he gathered his materials, and it took him at least another 12 minutes to return to the mediator's home (T414-T415). Considering the several minutes he was at the mediator's home, the 24 minutes of driving time and the time it took to gather his materials, I find there was from 30 to 40 minutes between O'Connor's first and second arrival at the mediator's home. That would have placed the time of his second arrival at around 12:45 p.m., but perhaps as late as 1:00 p.m.

The negotiations began with the discussion of "FASIP" procedures concerning longevity increments. O'Connor explained the parties' positions on that issue, he indicated that Norman made phone calls to his team regarding that issue, and that an agreement was eventually reached (T168-T169). From O'Connor's description, I estimate the FASIP negotiations took anywhere from 20 minutes to 1 hour to complete.

O'Connor testified that the parties next discussed the dual venue, EEOC and indemnification issues concerning Articles 9 and 10 (T169). No agreement was reached and I estimate those discussions may have taken 10-15 minutes. O'Connor said the parties then had an "intense" discussion on Article 10, but were going nowhere. As a result, he decided to telephone Keddie to discuss issues regarding Articles 9 and 10 (T169). Even if the discussion was short, I find it took from 10-20 minutes to conduct the Article 10 discussion and the first telephone call to Keddie.

On cross-examination, O'Connor was asked what time he first called Keddie. His response: "It was late morning" (T415). I cannot credit that testimony. O'Connor, on cross-examination, contradicted his testimony on direct. If I credit his direct testimony, taking into account when he arrived back to the mediator's home, and the time it took to negotiate the FASIP, dual venue and Article 10 issues, I find that O'Connor could not have first called Keddie, giving him every favorable inference on time, prior to 1:25 - 2:00 p.m.

O'Connor further testified that after the first call to Keddie, he returned to the table, put aside discussion of Articles 9 and 10, and began discussions on Article 12 eventually reaching an agreement on "TA's and GA's" (T170). He said the parties then discussed the family leave policy and "closed ranks." The parties had a lengthy discussion and Norman allegedly asked O'Connor for a favor which prompted O'Connor to call Keddie for a second time

(T170-T172). O'Connor testified that after the second call the parties began discussing Article 19 on parking. The parties exchanged information and a question arose regarding the amount of a rebate (T173). He said the parties then began discussing Article 26, issues regarding sexual harassment and discrimination, but were deadlocked (T173-T174). O'Connor then explained that the parties recapped their positions on Articles 9 and 10 and he allegedly told Norman that he needed Keddie to discuss Articles 9 and 10.

O'Connor testified he then called Keddie a third time and asked him to come to the mediator's home (T174). When O'Connor was asked on cross-examination how much time there was between the calls to Keddie, he first testified that the second call was made 8 minutes after the first call, and that the third call was made within 15 minutes or less of the second call. But then he testified that there was 20-25 minutes between one of the calls (T416). If I credit O'Connor's testimony, I find there must have been at least 30 - 35 minutes between O'Connor's first and third calls to Keddie. Keddie testified that he only remembered one call, the one that summoned him to the mediator's home, which he said he received around noon time (T589). He admitted there could have been other calls, but he could not be certain (T589-T591). He then testified he arrived at the mediator's home by 1:30 p.m. (T555, T556, T587).

O'Connor also testified on cross-examination, that Keddie arrived at the mediator's home in the early afternoon, approximately 1:30 p.m. (T408). But earlier, on direct-examination, O'Connor was

confused as to when Keddie arrived (T175). I cannot credit either O'Connor's or Keddie's testimony on the February 6 timing. Their testimony is inconsistent. Since, if I credit O'Connor, he could not have first called Keddie prior to 1:25 - 2:00 p.m. (and certainly not by noon time), and there was at least 30 - 35 minutes between the first and third call, I find that O'Connor would not have hung-up the third call prior to approximately 2:00 p.m. Considering the time it would have taken Keddie to get ready to leave his home, which he said was at least 15 minutes (T593), and the time he said it took to drive to the mediator's home - 15 minutes (T592), I find that Keddie, giving him every favorable inference, could not have arrived at the mediator's home before 2:30 p.m. But complicating that finding is Keddie's testimony that he received the "summoning" call from O'Connor at noon (T589) and arrived at the mediator's home at 1:30 p.m. (T555, T556). If it took Keddie an hour and one-half from the call to arrive at the mediator's home, then based on my finding from O'Connor's testimony that the third call was no earlier than 2:00 p.m., Keddie would not have arrived until 3:30 p.m.

O'Connor further testified that Keddie was at the mediator's home about two hours and left between 3:00 and 3:30 p.m. (T408). Keddie testified, however, that he left the mediator's home between 4:00 and 4:30 p.m. (T593-T594).

Both O'Connor and Keddie testified that after Keddie's arrival, the parties began discussing the creation of grievance

pools. They explained they told Norman that their proposal to continue the language in Article 10, Section IV.A.3. and 4. was a "must have" position, and they said they explained why the wording in 3. and 4. was important to them. They testified that Norman finally agreed to their demand and said something to the effect that he was doing this on his own and he would catch heck from management team member, Jean Ambrose (T175-T177, T560-T561).

Ambrose testified on cross-examination that Norman had told her that Keddie was involved in the mediation process regarding Article 10. She said there came a time when Norman told her that Keddie was meeting with him and O'Connor. She was then asked "And that was after February 2", and she responded, "yes" (T379). On redirect-examination, Ambrose was referred back to her response on cross-examination and she was asked what was her understanding of the question and what was her answer and she responded:

> "I said yes, it was after February 2nd because I understood the question to mean when was Mr. Norman's meeting informally with Dan O'Connor and Wells Keddie." (T386).

But, she was then asked if she knew when Norman met with O'Connor and Keddie. She responded:

> "No, I don't. I do recall it was a Saturday or a weekend meeting at some point, but I don't remember when." (T386-T387).

