

P.E.R.C. NO. 86-148

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

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

Respondents,

-and-

Docket Nos. CO-85-103-18
CO-85-318-19

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

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the University of Medicine and Dentistry violated the New Jersey Employer-Employee Relations Act when it refused to negotiate with the University of Medicine and Dentistry of New Jersey, Council of American Association of University Professors Chapters over using its discretion to grant exemptions to salary caps available under the salary administration memoranda issued by the State for fiscal years 1984 and 1985. The Commission further holds that the University violated the Act when it failed to negotiate with the Association over whether Doctors Verier and Hess would continue to receive salary cap exemptions after they had been demoted from administrative positions to teaching positions. As a remedy for these violations, the Commission orders negotiations over the amount of increased compensation employees may receive for the work they must perform. The Commission further holds, however, that UMDNJ did not violate the Act when it failed to negotiate over whether Doctor Morris would receive a salary cap exemption.

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ASSOCIATION OF UNIVERSITY PROFESSORS
CHAPTERS,

Charging Party.

Appearances:

For the Respondent, W. Cary Edwards, Attorney General
(Melvin E. Mounts, Deputy Attorney General)

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

DECISION AND ORDER

I. Introduction

The University of Medicine & Dentistry of New Jersey,
Council of American Association of University Professors Chapters
("AAUP") is the majority representative of basic science faculty of
the University of Medicine & Dentistry of New Jersey ("UMDNJ").
Pursuant to state regulations, a cap has been placed on the salaries
of UMDNJ employees. UMDNJ, however, has discretion to grant up to
30 salary cap exemptions for basic science faculty.

In State of New Jersey and University of Medicine & Dentistry, P.E.R.C. No. 85-106, 11 NJPER 290 (¶16105 1985), ("UMDNJ I"), the Public Employment Relations Commission held that the State of New Jersey and UMDNJ were not obligated under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), to negotiate over the creation of the salary cap and the maximum number of salary exemptions, but were obligated to negotiate over the possible use of UMDNJ's discretion to grant available exemptions. In State of New Jersey and University of Medicine & Dentistry, P.E.R.C. No. 86-7, 11 NJPER 452 (¶16158 1985) ("UMDNJ II"), we clarified our remedial order to specify that the respondents had to negotiate over which negotiations unit members might receive salary cap exemptions.

AAUP and the respondents appealed. On April 14, 1986, the Appellate Division affirmed our determinations substantially for the reasons we had expressed. App. Div. Dkt. No. A-11-85T7 (4/14/86).

UMDNJ I and II involved the parties' negotiations rights and obligations for fiscal years 1981, 1982 and 1983. The instant case involves fiscal years 1984 and 1985. We apply UMDNJ I and II and hold that respondents had no obligation to negotiate over the creation of the salary cap or the maximum number of salary cap exemptions, but did have an obligation to negotiate over the possible use of UMDNJ's discretion to grant available exemptions.

II. Procedural History

On October 18 and 24, 1984, AAUP filed an unfair practice charge and amended charge (CO-85-103) against the State and UMDNJ. This charge, as amended, concerned fiscal year 1984 and alleged that the respondents violated subsections 5.4(a)(1), (3) and (5)^{1/} of the Act when they refused to negotiate over establishing or implementing salary cap guidelines; refused to negotiate over how many and which basic science faculty might receive available salary cap exemptions; discriminatorily granted exemptions to basic science administrators, but not faculty; and illegally denied exemptions to certain faculty members who had medical and dental degrees.

On June 7 and August 28, 1985, AAUP filed another charge and amended charge (CO-85-318). This charge, as amended, concerned fiscal year 1985 and essentially repeated the allegations concerning fiscal year 1984. The charge also alleges that respondents violated our orders in UMDNJ I and II; that they unilaterally designated three faculty members to exceed the salary cap and that the chairperson of UMDNJ's negotiations team stated that UMDNJ would not

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

abide by the Commission's order requiring negotiations over which basic science faculty might receive available salary cap exemptions.

On August 1, 1985, the Director of Unfair Practices issued Complaints and Notices of Hearing on the charges concerning fiscal years 1984 and 1985 and consolidated the Complaints. The respondents then filed an Answer denying that they had violated the Act and asserting, as their primary defense, that statutes and regulations entirely preempted negotiations over the salary cap and exemptions. The Answer did not claim that respondents had a managerial prerogative to refuse to negotiate.

On September 18 and 19 and October 1, 1985, Hearing Examiner Arnold H. Zudick conducted a hearing. Recognizing that the instant case involved essentially the same issues and many of the same facts as UMDNJ I and II, the parties stipulated that the exhibits and factual stipulations introduced in UMDNJ I would be admitted in this proceeding.^{2/} The parties then examined witnesses and introduced exhibits concerning developments in fiscal years 1984 and 1985. They filed post-hearing briefs by December 2, 1985.

^{2/} Respondents' attorney submitted that that there were no new facts changing the basic scenario for fiscal years 1984 and 1985 and that the decision in this case should be the same as the final disposition in UMDNJ I and II. At the time of the hearing, the Appellate Division had not yet affirmed those decisions.

On February 6, 1986, the Hearing Examiner issued his report and recommended decision. H.E. No. 86-38, 12 NJPER 166 (¶17066 1986) (copy attached). Applying UMDNJ I and II, he held that the creation of salary cap guidelines for fiscal years 1984 and 1985 and the designation of a maximum number (30) of salary cap exemptions for basic science faculty did not violate the Act, but that respondents did violate the Act by refusing to negotiate over which basic science faculty might receive available salary cap exemptions. He specifically found that respondents violated subsections 5.4(a)(1) and (5) by refusing to negotiate over whether Dr. N. Ronald Morris should have received a salary cap exemption and by negotiating directly with Doctors Charles Vevier and Arthur Hess instead of the AAUP over the salary cap exemptions they retained after being demoted from administrative positions to teaching positions. He recommended dismissal of the Complaint's remaining allegations, including the alleged violations of subsection 5.4(a)(3) and the allegations concerning the statement of UMDNJ's negotiations chairperson that UMDNJ would not give up control of salary cap exemptions.

On March 4, after having received an extension, AAUP filed exceptions. It reasserts that no issues surrounding the implementation of salary caps have been preempted. It adds that the Hearing Examiner should have recommended negotiations over up to 30 exemptions for each fiscal year and should have found that the respondents violated subsection 5.4(a)(3) by discriminating between administrators and faculty in granting salary cap exemptions.

On March 10, after having received an extension, respondents filed exceptions. With respect to liability issues, they assert that the Hearing Examiner erred in concluding that their actions concerning Doctors Morris, Vevier and Hess violated the Act. With respect to remedial issues, they assert that the recommended order would violate their managerial prerogatives to the extent it requires negotiations over which basic science faculty, up to 12, might receive salary cap exemptions for fiscal years 1984 and 1985 rather than negotiations over the number of exemptions, up to 12, which might be allocated to basic science faculty.

III. Findings of Fact

The facts are not in dispute. We incorporate the findings of fact in UMDNJ I concerning fiscal years 1981, 1982 and 1983. We incorporate the Hearing Examiner's findings of fact concerning fiscal years 1984 and 1985.

