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# Recent Case Law & Policy Developments

## April 2007 through March 2008

### Public Employment Relations Commission

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What follows is an overview of Commission case law since the April 2007 Annual Conference.

#### Unfair Practice

#### Discrimination

The Commission concluded that a librarian would not have been assigned to the Learning Center even if the principal/superintendent had not been hostile towards her role as Association president. *Shore Reg. Bd. of Ed.*, P.E.R.C. No. 2008-1, 33 *NJPER* 201 (¶71 2007).

#### Good Faith Negotiations

A city did not violate its obligation to negotiate in good faith when it installed overt security cameras inside and outside its public safety complex without notice to or negotiations with the unions. *City of Paterson*, P.E.R.C. No. 2007-62, 33 *NJPER* 143 (¶50 2007). The installation was to

protect people and property and was not a mandatory subject of negotiations.

The Commission dismissed a charge alleging that an employer violated the New Jersey Employer-Employee Relations Act when it discontinued an alleged practice of permitting police officers assigned to full-day, off-site training to leave from and return directly to their homes without using compensatory time to make up the difference between the actual training time and their 12-hour shifts. *Borough of Bernardsville*, P.E.R.C. No. 2008-4, 33 *NJPER* 205 (¶74 2007). There was no established practice that entitled officers to end their shifts early without charging time.

Revisiting early precedents, the Commission held that it is no longer appropriate to disregard the parties' history of ratification in determining whether a negotiations team has final negotiations authority. *Borough of Palmyra*, P.E.R.C. No. 2008-5, 33 *NJPER* 207 (¶75 2007), recon. granted P.E.R.C. No. 2008-16, 33 *NJPER* 232

(¶89 2007). After considering all the evidence, including the parties' past history, the Commission concluded that the Borough's negotiators did not have the authority to enter into a successor contract without Borough Council ratification.

An employer must supply information to a majority representative if there is a probability that the information is potentially relevant and that it will be of use to the representative in carrying out its statutory duties. The Commission ordered an employer to supply a list of vendors that had employed police in private security jobs. *Union Tp.*, P.E.R.C. No. 2008-020, 33 *NJPER* 255 (¶95 2007). The Commission also found that the employer tended to interfere with protected rights when it conducted surveillance of off-duty PBA members.

A union did not prove its allegations that an employer violated the Act by denying bonus terminal leave to a retiring police officer and by refusing to negotiate over changes to the benefit and the impact on unit members. *Borough of Ridgefield*, P.E.R.C. No. 2008-27, 33 *NJPER* 279 (¶104 2007).

An employer could not unilaterally rescind a grievance settlement reached by its police director under the negotiated grievance

procedure. *City of Newark*, P.E.R.C. No. 2008-34, 33 *NJPER* 316 (¶120 2007), recon. P.E.R.C. No. 2008-53, \_\_\_ *NJPER* \_\_\_ (¶\_\_ 2008). Such a rescission repudiated the grievance procedure.

In a matter consolidated with a good faith layoff appeal before the Merit System Board, the Commission accepted the ALJ's conclusion that anti-union animus was not a substantial or motivating factor in the decision to abolish a county police department. *Hudson Cty.*, P.E.R.C. No. 2008-43, 34 *NJPER* 13 (¶6 2008). The Commission also concluded that the County was not required to negotiate before the Sheriff assumed responsibility for providing some of the patrol division services previously performed by the County police.

An individual does not have standing to allege a violation of the employer's duty to negotiate in good faith with the majority representative. *New Jersey Transit*, P.E.R.C. No. 2008-52, 34 *NJPER* \_\_\_ (¶\_\_ 2008).

### **Reducing An Agreement to Writing**

An employer violated the Act when it did not sign an agreement that accurately reflected the parties' prior agreement as modified by an interest arbitration award.

*Borough of Leonia*, P.E.R.C. No. 2007-3, 33 *NJPER* 204 (¶73 2007). Consistent with the obligation to implement an interest arbitration award is the obligation to reduce the award to writing and sign it.

### **Representation**

The Commission declined to review a Director of Representation decision applying well-settled case law that generally requires that superior officers be removed from a mixed unit based on the potential for a conflict of interest with rank-and-file officers, despite a history of a long relationship in a combined unit. *Maplewood Tp.*, P.E.R.C. No. 2008-2, 33 *NJPER* 203 (¶72 2007).