I cannot credit Ambrose's testimony to prove that Keddie was at the February 6 mediation or that Norman agreed to the AAUP's Article 10 proposal. Ambrose concluded her testimony by admitting that she did not know when Norman met with O'Connor and Keddie, and

although she thought it was a Saturday or weekend, she did not remember when. In addition, Ambrose did not testify about what allegedly happened on February 6, or that Norman ever agreed to any AAUP proposal. Given those findings I cannot infer or reconstruct from her testimony what occurred on February 6, 1993.

O'Connor testified that he did not remember the AAUP trading anything for Norman's alleged agreement on the grievance pool language (T422), and that although he (O'Connor) wrote "OK Selection-as is" on U-13 to signify Norman's acceptance of the AAUP's proposal on that language, he never actually showed U-13 to Norman (T328-T330). Similarly, Keddie said that on February 6 he wrote "continue from old contract as is" on U-2 next to Article 10, Section IV.A.3. and 4. of J-1 (T562), but there was no showing Norman was aware of that event.

O'Connor testified that he left the mediator's home at around 5:00 p.m. on February 6, but that Norman had agreed to stay to have a Chinese dinner with the mediator (T509-T510).

O'Connor claimed that there was another mediation session between he and Norman at the mediator's home on Sunday, February 7 (T180, T428). Keddie also claimed there was a session on February 7, but he admitted he was not in attendance, and that O'Connor had told him about it (T563, T595).

O'Connor also testified that he met with Norman on February 8, 1993. On direct-examination, he said he met with Norman in the morning (T183), but on cross-examination, he changed his testimony

and said he only met with Norman for an hour and a half between 4:00 and 5:45 p.m. (T436-T440).

I fully credit Norman's testimony regarding the events of February 6, 7 and 8, 1993. I also credit his testimony that a new agreement was to be implemented as a package, not article by article. O'Connor's and Keddie's testimony often conflicted with each other, their delivery and recollection of the facts paled in comparison to Norman, and, in general, I found them to be unreliable witnesses. Ambrose's testimony was not detailed or specific enough itself to prove the events of February 6, nor did it rehabilitate O'Connor's and Keddie's testimony to prove the facts that they alleged.

A comparison of O'Connor's and Keddie's testimony shows their recollection of the events of February 6 were almost completely out of sync. Keddie's own testimony was confused at best. Keddie was certain he received a telephone call from O'Connor around noon summoning him to the mediator's home. He and O'Connor said he (Keddie) arrived there around 1:30 p.m. That would have been an hour and one-half from the time of the call. But Keddie also gave the impression he may have left his home within 15 minutes of being called and it took 15 minutes to drive to the mediator's home. That could not have happened if he arrived at 1:30.

O'Connor himself, said he first arrived at the mediator's home around noon, he then had to return home, go back to the mediator's home, begin negotiations on certain articles, call Keddie

three times, and wait for Keddie to arrive. O'Connor could not have called Keddie at noon as Keddie said, because he had, allegedly, just arrived himself. Even giving the AAUP all favorable inferences, O'Connor's third call to Keddie would have had to have been made at 1:00 p.m. for Keddie to arrive at 1:30 assuming he left his home within 15 minutes of the call. But given the time it took for O'Connor to return home, come back, begin negotiations and make three calls to Keddie which included at least 30 minutes between the first and third calls, O'Connor could not have made the third call to Keddie even close to 1:00 p.m. O'Connor and Keddie could not even agree on when Keddie allegedly left the mediator's home.

I also cannot credit O'Connor's testimony that Norman had a Chinese dinner at the mediator's home on February 6. Norman testified he went out to dinner with his wife on February 6 to celebrate their anniversary. Exhibit E-9 supports that testimony and there is no reliable evidence to the contrary.

Similarly, O'Connor claimed there was a mediation on February 7, but Exhibit U-4 supports Norman's testimony of what happened on February 6, and what he did on February 7. Finally, O'Connor claimed he met with Norman in the late afternoon of February 8, but the AAUP stipulated that Norman was in a meeting with Rutgers' attorneys at the very time O'Connor claims he was meeting with Norman.

In contrast, I found Norman to be a substantially more reliable witness regarding the events of February 6 - 8. He seemed

to have a thorough recollection of the facts, his testimony was supported by E-9 and U-4, and he did not waiver in his testimony. Ambrose's testimony was not sufficient to overcome Norman's recollection of the facts. Thus, I find that on February 6 Norman met with just O'Connor and the mediator, he (Norman) made the proposal regarding five articles, he did not agree to renew the language in Article 10, Section IV.A.3. and 4. of J-1, and he left the mediator's home around 4:30 p.m. I further find that the parties did not meet on February 7 or 8, 1993.

7. O'Connor and Norman met again on February 9 and 10, resolving, they thought, all of the outstanding issues during these two meetings (T73, T184-T187). On February 10, the parties reached an agreement on Article 26, and signed a memorandum of agreement (U-9) limited to procedures to address sexual and racial harassment (T186). The issue regarding the selection of the grievance committees was not raised during those meetings (T91), and the parties did not sign or initial any other document or documents that would have served as a memorandum of agreement for Article 10 independently, or for an entire contract (T73, T294).

Norman acknowledged that O'Connor had never literally stated that the AAUP was withdrawing its grievance pool position from the table, or was agreeing to Rutgers' proposal, but since the AAUP did not raise the grievance pool issue again after February 2, 1993, he (Norman) inferred that the AAUP was withdrawing its position on that topic and he felt certain by February 10 that the

AAUP had agreed to Rutgers' position (T72, T659). There is no evidence, however, that Rutgers offered the AAUP any additional item in exchange for their alleged agreement to F.2.a.