We supplement the Hearing Examiner's findings in two respects. First, the Director of the Division of Budget and Accounting and the president of the Civil Service Commission jointly issued the salary administration memoranda for fiscal years 1984 and 1985. Second, these memoranda state that authorization by the Salary Adjustment Committee ("SAC") for a salary cap exemption in one year shall not necessarily be considered automatic approval for additional salary increases in succeeding years and additional

documentation may be required. It appears that the 18 administrators who received salary cap exemptions in fiscal year 1983 also received salary cap exemptions in fiscal years 1984 and 1985, and that UMDNJ no longer sends yearly documentation to the Department of Higher Education for these employees. UMDNJ's president testified that the group of administrators receiving exemptions is generally reviewed each year to see if anyone should be removed from the list; none had been removed at the time of the hearing, but UMDNJ was then in the process of removing one or two for the next year. In sum, in theory there are 30 available salary cap exemptions each year, but in practice the renewal of existing administrative exemptions has reduced the number of available exemptions to 12 for fiscal years 1984 and 1985.

IV. Analysis

A. Liability Issues

The basic liability issue in this case is the same as in UMDNJ I: the extent of respondents' obligation to negotiate over salary cap guidelines and exemptions. In UMDNJ I, we rejected both AAUP's argument that the salary administration memoranda for fiscal years 1981, 1982 and 1983 did not preempt negotiations in any respect and respondents' argument that these memoranda preempted negotiations in every respect. We held instead that the memoranda preempted negotiations to the extent they specified a salary cap and

a maximum number of exemptions, but permitted negotiations to the extent they gave UMDNJ discretion to grant up to a certain number of exemptions. The Appellate Division affirmed this holding, and neither AAUP nor the respondents have identified any factual differences concerning fiscal years 1984 and 1985 which might warrant a different result here. We accordingly hold that respondents, although not required to negotiate over the existence of a salary cap or the maximum number of salary cap exemptions, violated their obligation to negotiate with AAUP over using its discretion to grant exemptions available under the salary administration memoranda for fiscal years 1984 and 1985.

This case presents some specific questions concerning respondents' obligation to negotiate. The Hearing Examiner concluded that UMDNJ violated the Act when it failed to negotiate over whether Dr. Morris would receive a salary cap exemption. We disagree. While an exemption for Dr. Morris was considered, one was never granted and the parties agreed that no action would be taken pending resolution of this litigation. These circumstances do not establish that UMDNJ acted unilaterally in violation of subsection 5.4(a)(5). The Hearing Examiner also concluded that UMDNJ violated the Act when it failed to negotiate with AAUP over whether Doctors Vevier and Hess would continue to receive salary cap exemptions after they had been demoted from administrative positions to teaching positions represented by AAUP. We agree and incorporate the Hearing Examiner's analysis (p. 28). While UMDNJ was not

required to negotiate over demotions from positions outside AAUP's negotiations unit, it was obligated to negotiate over the compensation unit employees receive and this obligation attached once the demotions had taken place. The Hearing Examiner also found that UMDNJ was not required to negotiate over granting exemptions to Doctor Henry Brezenoff and Paul Gazzero since they occupied administrative positions outside AAUP's unit. We agree. Finally, the Complaint alleged that the denial of exemptions to two basic science faculty with medical or dental degrees constituted an unfair practice. We held it did not in UMDNJ I and reaffirm that ruling here.

We next consider whether UMDNJ violated subsections 5.4(a)(1) and (3) by favoring administrators and discriminating against basic science faculty. In UMDNJ I, we rejected this claim as it pertained to fiscal years 1981, 1982 and 1983. We do so here as it pertains to fiscal years 1984 and 1985.^{3/}

We finally consider whether the statement of UMDNJ's lead negotiator that the UMDNJ would not give up control of exemptions violated subsection 5.4(a)(1). The Hearing Examiner concluded it

^{3/} AAUP asserts that the Hearing Examiner miscast the burden of proof by suggesting that AAUP had argued that motive is not an indispensable element of proof. It asserts that it merely argued that direct proof of anti-union animus was not necessary and that the circumstantial evidence proved a violation. We do not believe, however, that the circumstantial evidence shown here is sufficient to prove hostility under In re Bridgewater Twp., 95 N.J. 235 (1984).

did not, and AAUP has not excepted. We adopt this conclusion for the reasons in the Hearing Examiner's opinion (pp. 26-27).

B. Remedial Issues

The Hearing Examiner has recommended an order requiring UMDNJ to take the following affirmative action: (1) negotiate in good faith with AAUP over which basic science faculty, up to 12, might receive salary cap exemptions for fiscal years 1984 and 1985, subject to submitting proper documentation to the Department of Higher Education and receiving SAC's approval; (2) negotiate in good faith with AAUP over the salaries for Doctors Vevier and Hess; and (3) post a notice of the violations and remedial actions taken. AAUP contends that the first aspect of this recommended remedy should be modified to require negotiations over up to 30 exemptions for each fiscal year. Respondents contend that the first aspect of this recommended remedy should be modified to require negotiations over the number of exemptions, up to 12, but not over the identity of the faculty who might receive such exemptions. The first aspect's documentation and approval requirements and the second and third aspects of the recommended order are not in dispute, and we will adopt them without further discussion.

AAUP contends that the salary administration memoranda for fiscal years 1984 and 1985 permitted up to 30 exemptions and that negotiations should be required over the full amount of available

exemptions instead of just 12. The Hearing Examiner, applying UMDNJ I, rejected that position because UMDNJ had already granted 18 valid exemptions to non-unit administrators.^{4/} We likewise apply UMDNJ I and adopt that recommendation.

Respondents contend that our remedial discretion should be limited to requiring negotiations over the number of exemptions, up to 12, basic science faculty might receive, rather than requiring negotiations over which basic science faculty, if any and up to 12, might receive exemptions. Respondents assert the latter remedy would significantly interfere with its prerogative to determine promotional criteria. We rejected this argument in UMDNJ II, the Appellate Division affirmed, and respondents have not attempted to distinguish that case. We reject it again now and adopt the same remedy as in UMDNJ I and II. We are simply requiring negotiations over the amount of increased compensation employees may receive for the work they must perform. In Lullo v. IAFF, 55 N.J. 409 (1970), the Court rejected a claim that such questions of increased compensation should not be collectively negotiated. The Court stated:

^{4/} More precisely, the Hearing Examiner found that 20 exemptions had been granted to administrators, but two of these exemptions violated the Commission's order in UMDNJ I and II that UMDNJ negotiate with AAUP over up to 12 possible exemptions. The Hearing Examiner also found that two administrators were improperly allowed to retain exemptions without negotiations following their demotions to unit positions. No one has argued that the number of available exemptions should be found to be less than 12, and the only issue is whether the number of available exemptions for negotiations should be 30 instead.