Individual employees cannot use an unfair practice charge to stand in a union's shoes to seek a new representation election or a finding that an employer or another union violated the first union's rights. *Hudson Cty.*, P.E.R.C. No. 2008-32 33 *NJPER* 315 (¶118 2007).

The Commission denied a request for review of a Director of Representation decision that had found insufficient facts to support the employer's assertion that petitioned-for employees were managerial executives or confidential employees.

*Camden Cty. Library*, P.E.R.C. No. 2008-35, 33 *NJPER* 319 (¶121 2007).

### **Scope of Negotiations**

Most Commission decisions involve the scope of negotiations. Parties can seek a scope determination during the course of negotiations, when one party seeks to negotiate over a matter that the other party contends is not a required subject for negotiations, or with respect to the negotiability and legal arbitrability of a matter that a union seeks to submit to binding arbitration.

### **Work Hours**

A grievance alleged and an arbitrator concluded that a municipality violated the contract when it deprived unit employees of overtime opportunities by allowing a subcontractor's workers to remove trees outside of regular work hours. The Commission concluded that the Township, having decided to use both public and private sector employees to remove trees, could have legally agreed that it would offer work opportunities beyond the normal work day and on Saturdays to its own employees before

using the subcontractor to perform that work.

*Township of Toms River*, P.E.R.C. No. 2007-56, 33 *NJPER* 108 (¶37 2007), app. pending App. Div. Dkt. No. A-004969-06T5.

The Commission permitted binding arbitration of a grievance asserting a violation of a work hours provision when an employer transferred a patrol officer with 30 years of experience from a day shift to a night shift. *City of Trenton*, P.E.R.C. No. 2007-61, 33 *NJPER* 118 (¶42 2007). The Commission concluded that the dispute centered on a change in work hours rather than any asserted governmental policy concern.

An employer had a non-negotiable managerial prerogative to implement a COMPSTAT system (computerized statistic) and to require that superior officers attend COMPSTAT meetings on their scheduled days off. *Union Tp.*, P.E.R.C. No. 2007-64, 33 *NJPER* 147 (¶52 2007). The employer did not seek a restraint of arbitration over the related overtime compensation claim.

The Commission found mandatorily negotiable a proposal to modify contract language to eliminate the unilateral power of the mayor and council to abolish the current 12-hour work schedule and return to an 8-hour schedule. *Borough of Pompton Lakes*,

P.E.R.C. No. 2007-68, 33 *NJPER* 125 (¶45 2007). The ruling did not prohibit the Borough from arguing to an interest arbitrator that the present language should be retained. Nor would it prevent the Borough from arguing that a future work schedule change is justified by non-negotiable governmental policy reasons.

The Commission declined to restrain binding arbitration of a grievance challenging a refusal to implement the work schedule approved in negotiations. *Mercer Cty. and Mercer Cty. Sheriff's Office*, P.E.R.C. No. 2008-10, 33 *NJPER* 216 (¶80 2007). The joint employers did not file a scope petition during interest arbitration proceedings and effectively forfeited their ability to argue that a work schedule was not mandatorily negotiable. The employers' efficiency concerns could have been addressed in the recently completed negotiations and the employers did not show that grievance arbitration seeking implementation of the negotiated work schedule would substantially limit any governmental policymaking powers.

A proposal to memorialize the current 12-hour work schedule was found mandatorily negotiable. *Borough of Upper Saddle River*,

P.E.R.C. No. 2008-22, 33 *NJPER* 259 (¶97 2007).

A police union could not arbitrate a challenge to the overall mix of officer qualifications, expertise and experience on each shift. *Borough of Rutherford*, P.E.R.C. No. 2008-23, 33 *NJPER* 260 (¶98 2007). If the union seeks to arbitrate a particular shift bid denial that the employer believes conflicts with its overall approach, the employer may file a new scope petition based on the particularized facts.

The Commission restrained arbitration to the extent a grievance challenged the decision to temporarily assign investigators to work from 5:30 p.m. to midnight to deal with an investigation of multiple homicides. *Atlantic Cty. Prosecutor's Office*, P.E.R.C. No. 2008-24, 33 *NJPER* 262 (¶99 2007). The Commission declined to restrain arbitration over any claim that the employer violated contractual overtime provisions.