As a result of their apparent oral agreement on February 10, the parties agreed that the AAUP would compile a document for a joint press conference to be held on February 11, 1993 (T89). Such a document was eventually compiled (U-5), but the parties disagree on when it was compiled. U-5 was not a memorandum of agreement, but it was supposed to represent what the parties had agreed upon. Norman testified that O'Connor gave him and reviewed U-5 with him on February 10 (T74, T90-T100, T116-T122). In fact, Norman said on cross-examination that on February 10 he and O'Connor in reviewing U-5, reviewed the page containing F.2.a., and the only conversation was to be sure they agreed on the "new language" which provided that no one was obligated to serve on a grievance committee more than once every three years (T97). But when asked earlier if Article 10 was attached to the document he and O'Connor reviewed on February 10, Norman said on direct examination:

> "I shouldn't have said that but I think so, I just don't quite recall but I think so." (T74).

Norman also testified on cross-examination that at the February 10 meeting, neither he nor O'Connor raised the grievance committee selection issue (T91). O'Connor testified that U-5 did not even exist on February 10, he did not review it with Norman, and that U-5 was not prepared until after the February 11 press conference (T188-T192). O'Connor said he did not review U-5 for accuracy, but

that he, nevertheless, delivered a copy to Norman the week after February 11 (T194, T453).

While I found Norman to be a more reliable witness than O'Connor regarding the events of February 6 - 8, his testimony on whether F.2.a. was attached to U-5 when he and O'Connor were allegedly reviewing it on February 10, was too uncertain and inconclusive to find that the parties really reviewed that Article at that time. Since Norman had doubts as to whether F.2.a. was attached to U-5 on February 10, then, regardless of when U-5 was compiled, I can only conclusively find that by the evening of February 11, U-5 contained, as the method for the selection of grievance committees, Rutgers' proposal F.2.a. from its January 27 proposal. U-5 does not contain a continuation of the language from Article 10, Section IV.A.3. and 4. of J-1. But the evidence also showed that U-5 contained several significant inaccuracies (T518-T525).

According to O'Connor and Keddie, U-5 did not exist at the time of the joint press conference held at approximately 1:30 p.m on February 11 (T191-T192, T573). Sometime prior to the press conference, Norman and O'Connor discussed the items the parties would talk about at the conference, but at hearing they could not agree on whether they discussed the grievance pools and grievance committees (T195, T649-T651). Nevertheless, both Norman and O'Connor agreed that O'Connor used the term "unbiased" in reference to the grievance committees. Norman testified that O'Connor

referred to "unbiased committee selection" which he (Norman) understood to refer to "random selection" for the grievance pool (T651). O'Connor testified he used the term "unbiased grievance committees" to refer to the grievance pool procedure in J-1 which he considered to be an unbiased method for the creation of the pools and grievance committees (T196).

According to O'Connor and Keddie, after the news conference AAUP officials began preparing U-5 to present to the AAUP Executive Council later that evening (T191, T455, T570, T573). It was Keddie's responsibility to prepare what the parties had agreed to for Article 10, including the language for the method of selecting the grievance committees (T455, T571). Keddie, who actually assembled the Article 10 material for U-5, considered it to be an important job (T463, T599). He said his task was to make sure that the things that had just been agreed to in Article 9 and 10 were properly inserted and were presented clearly (T571, T600). He concentrated much of his time on the grievance process (T601). Yet Keddie testified he did not go through Article 10 in U-5 to verify that it was accurate and complete, and he said his inclusion of F.2.a. in Article 10 was just a mistake (T573).

Although I am somewhat suspicious of Keddie's explanation regarding the assembly of U-5, since the parties had earlier agreed to work off of Rutgers' U-1 proposal for negotiations purposes, it is possible that Keddie included F.2.a. into U-5 by mistake. In addition, I find that U-5 was not a memorandum of agreement between the parties, it was never signed or initialed by the parties.

Keddie said that after U-5 was prepared (on February 11) a copy was distributed to every member of the AAUP Executive Council, somewhere between 32 and 38 people (T459-T460, T602, T603). Keddie explained and discussed Article 10 (T459-T461, T601), and eventually the Council voted to recommend ratification of the new "agreement" to the membership based upon the presentation of U-5 (T452-T453, T603).

After the Council's ratification of the new agreement, O'Connor prepared a document (U-6) for AAUP unit members to review in voting on whether to ratify the new agreement (T196, T468). U-6 was nothing like U-5. U-6 contained the text for some articles, but was basically summaries of articles for the new agreement (T196). U-6 and a ballot was mailed to all the unit members (T199), but they were not given copies of U-5 (T603-T604), and they were not provided with copies of the text of the new agreement because it did not exist at that time (T474).

Eleven summary paragraphs were listed under Article 10 in U-6. The only paragraph which even mentioned grievance committees was paragraph 10 which said:

> 10. Individuals are not obligated to serve on a Grievance Committee more than once every three years.

There was no discussion of how grievance pools were determined. O'Connor had U-6 printed on February 22, 1993, but he did not give Norman a printed copy, he gave him a typed copy the same day (T76-T77, T102, T196-T197). By March 17, 1993, the unit members had ratified a "new agreement" (T199, C-1, Attachment B).

8. On or about March 29, 1993, Norman gave O'Connor a copy of Rutgers' computer floppy disc that contained the language that Norman believed was the parties new collective agreement (T200). O'Connor did not provide an AAUP disc to Norman (T198, T604).

On March 31, 1993, O'Connor printed out the contents of the disc which contained the contract language in Exhibit U-15 (T200, T227-T228). The disc also matched the language in E-2, Rutgers' preliminary copy of the new agreement (T102-T103). Article 10, Section F.2.a. of U-15 and E-2 is the grievance pool language proposed by Rutgers that was also contained in U-5. That same day, O'Connor also prepared U-14, which is the cover page to U-15 (T201). O'Connor wrote on U-14 that "This Contract has not yet been verified against AAUP versions of the same Contract." But O'Connor never compared the language in U-15 with the AAUP's alleged version of the agreement (T204).

On April 8, 1993, O'Connor received a telephone message from Keddie that there was a problem with the grievance committee language in U-15. O'Connor called Keddie that evening and they discussed that they needed to get back to the language they allegedly had agreed to on February 6, 1993 (T205). On direct-examination, O'Connor said he called Norman on April 9 and explained the problem (T205). Norman allegedly responded that he did not believe he left anything out of the contract, but he agreed to check into the matter (T78). But on cross-examination, O'Connor first said that he called Norman about U-15 before he talked to

Keddie (T480-T482), but then he said he did not know when he spoke to Keddie in relation to when he spoke to Norman, and he did not know the sequence of when he spoke to both men (T493-T494).