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

Since Lullo, the Supreme Court has always held faculty compensation mandatorily negotiable. Bd. of Ed. of City of Englewood v. Englewood Teachers Ass'n, 64 N.J. 1 6-7 (1973); Burlington County College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 49 (1978) ("Galloway II"); Bd. of Ed. of Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582, 589 (1981); Local 195, IFPTE v. State, 88 N.J. 393, 403 (1982); Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9, 15 (1983). Just recently, the Appellate Division stressed this State's strong legislative policy favoring collective negotiations and held mandatorily negotiable the compensation issue of initial placement on a salary guide for teachers. Belleville Ed Ass'n v. Belleville Bd. of Ed., 209 N.J. Super. 93 (App. Div. 1986).

We do not prohibit UMDNJ from taking any negotiations position or require it to agree to any exemptions.^{5/} Like all other employers negotiating compensation issues, UMDNJ can protect its legitimate interests in preserving flexibility and competitiveness through the collective negotiations process.

ORDER

II. The University is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act by refusing to negotiate in good faith with AAUP over which basic science faculty, up to 12, at the University might receive salary cap exemptions; and

2. Refusing to negotiate in good faith with AAUP over which basic science faculty, up to 12, might receive salary cap exemptions for fiscal years 1984 and 1985; any exemptions allowed through negotiations are subject to the submission of proper documentation to the Department of Higher Education and the approval of the Salary Adjustment Committee;

^{5/} Nor do we suggest that the parties must negotiate over each exemption before one is granted. We will leave the mechanics of negotiations to the parties, but we would encourage negotiations over the number of available exemptions and the identity of possible recipients at the same time rather than exemption-by-exemption negotiations.

3. Failing to negotiate in good faith with the AAUP over whether Doctors Vevier and Hess should have received salary cap exemptions; and

4. Negotiating salaries directly with--and failing to negotiate in good faith with the AAUP over the salaries for--Doctors Vevier and Hess once they were placed in the AAUP's unit.

B. Take the following affirmative action:

1. Negotiate in good faith with AAUP over which basic science faculty, up to 12, might receive salary cap exemptions for fiscal 1984 and 1985; any exemptions allowed through negotiations are subject to the submission of proper documentation to the Department of Higher Education and the approval of the Salary Adjustment Committee.

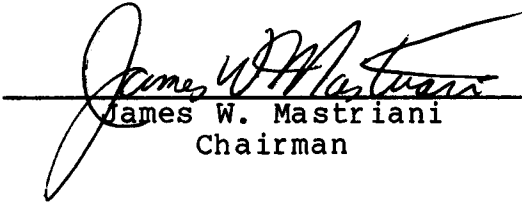
2. Negotiate in good faith with the AAUP over the salaries for Doctors Vevier and Hess.

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

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

II. That the Complaint(s) be dismissed with respect to the alleged violations of §5.4(a)(3).

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

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

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

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act by refusing to negotiate in good faith with AAUP over which basic science faculty, up to 12, at the University might receive salary cap exemptions.

WE WILL cease and desist from refusing to negotiate in good faith with AAUP over which basic science faculty, up to 12, might receive salary cap exemptions for fiscal years 1984 and 1985; any exemptions allowed through negotiations are subject to the submission of proper documentation to the Department of Higher Education and the approval of the Salary Adjustment Committee.

WE WILL cease and desist from failing to negotiate in good faith with the AAUP over whether Doctors Vevier and Hess should have received salary cap exemptions.

WE WILL cease and desist from negotiating salaries directly with--and failing to negotiate in good faith with the AAUP over the salaries for--Doctors Vevier and Hess once they were placed in the AAUP's unit.

WE WILL negotiate in good faith with AAUP over which basic science faculty, up to 12, might receive salary cap exemptions for fiscal 1984 and 1985; any exemptions allowed through negotiations are subject to the submission of proper documentation to the Department of Higher Education and the approval of the Salary Adjustment Committee.

WE WILL negotiate in good faith with the AAUP over the salaries for Doctors Vevier and Hess.

STATE OF NEW JERSEY, UNIVERSITY OF MEDICINE & DENTISTRY
(Public Employer)

Dated _____ By _____ (Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, Trenton, NJ 08608, (609) 292-9830.

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

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OF MEDICINE & DENTISTRY OF NEW JERSEY

Respondent,

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OF NEW JERSEY, COUNCIL OF AMERICAN
ASSOCIATION OF UNIVERSITY PROFESSORS
CHAPTERS,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the University of Medicine and Dentistry of New Jersey violated §5.4(a)(5) and derivatively 5.4(a)(1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it failed and refused to negotiate with the AAUP over which basic science faculty would receive salary cap exemptions for fiscal 1984 and 1985; when it unilaterally granted exemptions to certain unit members; and, when it circumvented the AAUP and negotiated salaries of two unit members with the affected employees.

In accordance with In re State of N.J. and UMDNJ, P.E.R.C. No. 85-106, 11 NJPER 290 (¶16105 1985), and P.E.R.C. No. 86-7, 11 NJPER 615 (¶16158 1985), the Hearing Examiner found that the University/State did not violate the Act by fixing a salary cap or by establishing exemptions to the cap.

The Hearing Examiner recommended the dismissal of the §5.4(a)(3) allegations in the Complaint.

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

H.E. NO. 86-38

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

In the Matter of

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

Respondent,

-and-

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CHAPTERS,

Charging Party.

Appearances:

For the Respondent
W. Carey Edwards, Attorney General
(Melvin E. Mounts, D.A.G., of Counsel)

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

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

Unfair Practices Charges were filed with the Public
Employment Relations Commission ("Commission") by the University of
Medicine and Dentistry of New Jersey, Council of American
Association of University Professors Chapters ("AAUP" or
"Association") alleging that the State of New Jersey and the
University of Medicine and Dentistry of New Jersey ("University"
and/or "State") violated the New Jersey Employer-Employee Relations

Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"). The Charge in Docket No. CO-85-103-18 was filed on October 18, 1984 and amended on October 24, 1984 alleging that the Unnversity violated §§5.4(a)(1), (3) and (5) of the Act. The Charge in Docket No. CO-85-318-19 was filed on June 7, 1985 and amended on August 28, 1985 also alleging that the University violated §§5.4(a)(1), (3) and (5) of the Act.^{1/}

In CO-85-103 the AAUP alleged (as paraphrased below) that the University violated the Act by:

1) Unilaterally establishing and implementing salary cap guidelines including the establishment of a maximum salary cap.

2) Failing to negotiate over how many employees represented by the AAUP should be allowed exemptions to exceed the salary cap.

3) Discriminating against the AAUP by granting salary cap exemptions for administrators while not granting exemptions to certain faculty members represented by the AAUP.

4) Failing to allow the salaries of certain unit members holding medical and dental degrees from rising above the salary cap in accordance with the guidelines established for fiscal 1984 and 1985.

In CO-85-318 the AAUP alleged (as paraphrased below) that the University violated the Act by:

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

1) Unilaterally determining in fiscal 1985 which employees will be exempt from the salary cap, and unilaterally selecting faculty member Dr. Ronald Morris to be exempt from the cap, and later unilaterally rescinding Dr. Morris' exemption.

2) Unilaterally selecting in fiscal 1985 individual administrators and two individuals represented by the AAUP to be exempt from the salary cap.

3) Failing to negotiate in fiscal 1985 over the establishment of a salary cap, over criteria by which employees can exceed the salary cap, and failure to negotiate over the implementation of the salary cap and the number of individuals who will exceed the cap.