Absent a showing by the employer of a particularized need to preserve or change a police work schedule, the union's work schedule proposal could be submitted to interest arbitration. *Borough of Closter*, P.E.R.C. No. 2008-56, 34 *NJPER* \_\_\_ (¶\_\_\_ 2008).

## Assignments and Transfers

Substantive decisions to transfer or reassign police officers are, as a rule, not legally arbitrable. *State of New Jersey (State Police)*, P.E.R.C. No. 2008-37, 33 *NJPER* 335 (¶125 2007). However, procedural claims that a police sergeant did not receive timely notice of her reassignments; that other officers received more advance notice; and that she was not given enough time to make child care arrangements in light of the required changes in work schedules and work hours were legally arbitrable. *City of Orange Tp.*, P.E.R.C. No. 2007-59, 33 *NJPER* 115 (¶40 2007).

The Commission restrained arbitration over a grievance contesting an employer's refusal to consider a correction sergeant for a permanent assignment as a "kitchen officer." *Somerset Cty. Sheriff's Office*, P.E.R.C. No. 2007-66, 33 *NJPER* 151 (¶54 2007). The Sheriff had a non-negotiable prerogative to match employee qualifications with job functions.

Since an assignment to Atrium Duty, which allegedly involved the duties of security and police personnel, was not incidental to a teacher's normal duties and did not involve

student safety or security, the challenge to the assignment could be submitted to binding arbitration. *Greater Egg Harbor Reg. H.S. Bd. of Ed.*, P.E.R.C. No. 2008-29, 33 *NJPER* 282 (¶106 2007).

### Discipline

The Commission restrained arbitration over any effort to have two provisional employees reinstated since their positions had been filled by employees who passed Civil Service exams and were selected from an eligibility list. *Passaic Cty.*, P.E.R.C. No. 2008-9, 33 *NJPER* 214 (¶79 2007). The Commission noted that *N.J.A.C. 4A:4-1.5* mandates termination from a provisional title if an employee fails to file for and take the Civil Service exam for that title. The Commission held, however, that the County did not terminate the two employees for that reason, but instead based their terminations on allegations of poor attendance and poor job performance, so an arbitrator could consider the union's contention that the employees should have their names cleared.

An arbitrator could legally determine whether delivery of an e-mail message through the school's e-mail system constituted sufficient cause to place a

memorandum passing judgment on the conduct in the teacher's personnel file. *Pequannock Tp. Bd. of Ed.*, P.E.R.C. No. 2008-17, 33 *NJPER* 240 (¶91 2007).

The Commission found legally arbitrable a challenge to the suspension of a kindergarten teacher for the remainder of a school year. *Clinton Tp. Bd. of Ed.*, P.E.R.C. No. 2008-19, 33 *NJPER* 242 (¶93 2007). The Association was not seeking to arbitrate the subsequent decision not to renew the teacher.

*N.J.S.A. 40A:9-154.1* limits appointments of school crossing guards to one-year terms, but an arbitrator's finding that a guard was terminated without just cause and reinstating her to a one-year term did not conflict with that statute. *City of Newark*, P.E.R.C. No. 2008-25, 33 *NJPER* 264 (¶100 2007).

An arbitrator could legally determine whether a teacher's comments at a Board meeting violated any negotiated procedures or school policies and whether there was sufficient cause for the superintendent to send the teacher a letter passing judgment on the conduct. *Pequannock Tp. Bd. of Ed.*, P.E.R.C. No. 2008-28, 33 *NJPER* 280 (¶105 2007).

Minor discipline of all public employees except State troopers may be

submitted to binding arbitration pursuant to a negotiated agreement. *New Jersey Transit*, P.E.R.C. No. 2008-31, 33 *NJPER* 286 (¶108 2007). The question of whether the parties in fact agreed to arbitrate minor discipline is outside the Commission's limited scope of negotiations jurisdiction.

A dispute over the terms of a settlement agreement and a dispute over whether an employer waived its right to hold a grievance hearing because it did not do so within 30 days of the issuance of a preliminary notice of disciplinary action were found to be legally arbitrable. *City of Millville*, P.E.R.C. No. 2008-42, 34 *NJPER* 11 (¶5 2008). However, any claim for back pay under *N.J.S.A.* 40A:14-149.2, which depends on an adjudication and exoneration of major disciplinary charges, must be made to the Merit System Board.