Norman testified that he first spoke to O'Connor regarding this matter on April 13, 1993 (T77). Subsequent to that date, he told O'Connor and Keddie that the language in Article 10, F.2.a. of U-15 was the correct version of the contract (T78, T205-T206). O'Connor then suggested to Norman that they compare notes with the mediator to see what happened on February 6 (T206). Keddie had also told Norman that he did not agree with his position and indicated the AAUP might take legal action (T79).

While I believe O'Connor spoke to Keddie on April 8, I do not credit his direct testimony that he spoke to Norman on April 9th. O'Connor on cross-examination contradicted his direct testimony, and he then admitted he was unsure of when he spoke to Keddie and Norman. Thus, I cannot rely on his testimony of when he spoke to Norman. Therefore, I credit Norman's testimony that he first spoke to O'Connor about U-15 on April 13.

On April 9, 1994, Rutgers implemented the salary increases the parties had agreed upon (T619-T621). But Rutgers implemented those increases under the mistaken belief that the entire contract, as a package, had been agreed upon (T619-T620).

On or about April 22, 1993, O'Connor telephoned Norman and asked him if he would agree to review notes with the mediator. Norman informed O'Connor the following day that he would not agree to such a meeting (T206-T207, T495).

The AAUP filed its charge on April 20, 1993, but Norman, personally, was not aware of it until May 6, 1993 (T622).

9. In addition to its primary charge regarding random selection for grievance committees, Rutgers also alleged the AAUP violated the Act by seeking to insert the words "the time of" into Article 9, Section F.5., and Article 10, Section G.7. of the new agreement after the AAUP ratified the contract without that language. The evidence reveals the following:

Article 9, Section F.5. of J-1 provides:

> 5. Step Two of this grievance procedure shall be held in abeyance for any portion of a grievance while any court or agency proceeding, brought by the AAUP or the grievant and concerning the substance of that portion of the grievance, is pending. In the event that a court or agency makes a binding determination on the substance of that portion of the grievance, Step Two of this grievance procedure shall no longer be available for that portion of the grievance. Nothing in this provision shall be construed or implied as a waiver by the University of the defenses of exhaustion of remedies or exclusivity of the grievance procedure, except as provided in paragraph 6. below.

Article 10, Section V.G. of J-1 provides:

> G. This Article X grievance procedure, whether or not pursued, shall constitute the sole and exclusive right and remedy of bargaining-unit members for all claims cognizable under this procedure. Decisions by a Grievance Committee or the Faculty Appeals Board as provided for in this Article X grievance procedure shall be considered a binding and final settlement of the grievance. The exclusivity of remedies and exhaustion of procedures provided for above are not intended nor shall they apply to rights of individual bargaining members that arise from sources independent of this Agreement, University policies, agreements, administrative decisions, or regulations. Should a member of the bargaining unit seek to exercise such a right, this Article X grievance procedure shall be held in abeyance for any portion of a grievance while any court or agency proceeding, brought by the AAUP or the grievant and concerning the substance of that portion of

> the grievance, is pending. In the event that a court or agency makes a binding determination on the substance of that portion of the grievance, this Article X grievance procedure shall no longer be available for that portion of the grievance. Nothing in this provision shall be construed or implied as a waiver by the University of the defenses of exhaustion of remedies or exclusivity of the grievance procedure.

In U-1, Rutgers' January 27, 1993 proposal, it proposed as Article 10, Section G.7., the identical language contained in Article 10, Section V.G. of J-1.[12/] The language in Article 9, Section F.5. and Article 10, Section G.7. of U-5 contained the identical language as contained in those same articles in U-1 and their predecessor articles in J-1. The parties in negotiations, however, agreed to add an additional paragraph with identical language to both those articles. That additional language is contained in U-5 attached to both Article 9, Section F.5. and Article 10, Section G.7. and provides:

> In the event of a final adjudication according to law with respect to Article IX F.5. or Article X G.7. that grievances involving the same subjects as charges or actions brought in other forums may not be held in abeyance and/or are not subject to exclusion from the grievance procedure, any grievances which were not processed by the University, pursuant to Article IX F.5. or Article X G.7. shall, at the option of the grievant or the AAUP, be reviewed and all rights of the grievant as of the grievance or any portion thereof was held in abeyance shall be preserved. With respect to such grievances or portion thereof, the University shall not have

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12/ Exhibit U-1 only contained Article 10, it did not contain a copy of Article 9. I presume, however, that Article 9 of Rutgers' January 1993 proposal contained the same language as in Article 9, Section F.5. of J-1.

> available upon revival the defenses of timeliness, waiver or election of remedies.

As part of its summary of new language for its unit members, the AAUP in U-6, included the language of the new "In the event" paragraph in listing the information regarding both Articles 9 and 10. The AAUP, however, made one slight change. Instead of using the designations "Article 9 F.5. or Article 10 G.7." in those paragraphs as it was written in U-5, it only used the designation "Article 9" in the Article 9 section of U-6, and only used the designation "Article 10" in the Article 10 section of U-6. Article 9, Section F.5. and Article 10, Section G.7. of U-15, however, included the new paragraph language for those articles just as it had been written in U-5.