4) Failing to negotiate salaries of employees represented by the AAUP and unilaterally implementing terms and conditions of employment.

5) Failing to abide by the Commission decisions in In re State of N.J. and UMDNJ, P.E.R.C. No. 85-106, 11 NJPER 290 (¶16105 1985), and P.E.R.C. No. 86-7, 11 NJPER 452 (¶16158 1985) to negotiate with the AAUP over which basic science faculty members will be exempt from the salary cap.

6) Unilaterally selecting two faculty (unit) members, who were formerly administrative employees, to receive exemptions from the salary cap.

7) Circumventing the AAUP and negotiating with individual faculty members represented by the AAUP concerning the implementation of salaries in excess of the salary cap.

8) Discriminating against the AAUP by implementing salary caps and rewarding managerial executives with exceptions to the cap to weaken the effectiveness of the AAUP as a majority representative.

The AAUP is seeking (as paraphrased below) an order requiring the University to:

1) negotiate in good faith with the AAUP over the establishment of a salary cap; over the criteria to exceed the salary cap; over the implementation of the salary cap; and, over how many and which employees will exceed the salary cap.

2) allow salaries of employees represented by the AAUP, including all faculty members with medical and dental degrees, to exceed the salary cap.

3) refrain from negotiating exemptions from the salary cap with individual faculty members, and from paying individual faculty members salaries in excess of the cap except when those salaries have been negotiated by the AAUP.

On August 1, 1985, the Director of Unfair Practices issued Complaints and Notices of Hearing and an Order Consolidating the Complaints. On September 21, 1985 the University filed Answers to the Complaints wherein it denied committing any violations of the Act. The University asserted as its primary defense that the actions complained of were preempted by law and regulations in that it (the University) acted pursuant to the Appropriations Act, and regulations of the Civil Service Commission and the Division of Budget and Accounting, and based upon recommendations from the Chancellor of Higher Education.

Hearings were held in this matter on September 18 and 19 and October 1, 1985 at which the parties had the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. The last transcript was received by October 9, 1985, and both parties filed post-hearing briefs the last of which was filed on November 22, 1985. The AAUP filed a reply brief on December 2, 1985.

Procedural History

On October 30, 1981 the AAUP filed an Unfair Practice Charge (CO-82-92-41) against the University alleging that the

University violated §§5.4(a)(1), (3) and (5) of the Act by unilaterally and discriminatorily capping the salaries of certain faculty members represented by the AAUP, which had the effect of preventing certain basic science faculty from receiving, during fiscal 1982 and 1983, salaries they otherwise were entitled to under the parties' collective agreement. The AAUP alleged further that the University (and State) had an obligation to negotiate over the criteria for the exemptions, who would receive these exemptions, and that the exemptions were discriminatorily denied to employees represented by the AAUP.

At the hearing in CO-82-92-41 the parties stipulated to, and introduced as separate exhibits, a considerable amount of evidence demonstrating the background of the parties' relationship and the history of the negotiations and development of faculty salaries through fiscal 1980 and 1981. The parties also introduced evidence regarding the development of salaries for basic science faculty for fiscal 1982 and 1983.

On October 18, 1984 the Hearing Examiner in that case issued his Recommended Report and Decision, H.E. No. 85-17, 10 NJPER 615 (¶15294 1984), finding that the University violated the Act. The Hearing Examiner did not find that the creation of a salary cap violated the Act, and he determined that neither the University nor the State violated the Act when they refused to negotiate over the criteria for exceeding the salary cap. However, the Hearing Examiner found that, to the extent that the University exercised

discretion in granting exemptions to the cap, it was a violation not to negotiate over how many and which basic science faculty would be exempt. The parties filed exceptions to that decision and on April 26, 1985, the Commission issued a decision, In re State of N.J. and UMDNJ, P.E.R.C. No. 85-106, 11 NJPER 290 (¶16105 1985) ("UMDNJ" I), adopting most of the Hearing Examiner's decision. The Commission did not find that the creation of the salary cap, the criteria for exemptions to the cap, or the administration of the exemptions violated the Act. It did find that the University violated the Act regarding how to use their discretion to grant exemptions. Specifically, the Commission held that the University violated the Act by refusing to negotiate over which basic science faculty would receive allocated salary cap exemptions for fiscal 1982 and 1983.^{2/} Since the University used 18 of 30 available exemptions in 1983, the Commission ordered the University to negotiate over the remaining exemptions and of allowing up to 12 basic science faculty to receive exemptions for fiscal 1983.

On May 17, 1985 the University/State filed a Motion for Reconsideration of the Commission's order in UMDNJ I. The Respondent's argued that to negotiate over which faculty members

^{2/} In UMDNJ I the Commission held that any negotiated agreement to grant or deny exemptions allocated to basic science faculty would still be subject to documentation to the Department of Higher Education, and approval by the Salary Adjustment Committee ("SAC"), a committee created by statute and regulation.

would receive exemptions would implicate promotional criteria and was, therefore, not negotiable. On July 2, 1985 the Commission issued a decision, In re State of N.J. and UMDNJ, P.E.R.C. No. 86-7, 11 NJPER 452 (¶16158 1985)(UMDNJ II), rejecting the Respondent's argument, but clarifying its Order to show that the University:

...must negotiate over which individual faculty members, if any and up to 12, will receive salary cap exemptions, subject to the submission of proper documentation to the Department of Higher Education and the approval of the Salary Adjustment Committee.
11 NJPER at 452.

The Commission's decision in UMDNJ II (and its decision in UMDNJ I) was appealed on August 1, 1985, appeal pending Appellate Division Docket No. A-1185T7. On September 13, 1985 the Appellate Division stayed the implementation of the Commission's order in UMDNJ II.

Since the Commission's decision in UMDNJ II did not issue until after the end of fiscal 1984 and 1985, and since the Appellate Division stayed the implementation of the Commission's Order, the University/State in fiscal 1984 and 1985 did not change its use of salary cap exemptions from what it had been in fiscal 1982 and 1983, and it did not, in fiscal 1984 and 1985, negotiate over how many and which basic science faculty, if any, would receive exemptions to the salary cap for those years. It was the University's refusal to change its method of operations regarding the use of salary cap exemptions in fiscal 1984 and 1985 that led to the filing of the instant charges.

In its post-hearing brief and oral argument in the instant matters the AAUP raised nearly the same allegations here that it raised in CO-82-92-41. In trying the instant cases the parties agreed to rely on the stipulations, exhibits, procedural history, the transcripts and briefs submitted in CO-82-92-41 which have been made part of the instant record (Transcript "T"-1 pp. 8-27). The record shows that the facts regarding fiscal 1984 are similar to the facts regarding 1982 and 1983 (T 1 p. 27). The AAUP, here, has renewed the same legal arguments raised in CO-82-92-41.

Unfair Practice Charges having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing and consideration of the post-hearing briefs, this matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record I make the following:

Findings of Fact

1. The State of New Jersey, and the University of Medicine and Dentistry of New Jersey are public employers within the meaning of the Act.

2. The Association of University Professors Chapters is a majority representative within the meaning of the Act and represents the basic science faculty employed by the University.