Neither a two-month suspension nor a reassignment of a detective to the patrol division were legally arbitrable since police officers may not arbitrate major discipline and a reassignment is not minor discipline. *North Bergen Tp.*, P.E.R.C. No. 2008-50, 34 *NJPER* \_\_ (¶\_\_ 2008).

No statute or regulation preempts an agreement to provide that employees who are

suspended pending disciplinary or criminal investigations will not suffer any loss of pay until final determinations of their status. *Passaic Cty.*, P.E.R.C. No. 2008-54, 34 *NJPER* \_\_ (¶\_\_ 2008).

### **Increment Withholdings**

Withholding an increment is generally a form of discipline, but not all increment withholdings can go to binding arbitration. Since the 1990 amendments to the PERC Act, *N.J.S.A.* 34:13A-22 *et seq.*, the Commission has been empowered to determine the proper forum for reviewing increment withholding disputes involving teaching staff members. *Scotch Plains-Fanwood Bd. of Ed.*, P.E.R.C. No. 91-67, 17 *NJPER* 144 (¶22057 1991), sets out the analysis the Commission uses in making such determinations.

Withholdings based predominately on the evaluation of teaching performance cannot be reviewed by an arbitrator and can only be reviewed by the Commissioner of Education. *Wildwood Bd. of Ed.*, P.E.R.C. No. 2007-57, 33 *NJPER* 110 (¶38 2007) (guidance counselor allegedly provided deficient counseling services to special needs students and an elementary school teacher allegedly failed to properly test and retest students);

*Sterling Bd. of Ed.*, P.E.R.C. No. 2007-58, 33 *NJPER* 112 (¶39 2007) (increment withheld for alleged deficiencies in student discipline, classroom management, student assessment; arbitration permitted over alleged violation of obligation to issue observation reports within five days of observation); *Freehold Reg. H. S. Bd. of Ed.*, P.E.R.C. No. 2007-65, 33 *NJPER* 149 (¶53 2007) (alleged pattern of guidance counselor's being disorganized and not responding promptly to the questions of students and parents); *Mercer Cty. Voc-Tech School Bd. of Ed.*, P.E.R.C. No. 2008-26, 33 *NJPER* 265 (¶101 2007) (although allegedly compromising the security of a standardized test was a mixed reason, all of the other stated reasons for the withholding indisputably related to teaching performance); *Freehold Reg. H.S. Bd. of Ed.*, P.E.R.C. No. 2008-48, 34 *NJPER* \_\_ (¶\_\_ 2008) (alleged inability to maintain student confidentiality; failure to communicate concerns regarding students and co-workers as they arise; and failure to create a study guide to effectively help students compensate for learning disabilities: first and third reasons were based on an evaluation of teaching performance).

Withholdings not based predominately on the evaluation of teaching performance

may be reviewed by an arbitrator. *Old Bridge Bd. of Ed.*, P.E.R.C. No. 2008-15, 33 *NJPER* 230 (¶88 2007). (teacher asked student to take an Association document to the classroom of other teachers and have them sign it while the rest of the class continued their work)

### Sick Leave

A dispute over whether the employer had to convene a board of doctors before it declared that an injured sergeant was permanently unfit to resume his duties was found to be within the scope of negotiations. *New Jersey Transit*, P.E.R.C. No. 2007-63, 33 *NJPER* 145 (¶51 2007).

Prohibiting an employer from calling an employee until after three consecutive days would substantially limit the employer's ability to determine if there was sick leave abuse. *Livingston Tp.*, P.E.R.C. No. 2008-11, 33 *NJPER* 218 (¶81 2007). Also, an employer's right to verify sick leave does not require a prior finding of sick leave abuse.

Education statutes and case law do not prohibit an agreement over the amount of sick leave to be granted part-time employees. *Quinton Bd. of Ed.*, P.E.R.C. No. 2008-18, 33 *NJPER* 241 (¶92 2007).

## Compensation and Benefits

A claim for compensatory time off for essential State employees who were required to work during the July 2006 State shutdown was preempted by Department of Personnel regulations that limit the compensation for essential workers to regular pay. *State of New Jersey*, P.E.R.C. No. 2007-60, 33 *NJPER* 116 (¶21 2007), app. pending App. Div. Dkt. No. A-004843-06T3.