Sometime just prior to April 29, 1993, O'Connor made certain changes to the wording in Articles 9 and 10 of the new agreement. By letter of April 29, 1993 (U-7), Norman notified O'Connor that he had made substantive changes in the language that had been agreed to and ratified. He indicated that O'Connor had added the words "the time of" in Article 9, Section F.5. and Article 10, Section G.7., and that he had added two new paragraphs (probably paragraphs 3. and 4. of Article 10, Section IV of J-1) to Article 10, Section F.2.a. of the new agreement. Norman explained that Rutgers had not agreed to those changes and that they would not be included in the printed contracts. The first paragraph of U-7 provided:

> I received the copies of Article IX and Article X that you sent to me yesterday. You have made substantive changes which were not part of the agreement reached by the parties or ratified by the AAUP. You have added the words "the time of" in Article IX. F.5 and in Article X. G.7. You have added two new paragraphs in Article X. F.2.a. The University never agreed to these provisions and the AAUP did not ratify them. The paragraph references in the margin, on the other hand, are not substantive changes and I have no objection to them. They will be included in the printed contracts. The substantive changes will not appear in the printed contracts.

U-7 was faxed to the AAUP office on Thursday, April 30, 1993 (T209), but O'Connor claims he did not see it until after he had signed a letter to Norman (U-8) also on April 30, 1993 (T208, T210). In U-8, O'Connor argued that the copy of Article 10 that he had sent to Norman reflected what the parties had agreed to. He did not deny that he sought to add the words "the time of" into Articles 9 and 10, but he argued that that was not a substantive change. U-8 provides as follows:

> As you and I have previously discussed, the copy of Article X which the AAUP sent over to you reflects the agreements mutually reached by the parties during negotiations. Your attempts at unilateral removal of substantive parts of Article X after we have agreed on the wording is not valid. As you know, the AAUP has already filed a charge with the Public Employment Relations Commission to remedy aspects of this unfair practice.
>
> The AAUP also proposed that the Administration and the union meet with the mediator to attempt to try to ascertain the actual agreements reached during the meetings between the parties when the agreement on Article X was finalized. You have advised me that you will refuse to participate in this effort. Unfortunately, this will leave no alternative but for the AAUP to press its legal remedies.

> The words added to Article IX.F.5. and Article X.G.7, "the time of," are needed to correct a mutual mistake that left this sentence garbled. The change is not substantive.
>
> The AAUP would like to have the new collectively negotiated agreement signed and distributed promptly. Clearly, it will not be possible to do this until we resolve the disputes about the language of Articles IX and X. Your refusal to engage in a mutual process on these issues will necessarily cause additional delays. Until this dispute is resolved, it would be severely disruptive and illegal for the administration to prepare to distribute contracts which are incomplete and which contain disputed language.

Norman received U-8 (T84), but O'Connor could not recall receiving a response (T209).

ANALYSIS

There are two issues in this case. The first, and primary, issue is whether the parties reached an enforceable agreement on a method for the creation of grievance pools and selection of grievance committees, and if so, what was it? The second, and more minor issue is whether the AAUP, by attempting to add the words "the time of" into Articles 9 and 10, violated the Act.

In considering these issues, it is necessary for me to decide whether an agreement had been reached and whether a party refused to sign such an agreement. Borough of Fair Lawn, H.E. No. 91-33, 17 NJPER 201, 205 (¶22085 1991), adopted P.E.R.C. No. 91-102, 17 NJPER 262 (¶22122 1991); Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 87-117, 13 NJPER 282, 283 (¶18118 1987); Jersey City Bd. of Ed., P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983).

In order to determine whether an agreement has been reached I must attempt to discover the intent of the parties. The Supreme Court in Kearny P.B.A. Local #21 v. Town of Kearny, 81 N.J. 208, 221-222 (1979) listed a number of interpretative devices that have been used to discover the parties' intent. They included consideration of: the particular clauses; circumstances leading up to the creation of the contract; and review of the parties' conduct regarding the disputed provisions. In addition, in Jersey City Bd. of Ed. the Commission explained that the intent of the parties, as clearly expressed in writing, is the controlling factor, thus it concluded that the starting point in determining what the parties agreed to was an examination of their memorandum of agreement. Id. at 21. That, of course, raises the most significant problem with these cases, there was no memorandum of agreement on the grievance pool language. I am left, therefore, to examine the totality of the circumstances to determine whether there was any meeting of the minds. Ocean Cty. Sheriff, P.E.R.C. No. 86-107, 12 NJPER 341, 347 (¶17130 1986); Mt. Olive Bd. of Ed., P.E.R.C. No. 84-73, 10 NJPER 34 (¶15020 1983).

The Grievance Pool/Committee Issue

The facts of the primary issue here do not fit into a classic meeting of the minds case. Usually, in those cases, the parties have agreed to particular language but cannot agree on what it means or how it applies. In those situations where there is no written agreement, the parties usually disagree on what language had

been agreed upon. But here, in the AAUP case at least, the parties could not even agree that they reached an agreement, and in Rutgers' case, Norman conceded that no AAUP official ever actually voiced agreement with Rutgers' grievance pool proposal.

Here, neither party successfully proved its case. But this was something more than a failure of the meeting of the minds. This was an unfortunate example of each party's failure to communicate with the other regarding the effect of specific events as they transpired. If O'Connor and Keddie believed that Norman agreed to their proposal on February 6, it was incumbent upon them to insist that the parties sign-off on that specific language before any of them left the mediator's home. Similarly, once Norman felt convinced that the AAUP had acquiesced to Rutgers' proposal, it was his responsibility to have O'Connor sign-off on that language rather than just assume an agreement had been reached.

Without clear written agreements, both parties were left to present lengthy, complicated and sometimes different and inconsistent evidence to prove their respective cases. In oral argument and their post-hearing briefs, both parties vigorously argued why their evidence should be credited, what inferences should be made, and why the other side should not be believed. All of which is the very antithesis of the negotiations process.

The intent of the negotiations process is to foster a climate where the parties, through their good faith give-and-take, are eventually brought along in tandem to the point where they reach

a consensus on the language or content of each article of an agreement. The more the parties must rely on the presentation of disputed and sometimes inconsistent facts to prove what they respectively claim was the consensus, the more likely it is that no consensus was ever reached. Such was the result here. A discussion of each case demonstrates the problem.