Background Facts

3. The parties stipulated to the inclusion herein of 15 findings of fact found by the Commission in UMDNJ I, 11 NJPER at 292-293 (T-1 p. 6). Those facts are:

1. The Council of Chapters of the American Association of University Professors at the University of Medicine and Dentistry of New Jersey (AAUP), the Charging Party, is the exclusive public employee representative under the Act for full-time members of the faculty of respondent University of Medicine and Dentistry of New Jersey (University). There are 700 members in the unit represented by the AAUP, 235 of whom are members of the basic science faculty.^{3/}

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

3. From 1972 until the present time, the AAUP has entered into five (5) separate collective negotiations contracts with the State and/or University. The State,

^{3/} According to Joyce Orenstein, Executive Director of the AAUP, there are approximately 50 basic science faculty who are still capped (T 1 p. 37).

through the Governor's Office of Employee Relations, the University and the Department of Higher Education (DHE), has actively participated in and approved all such agreements, the latest one covering the period July 1, 1981 to June 30, 1983.^{4/}

*(Footnote 7 from UMDNJ I):

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

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

^{4/} Since the completion of the hearing (and facts) leading to UMDNJ I the parties have entered into their sixth separate collective negotiations agreement. That latest agreement was admitted into evidence in the instant cases as Exhibit J-14, and covers the period July 1, 1983 to June 30, 1986.

5. Following negotiations leading to the Agreement between the parties covering the period July 1, 1979 to June 30, 1981 (Exhibit J-2), the University submitted to SAC requests for salary increases for "medical faculty," which included faculty members who were not licensed doctors and dentists. The requests were not processed pending receipt of a legal opinion requested by DHE through its Chancellor, T. Edward Hollander, from the Attorney General as to whether faculty who were not licensed doctors or dentists, were included within the definition of the term "medical faculty" in the Appropriations Act for that year. L.1979, c.119.

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

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

8. By cover memorandum dated March 3, 1981, the State promulgated a document, revised on February 27, 1981, entitled Criteria for SAC approval of CMDNJ Faculty and Administrators Salaries Above the Department Head Maximum (Exhibit J-6). This document was neither negotiated with

^{5/} Since the development of the facts in Item No. 7 the AAUP has attempted to negotiate the issue of salary caps with the University for fiscal 1984 and 1985, but the University did not negotiate, and continued to unilaterally determine which employees would receive exemptions to the cap. Although the parties did not specifically stipulate regarding the effect of J-14, the 1983-86 agreement, it is obvious from the parties' positions that nothing contained in J-14 should be understood to constitute a waiver of the AAUP's position regarding salary caps.

the AAUP nor disclosed to it during negotiations. Pursuant to it, medical faculty could be considered for salary adjustments in excess of the statutory caps with limitations specified. There were also exempted from the statutory cap for fiscal 1982 the President, the Executive Vice-President, the Vice-President, Health Care Facilities, the Dean, New Jersey Medical School, the Dean, New Jersey Dental School, the Dean, Graduate School of Biomedical Sciences, the Dean, Rutgers Medical School, the Dean, New Jersey School of Osteopathic Medicine and Department Chairpersons. Additionally, the administrators who held the titles of Associate Dean, Assistant Dean and Section Head, Vice-President and Executive Director-College Hospital were permitted to be considered for salary adjustments in excess of the cap as were administrators who held medical or dental degrees and ten administrators who did not have medical or dental degrees. The guidelines were retroactive to July 1, 1980.

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

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

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

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

13. Pursuant to Salary Administration Memorandum #8-83 (Exhibit J-8), salaries for faculty on the clinical salary scale (exclusive of faculty paid from the basic science salary scale) were increased to the level called for under the contracted agreement by action of the President of UMDNJ. A total of 131 faculty members holding medical or dental degrees were thus released from the cap and allowed to receive the contracted for increases. No basic science faculty on the basic science salary scale were permitted to receive salaries above the \$59,000 maximum.

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

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

The parties also stipulated to the inclusion in this case of Exhibits J-1 through J-12, Exhibits CP-1 through CP-30, and Exhibits R-1 and R-2, from UMDNJ I (T 1 pp. 7-8). Those documents were admitted herein, and in order to be consistent with those markings I began the markings in this case with J-13, CP-31, and R-3 respectively.^{6/}

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

Facts Regarding Fiscal 1984 And 1985

5. For fiscal 1984 a salary cap of \$62,000 was imposed through a Salary Administration Memorandum (Exhibits CP-34 and C-1B and C-1C) on April 19, 1984 again by Civil Service Commission President, Eugene McCaffrey.^{7/} McCaffrey issued a Salary

^{6/} The stipulated facts and exhibits show what occurred in 1982 and 1983 and prior thereto regarding salaries for the basic science faculty. That information is relevant in this case primarily as background information. However, since the parties agree that the facts for fiscal 1984 are nearly identical to the facts in CO-82-92-41 for 1983 (T 1 p. 27), then I will rely on the stipulated facts and exhibits as constituting most of the facts for 1984. Additional facts for 1984 are included infra.

^{7/} On January 11, 1984 Ronald Marlowe, Assistant Chancellor of the Department of Higher Education, sent a memorandum to Richard Standiford, Director of the Division of Budget and Accounting (Exhibit CP-31), and a memorandum to the University's Chief Financial Officer (Exhibit CP-32), concerning the salary cap for fiscal 1984. Both CP-31 and CP-32 concerned the establishment of regulations, criteria and

Administration Memorandum (Exhibits CP-38 and C-2A) establishing a salary cap of \$64,500 for fiscal 1985.^{8/} Just as in the 1983 Salary Administration Memorandum, both the 1984 and 1985 salary cap memorandums authorized the University's President, Dr. Stanley Bergen, to grant up to 30 exceptions to the salary caps.

From all of the evidence in the record I find that the 30 exemptions to the salary cap mentioned in CP-34 and CP-38 (and CP-27 the 1983 Salary Administration Memorandum) is the same 30 exemptions, and does not mean 30 different exemptions for each year, 1983, 1984 and 1985 for a total of 90 exemptions. Rather, the University from 1983 through 1985 had one block of 30 salary cap exemptions it could grant. It used 18 exemptions, leaving 12 exemptions available for 1983, 1984 and 1985.

Chancellor Hollander testified that the grant of 30 exemptions was arbitrarily determined by Civil Service President McCaffrey and himself (T 2 p. 21). Hollander explained that 30 was

7/ Footnote Continued From Previous Page

salary caps for fiscal 1984. That information was not shared with or negotiated with the AAUP. On February 18, 1984 Chancellor Hollander sent Mr. Standiford a memorandum, Exhibit CP-33, which was a draft of what eventually became CP-34. Exhibit CP-33 was not negotiated with the AAUP.

8/ On January 16, 1985 Judith Turnbull, Director of Personnel Policies for the Department of Higher Education, sent a memorandum, to Chancellor Hollander (Exhibit CP-37), attaching the draft of what became CP-38. The information contained in the draft was shared with Standiford, and University President Bergen, but not with the AAUP.

arrived at in order to give the University some leeway, but he did not expect a need to review that figure each year (T 2 pp. 21-22). When asked whether the University would utilize all 30 exemptions Hollander testified:

I expected in time they would, yes....I would assume that the institution would want to maintain some leeway and flexibility so that should the need to make an appointment above the cap, it would have the wherewithal to do that, because we made it very clear to the university, once they made that, that was it.