Whether teaching assistants assigned to transport students off campus for community-based instruction are eligible for a stipend is a negotiable compensation question. *Bergen Cty. Special Services Bd. of Ed.*, P.E.R.C. No. 2007-69, 33 *NJPER* 126 (¶46 2007).

Salary guide placement is mandatorily negotiable and an employer does not have a managerial prerogative to place new employees anywhere within the salary range for their job titles. *Toms River Tp.*, P.E.R.C. No. 2008-30, 33 *NJPER* 284 (¶107 2007).

An alleged unilateral change in terminal leave benefits is legally arbitrable. *Borough of Hawthorne*, P.E.R.C. No. 2008-45, 34 *NJPER* 41 (¶11 2008).

## Health Benefits

*N.J.S.A.* 52:14-17.3 permits parties to negotiate employee contributions to the cost of State Health Benefit Program coverage by negotiations unit. Thus, a regulation no longer preempts negotiations over premium sharing for dependent coverage in local government. *Berkeley Tp.*, P.E.R.C. No. 2008-8, 33 *NJPER* 214 (¶78 2007); *see also* *Bergenfield Bd. of Ed.*, P.E.R.C. No. 2008-47, 34 *NJPER* 44 (¶13 2008) (new law permits implementation of premium sharing clauses in existing agreements).

After the State Health Benefits Commission (“SHBC”) implemented co-pay increases for NJPLUS and HMO office visits, the Commission declined to restrain binding arbitration of a grievance alleging a violation of a contractual obligation to provide medical benefits equal to or better than the existing plan. *Rockaway Tp.*, P.E.R.C. No. 2008-21 33 *NJPER* 257 (¶96 2007), app. pending App. Div. Dkt. No. A-1628-07T2. The Commission held that an arbitrator could not order the employer to continue the previous co-pay levels since the SHBC had exercised its authority to set higher levels, but the Commission did not decide whether an

arbitrator could issue a remedial order requiring the employer to reimburse employees for the higher co-pay expenses. *See also City of Bayonne*, P.E.R.C. No. 2008-41, 34 *NJPER* 9 (¶4 2008) (arbitrator cannot order a roll-back of SHBP co-pay levels).

### Promotions

The Commission declined to restrain binding arbitration of a grievance asking that the police chief respond to the union's inquiries and grievances about officers required to work out-of-title. *City of Jersey City*, P.E.R.C. No. 2007-67, 33 *NJPER* 124 (¶44 2007). However, the Commission restrained arbitration to the extent the grievance demanded that officers be promoted.

The substantive decision to promote one employee rather than another based on the subjective and/or objective criteria the employer has unilaterally chosen to use and apply is non-negotiable. *State of New Jersey (State Police)*, P.E.R.C. No. 2008-37, 33 *NJPER* 335 (¶125 2007).

### Miscellaneous Scope Decisions

Although the number of prisoners in a patrol car and the number of patrol officers required to transport one or more prisoners have an impact on employee safety, the dominant issue in both situations is the non-negotiable policy decision of a public employer to determine staffing levels. *Borough of Spotswood*, P.E.R.C. No. 2007-70, 33 *NJPER* 128 (¶47 2007). A proposal to limit the number of prisoners transported per patrol car was therefore found not mandatorily negotiable.

The Commission denied a restraint of binding arbitration of a grievance involving a narrow dispute over whether the county's residency policy applied to a particular employee who was hired before the policy was adopted and allegedly lived outside the county at all times since. *Camden Cty.*, P.E.R.C. No. 2008-13, 33 *NJPER* 227 (¶86 2007).

The Commission declined to restrain binding arbitration of a grievance alleging unsafe working conditions on a day when staffing levels dipped below the levels set by department directives and standard operating procedures. *Livingston Tp.*, P.E.R.C. No. 2008-14, 33 *NJPER* 229 (¶87 2007). An

arbitrator, however, could not order an increase in staffing levels.

Grievances contesting the denial of temporary disability benefits to a group of employees and challenging the employer's new temporary disability procedures were preempted by the Temporary Disability Law and its implementing regulations. *New Jersey Turnpike Auth.*, P.E.R.C. No. 2008-36, 33 *NJPER* 332 (¶124 2007).