The AAUP Case - CO-H-93-375

The AAUP's case is based upon the events of February 6, 1993. In its post-hearing brief, the AAUP argued that it presented corroborated testimony, supported by Exhibits U-3 and U-13 and Ambrose's testimony, that Norman had agreed to continue in the new contract the grievance pool language from Article 10, Section IV.3. and 4. of J-1. The heart of the AAUP's case was O'Connor's and Keddie's testimony. The AAUP apparently assumed that because O'Connor and Keddie corroborated one another with respect to Norman's alleged actions on February 6, that their testimony would prevail. That may have been true if their testimony had been consistent and reliable, but it was not.

A comparison of just O'Connor's and Keddie's testimony reveals the serious inconsistencies in what they say occurred that day. Keddie insisted that he received the call summoning him to the mediator's home around noon time. That could not have happened. O'Connor may have arrived at the mediator's home around noon time, but it took at least 30 minutes, or more, to go home then return to the mediator's home, and it took approximately 35 minutes or more to

negotiate over several articles before O'Connor even made the first call to Keddie which would have been well after 1:00 p.m.

Keddie also gave the impression that it took him 15 minutes to leave his home after the call he received and another 15 minutes to arrive at the mediator's home, but then he, and O'Connor, said he arrived at the mediator's home at 1:30. Both men are simply wrong. Keddie said he received O'Connor's call on February 6 around noon, but did not arrive until 1:30, an hour and one-half later, yet he also gave the impression that it only took him 30 minutes to get to the mediator's home after the call. Such a glaring inconsistency led me to conclude that Keddie could not reliably recall the facts.

O'Connor too, said Keddie arrived at the mediator's home at 1:30 p.m., but that could not have happened. O'Connor would have had to have called Keddie the third time by 1:00 p.m. for him to have arrived by 1:30 p.m.. Given O'Connor's testimony about when he arrived back to the mediator's home, that the parties negotiated over several articles before he began calling Keddie, and that there was about 30 minutes between the first and third call to Keddie, it was not possible for O'Connor to place the third call to Keddie anywhere near 1:00 p.m. O'Connor and Keddie could not even agree on when Keddie left the mediator's home.

The reliability of O'Connor's testimony was already in doubt after being reviewed with Keddie's, but when compared with Norman's testimony, O'Connor's testimony simply lost its credibility. O'Connor was somewhat insistent regarding three

specific events, but none of which proved to be true. He had said that Norman stayed at the mediator's home on February 6 for a Chinese dinner, but Norman countered that he went to dinner with his wife at a local restaurant that evening to celebrate his anniversary. Exhibit E-9 supported Norman's testimony.

O'Connor also said he had a negotiations session with Norman on Sunday, February 7, but he offered no corroborating proof. Norman explained that on February 7 he dictated a document outlining the results of the February 6 session as he remembered it, and U-4 supports that testimony.

Finally, O'Connor said that he met with Norman late in the afternoon on February 8 for further discussions. That did not happen. Norman denied it, and the AAUP subsequently stipulated that during that very time period Norman was meeting with Rutgers' attorneys. While I am not at all suggesting that O'Connor and Keddie intentionally misrepresented the facts,[13/] since their testimony was inconsistent and inaccurate on significant events concerning February 6, 7 and 8, 1993, I cannot rely on them to prove the allegations in the AAUP charge about what Norman said or did on February 6. Norman's testimony regarding the events of those days, however, was well corroborated and I credit it here.

13/ Both O'Connor and Keddie impressed me as witnesses who were testifying based upon their best recollection of the facts. O'Connor, in particular, struck me as sincere and well intentioned. I am only finding that he and Keddie did not have a good recollection of the facts.

The AAUP also argued that certain handwritten comments on U-3 and U-13 supported its allegations. I do not agree. The bracketed "Need to substitute" language in U-3 and U-13 was written by O'Connor, not Norman. O'Connor may have intended that language to refer to Article 10, Section IV.3. and 4. of J-1, but the language itself does not specifically refer to Article 10, and I credited Norman's testimony that he thought it referred to Article 10, Section II.B.16. and 17. of J-1. The AAUP also claimed that the "OK Selection-as is" language on U-13 was proof that sections 3. and 4. would be continued in the new agreement. But that was O'Connor's language, not Norman's. Norman was never shown that language, he did not agree to it, nor did he sign-off on its meaning. While U-13 might be evidence that O'Connor thought the grievance pool/committee language would remain "as is", it is not proof that Norman ever agreed to that language. Thus, the parties did not reach a meeting of the minds on the meaning of those documents.

In its post-hearing brief, the AAUP also vigorously argued that Ambrose's testimony contradicted Norman's version of the February 6 events and supported O'Connor and Keddie. But I found that Ambrose's testimony was not conclusive evidence of the February 6th events.

In its brief, the AAUP inferred from Ambrose's testimony that the meeting she referred to was February 6, and from that it inferred that Norman had agreed to the AAUP proposal. I make no such inferences. Ambrose's testimony is inconclusive regarding the

February 6 events. She did not know when Norman met with O'Connor and Keddie, and could not even be certain it was a Saturday. I cannot infer from that testimony that Keddie was at the February 6 mediation or that Norman agreed to continue the prior grievance pool/committee language.

The AAUP also referred to Norman's refusal to compare notes with O'Connor and the mediator regarding the February 6 events, and attempted to persuade me to infer therefrom that Norman had agreed to the AAUP's proposal. Such an inference would be inappropriate. Nothing a mediator says, does or writes can be the basis upon which an unfair practice charge is decided. To do so would compromise the mediator confidentiality rule, N.J.A.C. 19:12-3.4, and would severely taint the mediation process. Thus, Norman's refusal to compare notes with the mediator has no affect on any material fact in this case.

It was the AAUP's burden to prove by a preponderance of the evidence that Norman agreed to continue the prior grievance pool language. But a review of the events of February 6, 7 and 8 shows that the AAUP evidence was simply insufficient for that purpose. Thus, based upon the totality of the circumstances I find there was no agreement on the grievance pool language on February 6. The AAUP's charge, therefore, should be dismissed.