So I would expect that there would always be some vacancies....

I didn't expect we would need to review that every year. We expected the total size of the staff to be roughly stable.^{9/} (T 2 pp. 22-23).

The record also shows that in addition to using 18 of 30 exemptions by calendar 1983, the University has now used two additional exemptions. It exempted Dr. Henry Brezenoff in fiscal 1984 (Exhibit CP-40 and CP-40A) and exempted Mr. Paul Gazzero in fiscal 1985 (Exhibits CP-41 and CP-41A), leaving only ten exemptions of the original 30 exemptions still available for negotiations pursuant to UMDNJ I and II.^{10/}

^{9/} I interpret this testimony to show that once the University used up all 30 exemptions to the cap they would have no more exemptions unless granted additional exemptions by the State. Although the AAUP in its post-hearing brief argued that the University did not technically renew the 18 exemptions from 1983, that does not establish that more than one block of 30 exemptions was available.

^{10/} Whether the University's use of two additional exemptions without negotiations with the AAUP pursuant to UMDNJ I and II was a violation of the Act will be discussed infra.

Dr. Brezenoff is the Associate Dean of Graduate School of Biomedical Sciences. The University requested an exemption for him in early 1983 retroactive to July 1, 1982. The SAC approved his exemption on January 10, 1984 retroactive to October 29, 1983 (CP-40A). Mr. Gazzerio was hired by the University in 1985 as Senior Vice President for Administration and Finance and requested an exemption for him on February 20, 1985.

The 1984 and 1985 salary cap memorandums required the same documentation to the Department of Higher Education and submission to SAC as the 1982 and 1983 memorandums for exemptions to the cap. They also authorized the University President to exceed salaries specified for selected Chief subordinates and thereby to reduce the remaining number of faculty exemptions.

The 1985 salary memorandum, however, contained certain new criteria for exemptions. It authorized exemptions to the cap based upon the following:

1. To recognize and insure the continued employment of current exceptional faculty or administrative staff.
2. To enhance the recruitment and employment of exceptional faculty and administrators to the institution.^{11/}

^{11/} The new language in CP-38 was apparently created by the Chancellor's office and Standiford. On January 7, 1985 Turnbull sent Standiford a memorandum (Exhibit CP-35) attaching the new language for his review. CP-37 shows that the information contained in CP-35 was agreed to by President Bergen. On May 17, 1985 (Exhibit CP-36), Standiford advised McCaffrey to insert the new language into the salary regulations for fiscal 1985. There was no negotiations over that language with the AAUP.

6. Chancellor Hollander testified that he did not direct the University on how to use the exemptions (T-2 p. 29). In fact, he testified that selection for exemptions was the University's responsibility (T 2 pp. 23-24). Hollander and Bergen, however, had a meeting in November 1984 regarding the University's use of exemptions. Hollander testified that he discussed with Bergen that the exemptions should be used to recruit exceptional people (T 2 p. 37). Subsequent to that meeting President Bergen, on November 20, 1984 wrote a letter to Hollander (Exhibit CP-39) specifically detailing the reasons for the 18 exemptions he had used. For the most part, the exemptions were given to administrators or basic science department chairpeople. Bergen indicated in CP-39 that these particular exemptions were needed to retain those employees in their positions. Bergen testified that he had three criteria for granting exemptions to basic science faculty:

- 1) if they already exceeded the cap,
- 2) if they were an exceptional faculty member in their contribution to teaching and research, and
- 3) if they were employees who might be recruited away if their salary was not increased (T 3 pp. 6-7).

By letter dated December 4, 1984 (Exhibit CP-43) Hollander responded to CP-39 expressing his desire that exemptions to the cap be used to recruit exceptional professors to the University. Bergen responded to CP-43 by letter of January 2, 1985 (Exhibit CP-44), and expressed his belief that the exemptions had to be used to retain

basic science and clinical science department chairmen.^{12/} None of these concerns or issues raised between Bergen and Hollander were negotiated with the AAUP.

7. On January 25, 1984 Dr. Bruce Breckenridge, Chairman of the Department of Pharmacology, submitted a recommendation (attachment to Exhibit CP-42) to Dr. Richard Reynolds, Dean of Rutgers Medical School, requesting that Dr. N. Ronald Morris of his department, and a basic, not clinical, science instructor, be given an exemption to the salary cap. On February 21, 1985 Dean Reynolds submitted his own recommendation (attachment to CP-42) to President Bergen requesting an exemption for Dr. Morris. On April 15, 1985 Dr. Breckenridge submitted another recommendation to Dean Reynolds on behalf of Dr. Morris (attachment to CP-42). Dean Reynolds signed a "Faculty Personnel Approval Form" (CP-42) on April 22, 1985 reflecting his recommendation that Dr. Morris be raised above the salary cap.

In April or May of 1985 Dr. Morris contacted Dr. Herbert Cohen, President of the Rutgers AAUP chapter, and requested that the AAUP not block his salary exemption (T 1 p. 48). Dr. Cohen

^{12/} Bergen testified that two basic science department chairmen, Dr. Darwin Prockop and Dr. Bruce Breckenridge, were included in the first group of 18 exemptions because although they were M.D.'s, since they were not actually teaching clinical medicine, they had to be treated in the salary cap exemption list (T 3 p. 7). Bergen was convinced that they would not have continued in their positions if they did not receive an exemption (CP-39).

testified that he informed Dr. Morris that the AAUP had no objection to him per se, but he (Cohen) also informed him (Morris) of the ongoing litigation regarding the salary cap issue (T 1 p. 48).

Dr. Cohen then spoke with Dean Reynolds and informed him that although he would normally support an exemption for Dr. Morris, the issue was that an exemption was being given without negotiations (T 1 p. 50). Cohen testified that Dean Reynolds, who also negotiates on the University's behalf, then told him that the University did not intend to give up control of the exemptions (T 1 p. 51). Dean Reynolds subsequently withdrew his recommendation that Dr. Morris receive a salary cap exemption (T 1 pp. 52-53). The University did not negotiate with the AAUP over whether Morris should have received an exemption, nor over Reynolds' withdrawal of his recommendation to grant Morris an exemption.

8. The record shows that two individuals, Dr. Charles Vevier and Dr. Arthur Hess, who were not M.D.'s, but who had been administrators, were "grandfathered" into the first group of 18 exemptions. Dr. Vevier had been the University's Executive Vice President, and Dr. Hess had been a department chairman, but when they relinquished those positions they became basic scientists in the AAUP's unit. Both men had been above the salary cap when they held their administrative positions and President Bergen did not want to reduce their salaries below the cap when their job status changed in light of their "significant contributions to the University." (T 3 pp. 18-21; CP-39).

Both Vevier and Hess, however, did realize a change in their salaries after they relinquished their administrative duties (T 3 pp. 20-21). Hess, apparently in agreement with Dean Reynolds, had his salary reduced, but it still remained above the cap (T 3 pp. 31, 55). Vevier, in discussions with President Bergen, did not have his salary reduced, but it was agreed that his salary would be frozen above the cap level he had achieved as Vice President (T 3 pp. 31, 47). The University did not negotiate the change in either Vevier's or Hess' salary with the AAUP.