The Commission declined to restrain binding arbitration of a grievance challenging an obligation to fill out separate forms for requesting the use of compensatory and vacation leave allowances. *Borough of South River*, P.E.R.C. No. 2008-38, 33 *NJPER* 338 (¶126 2007).

The Commission restrained binding arbitration to the extent grievances challenged the Judiciary's decision to restrict employees' after-hours access to courthouses. *New Jersey Judiciary*, P.E.R.C. No. 2008-39, 34 *NJPER* 4 (¶2 2008). The Commission permitted arbitration over severable employee health, safety, and compensation issues.

The Commission declined to restrain arbitration over an alleged violation of a department policy requiring evaluations to be conducted during the first quarter, but

restrained arbitration to the extent the grievance sought to require the employer to give the grievant a satisfactory rating for attitude and professionalism. *Atlantic Cty. Prosecutor's Office*, P.E.R.C. No. 2008-40, 34 *NJPER* 7 (¶3 2008).

Whether an employer submitted its layoff plan to the Department of Personnel in bad faith was within DOP's jurisdiction and not arbitrable. *Borough of Point Pleasant*, P.E.R.C. No. 2008-46, 34 *NJPER* 43 (¶12 2008). A grievance asserting that an employee had been harassed and subjected to a hostile work environment was legally arbitrable.

A school board may legally agree to arbitrate non-renewals of employment contracts of non-teaching staff members. *Trenton Bd. of Ed.*, P.E.R.C. No. 2008-49, 34 *NJPER* \_\_ (¶\_\_ 2008).

The Commission ruled that an arbitrator could consider whether the parties agreed to provide separate faculty rooms for teachers and the viability of proposed alternatives. *Matawan-Aberdeen Reg. Bd. of Ed.*, P.E.R.C. No. 2008-55, 34 *NJPER* \_\_ (¶\_\_ 2008). However, if the arbitrator issues a remedy that the board believes would require a major capital expense or significantly

interfere with its educational objectives, the board may re-file its scope petition.

### **Motions and Procedural Matters**

The Commission granted the Judiciary's motion for reconsideration and vacated a portion of an interim relief order. *New Jersey State Judiciary*, P.E.R.C. No. 2008-12, 33 *NJPER* 225 (¶85 2007). The Commission found that the record did not show that the union demanded to negotiate over the disputed issues or that the Judiciary refused to negotiate in response to such a demand.

The Commission sustained the Director of Unfair Practices' refusal to issue complaints where the unfair practice charges did not specify any actions within the six-month period before the charges were filed that might constitute an unfair practice; there were no circumstances that warranted tolling the statute of limitations; and the charging party was given an opportunity to amend his charges to specify timely allegations of unfair practices surrounding his termination, but did not do so. *City of Long Branch*, P.E.R.C. No. 2008-33, 33 *NJPER* 316 (¶119 2007).

Statements allegedly made by a school board president and business administrator are

admissible as party admissions because the president and administrator were board agents and representatives. *Kearny Bd. of Ed.*, P.E.R.C. No. 2008-44, 34 *NJPER* 40 (¶10 2008).

If a charging party can prove that a delay in filing an unfair practice charge against his employer was caused by his union's breach of the duty of fair representation, he might be able to overcome the timeliness bar. *Borough of North Caldwell*, P.E.R.C. No. 2008-51, 34 *NJPER* \_\_ (¶\_\_ 2008).

### **Interest Arbitration**

The Commission affirmed a conventional interest arbitration award that awarded salary increases, significant health insurance cost containment measures, and health benefits for retirees. *Borough of Ringwood*, P.E.R.C. No. 2008-7, 33 *NJPER* 211 (¶77 2007). The arbitrator calculated the cost of the retiree insurance benefit over 15 years, subtracted the savings the Borough will achieve by not paying a \$2000 stipend, and then balanced those costs with the cost containment achieved by changes to the health plan he awarded for active employees and a salary increase rate at the lower end of the

range. A retiree prescription benefit was not a disputed issue before the arbitrator and the arbitrator was not required to consider its proposed elimination as part of the parties' unratified memorandum of agreement. Nor was the arbitrator required to separately address the cost of that benefit as part of his award.