Rutgers' Case - CE-H-93-14

Rutgers' case on the grievance pool language began on a weak note. Norman conceded that neither O'Connor nor Keddie

literally voiced agreement to the language in Rutgers' F.2.a. proposal. Norman just assumed, or inferred, that their silence on that issue, and the subsequent appearance of F.2.a. in U-5, meant they agreed to his proposal. That assumption cannot be the basis of a collective agreement. The issue here is whether there was a meeting of the minds on the inclusion of F.2.a. into the parties' new agreement. I find there was not.

Certainly the appearance of F.2.a. in U-5, with the change Norman said he had agreed to, was some validation for Norman's assumption. U-5, after all, was wholly the AAUP's product. Keddie explained how important Article 10 was and that it was his job to make sure it was done correctly. Keddie said his placing F.2.a. in U-5, however, was a mistake. While I did not find Keddie to be a reliable witness regarding the February 6 events, I think it is entirely possible that F.2.a. appeared in U-5 by mistake. The parties were working off Rutgers' January 27 proposals and in the haste to put U-5 together, Keddie may have forgotten to substitute the AAUP's proposal for F.2.a. Since there were several other significant mistakes in U-5, absent a clear written agreement on that language, or even any verbal consent, specifically on F.2.a., I cannot find that the parties ever reached a consensus on that language.

In its post-hearing brief, Rutgers, citing Passaic Valley Water Comm'n, P.E.R.C. No. 85-4, 10 NJPER 487 (¶15219 1984), argued that the AAUP could not prove its own case because its members were

not given a text of what they thought was the new agreement, therefore, the members did not ratify the AAUP's version of Article 10. Rutgers then argued that it should prevail in its own case, however, because it would be unfair for the union to insulate itself from the Act's requirements by having its members ratify something less than what its Executive Council approved. Rutgers' argument, however, lacks merit. The issue here is not whether the AAUP's membership ratified F.2.a., the issue is whether the parties reached a meeting of the minds to include F.2.a. into an agreement. I find that absent a written or clear oral agreement, no meeting of the minds occurred.

The mere inclusion of F.2.a. in U-5 does not substitute for the process which leads the parties to a meeting of the minds. If that process has not occurred, then no agreement on the particular language has been reached. Such is the result here. Norman conceded that neither O'Connor nor Keddie ever actually agreed to the language in F.2.a. At one point, Norman did say that he and O'Connor reviewed the F.2.a. language when they, allegedly, reviewed U-5 on February 10 and O'Connor voiced no objection to that language. But at another point, Norman also said he was not quite sure if Article 10 was attached to the document he and O'Connor were, allegedly, reviewing. Due to the inconsistency in Norman's testimony, I cannot rely on it to prove the parties reached agreement on that language.

Similarly, the Executive Council's acceptance of U-5 does not substitute for the reaching of a mutual agreement between the negotiating parties which had to precede the beginning of the ratification process. Norman had said that the parties had not discussed the grievance pool language since February 2. That silence on the issue and Norman's inferences do not add up to an agreement on that language. Norman should have acted on his inferences and obtained O'Connor's agreement, if possible, to F.2.a. By maintaining his own silence on that issue, Norman ran the risk of being unable to prove that a meeting of the minds occurred. Since it is possible that F.2.a. appeared in U-5 by mistake, under the circumstances here, the Council's approval of U-5 cannot be transformed into a meeting of the minds.[14/]

Rutgers, relying on West Jersey Title Co. v. Industrial Trust Co., 27 N.J. 144 (1958), also argued that the AAUP was subject to the language in F.2.a. because it (Rutgers) relied on the AAUP's statement that it ratified the contract and thus paid the new salary rate. That argument also lacks merit. The facts in West Jersey show that a divorce decree had issued providing for the specific

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14/ The parties, in their post-hearing briefs, argued over whether the AAUP members really ratified F.2.a. because that language was not contained in U-6. This case does not get to that level, however, because the parties never reached a meeting of the minds on the language. If they had, however, I would find that a union cannot necessarily avoid its obligations under section 5.4(b)(4) of the Act just because its leadership fails to give all, or the exact negotiated language to its membership for ratification.

disposition of certain property. But due to the omission of a formal conveyance, an issue arose as to who held title to the property. The Court held that the intent in the decree could not be repudiated by the omission since it would create an injustice. That case has nothing to do with the negotiations process and whether Keddie, O'Connor and/or the AAUP Executive Council actually agreed to F.2.a.. This case is distinguishable from West Jersey primarily because the parties here never reached an agreement on the critical issue in the first place. I will address Rutgers' reliance on the AAUP's apparent acceptance of that language in the Remedy section infra.

Therefore, based upon the above analysis, I find that Rutgers did not prove that the AAUP agreed to the language in F.2.a., thus, that part of Rutgers' charge should be dismissed.

Issue Regarding "the time of" Language

In contrast to the grievance pool/committee language, there is no dispute on the language the parties agreed to in Articles 9.F.5. and 10.G.7. The new agreement identically includes the original language from the predecessor articles in J-1, and the new and identical paragraph for both articles that was included in U-5 is the same in U-15. Here, unlike the grievance pool issue, U-6 included the new language the parties had agreed upon in U-5. Thus, I find there was a meeting of the minds on that language.

Apparently, sometime before April 29, O'Connor inserted the words "the time of" into Articles 9.F.5. and 10.G.7. Norman

objected to the change by sending U-7. O'Connor in U-8 did not deny adding those words to those articles, but argued it was done to correct a mutual mistake, and that it was not a substantive change.

The AAUP, however, did not present proof of a mutual mistake, and whether or not adding those three words to Articles 9 and 10 constitute a substantive change, is irrelevant. Without Rutgers' consent, O'Connor cannot add to the wording of language that has already been ratified. Consequently, the AAUP violated subsection 5.4(b)(3) of the Act by insisting on changing language the parties had already ratified. The AAUP did not violate subsection 5.4(b)(4) of the Act, however, because the parties did not reach a complete agreement that is ready for signature. Thus, that subsection of the charge should be dismissed.