Analysis

The Salary Cap, Criteria & Negotiations

In UMDNJ I the Commission did not find that the establishment of a salary cap, or the creation of criteria for exemptions to the salary cap, or the administration of the exemptions, violated the Act. The result here is the same. In a detailed legal analysis, one that need not be repeated here, the Commission in UMDNJ I concluded that the creation of the criteria was at least partially preemptive. 11 NJPER at 296-297. It was preemptive to the extent that the University had the right to establish and adopt the criteria. But it was not preemptive with regard to the University's discretion to grant or deny salary cap exemptions to basic science faculty. 11 NJPER at 297. The Commission held that the discretion to grant or deny exemptions could be exercised through the collective negotiations process. The Commission, therefore, found that the University had a duty to

negotiate over how many (up to 12), if any, of the basic scientists would be entitled to one of the remaining exemptions, subject to proper documentation and SAC approval.

Since the facts regarding the 1984 and 1985 salary cap and criteria were not appreciably different from the 1982 and 1983 facts, the result here must be the same for the same reasons enunciated in UMDNJ I. The creation and adoption of the salary cap and criteria in 1984 and 1985, and the number of exemptions, was not a violation of the Act. Similar to fiscal 1982 and 1983 in UMDNJ I and II, however, the University in fiscal 1984 and 1985 had a duty to negotiate over how many, if any, of the remaining 12 salary cap exemptions would be used for basic science faculty. The University failed and refused to engage in such negotiations and therefore violated §5.4(a)(5) of the Act.

Despite the fact that the University has now utilized two additional exemptions, for Brezenoff and Gazzero, the University must, for 1984 and 1985, still negotiate over 12 exemptions (minus the number of exemptions negotiated to be used for 1983 pursuant to UMDNJ I), and how many, if any, basic science faculty would be entitled to those exemptions. Although the University was not required to negotiate with the AAUP over whether to grant exemptions to Brezenoff and Gazzero because they were not in the unit, it was, nevertheless, a violation of §5.4(a)(5) of the Act for the University to utilize 2 of the remaining 12 exemptions in the face of the Commission remedy in UMDNJ I that it negotiate with the AAUP

over how many, if any up to 12 exemptions would be used for basic science faculty.

The University is simply taking a chance that it will be successful on its appeal of UMDNJ I and II. If it is successful, of course, it will not have violated the Act by granting these two additional exemptions. If the appeal fails, however, a violation will have been committed and the University will be required to negotiate over the 12 exemptions.

Although I found that the use of two additional exemptions violated the Act, I will not recommend that the award of those exemptions be revoked and a return to the status quo be ordered. I believe it is a policy decision for the Commission to determine in this case how best to effectuate its remedy in UMDNJ I and II. I note, for example, that the University might decide not to renew the exemptions of two other people, if necessary, not Brezenoff and Gazzero.

There are certain factors which much be considered in determining the appropriate remedy. First, I find that the University did not violate §5.4(a)(3) of the Act by granting exemptions to Brezenoff and Gazzero. There was no showing that their exemptions were granted as a result of anti-union animus. In fact, if animus were evident I would still find that the University committed no a(3) violation because I believe it satisfied the test in Bridgewater Twp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), that it had legitimate business needs to grant those exemptions.

Second, I note that the Commission's remedy in UMDNJ I only requires negotiations up to 12--if any--which does not necessarily mean that 12 exemptions will be allocated to basic science faculty. If the AAUP succeeded in negotiating 12 exemptions for basic science faculty, then the University would need to determine which 2 of the 20 used exemptions not to renew.^{13/}

The Morris Incident

The University violated §5.4(a)(5) of the Act by failing to negotiate with the AAUP over whether to grant Dr. Morris a salary cap exemption. Since the University was required to negotiate over the 12 remaining exemptions pursuant to UMDNJ I, its failure to negotiate over its decision to grant an exemption to Morris violated the Act.^{14/}

The AAUP also alleged that Dean Reynolds' comment to Dr. Cohen that the University would not give up control of exemptions

^{13/} The University could unilaterally determine which 2 exemptions not to renew as long as they were not held by employees in the AAUP unit.

The University must be on notice that if it continues to utilize exemptions during the pendency of the appeal in UMDNJ I and II, and if it subsequently loses that appeal, it may be faced with a decision to revoke, or at least not renew some exemptions.

^{14/} It follows that the unilateral decision to withdraw the recommendation for an exemption for Morris also violated §5.4(a)(5) of the Act. I do not find, however, that the University's decision to withdraw its recommendation for Morris violated §5.4(a)(3) of the Act. The recommendation was not withdrawn because of anti-union animus, or to adversely affect the AAUP's ability to represent the unit.

violated the Act. I disagree. I recognize that motive is unnecessary for finding independent 5.4(a)(1) violations of the Act. In re N.J. College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978); In re N.J. Sports & Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). The "tendency" of an employer's conduct to interfere with employee rights is the controlling element. In re Commercial Twp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982), aff'd App. Div. Docket No. A-1642-82T2 (12/8/83). In re City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (¶4096 1978), aff'd App. Div. Docket No. A-3562-77 (3/5/79). I do not believe that in the context of this case, however, that Reynolds' comment had the "tendency" to interfere with Cohen's or the AAUP's protected rights. That conversation took place just after the Commission issued UMDNJ I. Both Cohen and Reynolds had to be aware of that decision and that the University would appeal, and Reynolds merely expressed the University's position that it did not want to give up control of the exemptions. Since Cohen was President of the AAUP I hardly believe that remark was a surprise to him and, therefore, it did not have the tendency to interfere with his (Cohen's) or the AAUP's protected rights.

Since in its reply brief the AAUP specifically indicated that it sought no relief in connection with the Morris incident, then a posting of the general violation of not negotiating over which basic science faculty members would receive salary cap exemptions is a sufficient remedy to the Morris incident.

The Vevier and Hess Incidents

Since the Commission in UMDNJ I required the University to negotiate with the AAUP over the discretionary use of exemptions, the University also violated §5.4(a)(5) of the Act by granting or renewing the exemptions for Vevier and Hess once they became part of the AAUP's unit, and by negotiating directly with those employees to determine their compensation once placed in the unit.

In In re Mt. Olive Bd. of Ed., P.E.R.C. No. 84-73, 10 NJPER 34, 36 (¶15020 1983); and In re N.J. Dept. of Law and Public Safety, I.R. No. 83-2, 8 NJPER 425, 427 (¶13197 1982), the Commission considered the language in §5.3 of the Act where it provided that majority representatives "shall be the exclusive representative for collective negotiations" and held that this "exclusivity principle" prevented anyone other than the certified representative from negotiating terms and conditions of employment. The record shows, conclusively, that Hess directly "negotiated" a reduction in his salary with Dean Reynolds, and that Vevier "negotiated" with President Bergen to freeze his (Vevier's) salary. The University's circumvention of the AAUP by its direct dealings with those employees regarding a term and condition of employment violated the Act.

Although I do not recommend a return to status quo remedy regarding Vevier and Hess, I do recommend that the University be required to negotiate the level of their salaries with the AAUP.

The 5.4(a)(3) Allegations

In its post-hearing brief the AAUP asserted that motive is not an indispensable element of proof. It argued that certain conduct may be so inherently destructive that there need be no proof of an underlying improper motive. At least in the context of this case, I disagree. While inherently destructive conduct might prove to be an independent 5.4(a)(1) violation of the Act because motive is not required to prove such violations, N.J. College of Medicine and Dentistry, supra; N.J. Sports and Exposition Authority, supra, the AAUP must establish an anti-union motive to prove a §5.4(a)(3) violation of the Act. In re Borough of Haddonfield Bd.Ed., P.E.R.C. No. 77-36, 3 NJPER 71 (1977); In re Cape May City Bd.Ed., P.E.R.C. No. 80-87, 6 NJPER 45 (¶11022 1980). In fact, the Supreme Court's "dual motive" test in Bridgewater, supra, contemplates the need to prove motive in (a)(3) violations.

Having reviewed the entire record I do not believe that any of the University's actions violated §5.4(a)(3) of the Act. For the same reasons enunciated in UMNDJ I, there was no direct evidence of anti-union animus motivating the administration of the salary caps in the instant cases. The continuation in 1984 and 1985 of the University's policy established in 1982 and 1983 to give exemptions to administrators rather than basic science faculty was neither new nor surprising. It was consistent with what the University had done in the past, and thus, not motivated by anti-union animus. The

University's decision to continue that policy in 1984 and 1985, which really occurred before UMDNJ I issued, cannot raise the 1984 and 1985 conduct to "inherently destructive" conduct that would require an (a)(3) finding.

Similarly, the University's decision to grant salary cap exemptions to Vevier and Hess did not violate §5.4(a)(3) of the Act. There was no showing that such action was motivated by anti-union animus. Those employees, as administrators, had received salaries above the cap before they became part of the AAUP's unit, and the record reflects that it was their contribution to the University as administrators, and not anti-union animus, that was the reason for continuing their salary cap exemptions. Although the circumvention of the AAUP in fixing their salaries once placed in the unit violated §5.4(a)(5) of the Act, that action did not amount to a violation of §5.4(a)(3). There was no apparent motive or intent to destroy the effectiveness of the AAUP by such action.

Finally, I note that the AAUP appears to be asserting that by failing and refusing to follow UMDNJ I and UMDNJ II in 1984 and 1985, particularly in consideration with all of the University's actions, the University's conduct was inherently destructive to the AAUP's effectiveness and, therefore, amounted to a violation of §5.4(a)(3) of the Act. I disagree. UMDNJ I did not even issue until after the 1984 and 1985 acts complained of occurred. The University in 1984 and 1985 merely followed its policy from 1982 and 1983 before it

could have known of the result in UMDNJ I.^{15/} It is not as if the University continued its conduct in the face of a Commission decision. Even if it had, the Appellate Division stayed the implementation of the Commission's decision in UMDNJ I and II. The University was, therefore, not legally obligated to follow that decision during 1984 and 1985, nor is it obligated to follow that decision to date. The University simply took the chance that it would be successful on appeal. If it is not, the results of UMDNJ I and II, and the results of this case if adopted, will still be imposed.

Accordingly, based upon the entire record and the above analysis, I make the following:

Conclusions of Law

1. The University violated N.J.S.A. 34:13A-5.4(a)(5) and derivatively 5.4(a)(1) by:

(1) refusing to negotiate with the AAUP over how many (up to 12) and which basic science faculty will receive salary cap exemptions in fiscal 1984 and 1985.

(2) by failing to negotiate with the AAUP over whether Dr. Ronald Morris should have received a salary cap exemption

(3) by refusing to negotiate a salary cap exemption for Dr.'s Vevier and Hess and

^{15/} Even though H.E. No. 85-17 issued on October 18, 1984, Hearing Examiner decisions are only recommendations and need not be complied with unless adopted by the Commission. In any case, however, even that decision issued almost midway through fiscal 1985.

(4) by circumventing the AAUP and negotiating salary levels directly with Dr.'s Vevier and Hess.

2. The University/State did not violate N.J.S.A. 34:13A-5.4(a)(5) by unilaterally fixing a salary cap level, or by establishing the criteria for exemptions to the cap.

3. The University did not violate N.J.S.A. 34:13A-5.4(a)(3) by any of its actions.

Recommended Order

I recommend that the Commission ORDER:

1. That the University cease and desist from:

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

B. Refusing to negotiate in good faith with AAUP over which basic science faculty, up to 12, will receive salary cap exemptions for fiscal years 1984 and 1985; any exemptions allowed through negotiations are subject to the submission of proper documentation to the Department of Higher Education and the approval of the Salary Adjustment Committee; and

C. Failing to negotiate in good faith with the AAUP over whether Dr.'s Vevier and Hess should have received salary cap exemptions; and

D. Negotiating salaries directly with--and failing to negotiate in good faith with the AAUP over the salaries for--Dr.'s Vevier and Hess once they were placed in the AAUP's unit.

2. That the University take the following affirmative action:

A. Negotiate in good faith with AAUP over which basic science faculty, up to 12, will receive salary cap exemptions for fiscal 1984 and 1985; any exemptions allowed through negotiations are subject to the submission of proper documentation to the Department of Higher Education and the approval of the Salary Adjust Committee.^{16/}

B. Negotiate in good faith with the AAUP over the salaries for Dr.'s Vevier and Hess.

C. Post in all places where notices to University employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent

^{16/} The 12 available exemptions are the same 12 exemptions set forth in UMDNJ I and II. Apart from the legality of the exemptions used for Gazzero and Brezenoff discussed infra, if the pool of 12 exemptions is decreased based upon negotiations for 1983, as required by UMDNJ I, then the remaining figure would be the available exemptions for negotiations for fiscal 1984 and then 1985.

University to ensure that such notices are not altered, defaced or covered by other materials.

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

3. That the Complaint(s) be dismissed with respect to the alleged §5.4(a)(3) violations of the Act.


Arnold H. Zudick
Hearing Examiner

Dated: February 6, 1986
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed by the Act by (a) refusing to negotiate with the AAUP over which basic science faculty employees, up to 12, will receive salary cap exemptions for fiscal 1984 and 1985, and (b) failing to negotiate with the AAUP over whether Dr.'s Vevier and Hess should have received salary cap exemptions, and (c) negotiating salaries directly with--and failing to negotiate in good faith with the AAUP over the salaries for--Dr.'s Vevier and Hess when they were placed in the AAUP's unit.

WE WILL Negotiate in good faith with the AAUP over allowing up to 12 employees on the basic science faculty to receive salary cap exemptions for fiscal years 1984 and 1985.

WE WILL negotiate in good faith with the AAUP over the salaries for Dr.'s Vevier and Hess.

STATE OF NEW JERSEY AND UMDNJ

(Public Employer)

Dated _____

By _____ (Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with James Mastriani, Chairman, Public Employment Relations Commission, 495 W. State Street, Trenton, New Jersey 08618, Telephone (609) 292-9830