REMEDY

The only violation I found in these cases was the AAUP's failure to negotiate in good faith (5.4(b)(3)) with Rutgers by insisting on adding language to Article 9, Section F.5. and Article 10, Section G.7. after the language of those Articles had been negotiated and ratified. The appropriate remedy for that violation normally would be to order the AAUP to cease and desist from insisting on adding additional language to those specific contract provisions. While I am finding that the AAUP technically violated the Act in April 1993, now, since negotiations have not been completed, the AAUP may attempt to negotiate over whether "the time of" should be added to those Articles.

Since I had previously found that the parties did not reach a meeting of the minds regarding the grievance pool language, it is premature to order the AAUP to sign an agreement including the Articles 9.F.5. and 10.G.7. language. The parties did not intend to implement their new contract article by article. It was intended to be implemented as a package only after complete agreement had been reached. Without a meeting of the minds on the grievance pool language, there was no complete agreement, thus, no 5.4(b)(4) violation of the Act. Negotiations having not been completed, the parties are still entitled to place any item on the table, even those that had previously been agreed upon, for which negotiations may be needed to achieve a complete agreement.

Normally, the appropriate remedy for a 5.4(b)(3) violation would also include a posting in addition to the cease and desist order. I am not, however, recommending a posting in this case. Compare, Passaic Valley Water Comm'n, P.E.R.C. No. 85-4, 10 NJPER 487 (¶15219 1984). These parties have been through difficult and protracted negotiations. Due to a mutual error they find themselves forced to return to the negotiations table to complete the negotiations for a new agreement. A posting on the (b)(3) violation will only exacerbate an already strained negotiations relationship and will not further the policies of the Act.

Finally, Rutgers in its post-hearing brief, raised two issues for which it sought a remedy. First, it argued that it was entitled to a favorable decision here because it paid the newly

negotiated salary rate in reliance upon the AAUP's statement that it had ratified the new agreement. Second, it argued that it was entitled to an order requiring it to rescind the pay increases implemented on April 9, 1993. I will discuss these matters together.

Rutgers' charge did not allege that the AAUP violated the Act by intentionally misleading it (Rutgers) into believing that it (AAUP) had ratified the contract language it (Rutgers) sought in order to begin obtaining the negotiated salary increase. But even if that allegation had been made, there is insufficient evidence to find that the AAUP acted improperly in telling Rutgers that it ratified the agreement. There was no evidence that the AAUP acted to deceive Rutgers. The problem here was that the parties sloppy negotiations resulted in a miscommunication regarding important language.

Rutgers' decision to implement the salary increase on April 9 was an honest and even normal reaction to the AAUP's ratification of what it (Rutgers) believed was the language in U-15. Rutgers may have relied on the AAUP's apparent ratification of the agreement, but it was not required to implement the new salary guide or any other part of the new agreement until a final document was signed by both sides. Compare, Carlstadt Bd. of Ed., H.E. No. 83-1, 8 NJPER 465, 467 (¶13219 1982). Without proof that the AAUP intended to deceive, Rutgers' reliance on the AAUP's apparent ratification of the new agreement, therefore, does not rise to a violation of the Act.

Rutgers' request for an order requiring it to rescind the April 9, 1993 pay increase is misplaced. The Commission's responsibility is to order remedies to fit the particular violation(s) found. Rutgers did not violate the Act here, thus, there is no basis upon which to issue an affirmative order requiring Rutgers to do something. Similarly, there is no basis upon which to issue the requested order based upon the 5.4(b)(3) violation found against the AAUP. I have previously discussed the appropriate remedy for that violation and it cannot include a requirement that Rutgers take certain action.

Rutgers, relying upon In re Hunterdon County Board of Chosen Freeholders, 116 N.J. 322 (1989), argued for the above requested remedy because it believes it cannot unilaterally rescind implementation of the new salary guide. While I need not directly address that issue, I note that the premise in Hunterdon was that the County acted unlawfully from the start, but Rutgers here, did not. The AAUP never suggested that Rutgers acted unlawfully by implementing the new salary guide. Rutgers, in fact, was acting in good faith when it implemented the newly negotiated salary guide based upon its belief that the AAUP had ratified U-15. But Rutgers was not required to implement that guide because the new agreement had not been finalized.

Ultimately, however, Rutgers must make its own choice about whether it legally can, or pragmatically should, implement the salary guide from J-1. I recommend against it. It will only

polarize the parties. This is a time for the parties to recognize their mutual failure to adequately communicate their respective beliefs in the prior negotiations process, put that era behind them, and quickly, and with an open mind, engage in negotiations needed to complete the language for a new agreement.

I close using the final words of the Supreme Court in Hunterdon where it said that parties can better effectuate the goals of the Act:

> ...by sincerely attempting to communicate with each other before resorting to the procedural weapons provided by the labor-relations process.
>
> 116 N.J. at 339.

Based upon the above findings and analysis, I make the following:

CONCLUSIONS OF LAW

1. Rutgers did not violate any provision of the Act.

2. The AAUP did not violate subsections 5.4(b)(4) of the Act.

3. The AAUP violated subsection 5.4(b)(3) and derivatively (b)(1) of the Act only by insisting on adding "the time of" language into language ratified without those words.

RECOMMENDED ORDER

I recommend the Commission ORDER:

A. That the AAUP cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the

Act, particularly, by insisting on adding additional words to contract language already ratified without those words.

2. Refusing to negotiate in good faith with Rutgers concerning terms and conditions of employment for employees in the AAUP's unit, particularly by insisting on adding additional words to contract language already ratified without those words.

B. That the AAUP take the following action: negotiate with Rutgers over any attempt to change language that was previously agreed upon prior to ratifying a new agreement.

C. That the 5.4(a)(1), (5) and (6) and (b)(4) allegations and the remainder of the (b)(1) and (3) allegations be dismissed.

Arnold H. Zudick
Hearing Examiner

DATED: February 28, 1994
Trenton, New Jersey