

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,
Petitioner,

-and-

Docket No. SN-12

RUTGERS COUNCIL OF AMERICAN ASSO-
CIATION OF UNIVERSITY PROFESSORS
CHAPTERS,

Respondent.

RUTGERS COUNCIL OF AMERICAN ASSO-
CIATION OF UNIVERSITY PROFESSORS
CHAPTERS,

Petitioner,

-and-

Docket No. SN-13

RUTGERS, THE STATE UNIVERSITY,
Respondent.

SYNOPSIS

The Commission issues a decision and order in consolidated scope of negotiations proceedings involving fifteen contract demands presented by the AAUP during negotiations for a successor agreement with Rutgers University. Initially, the Commission analyzes the concepts of collegiality and collective negotiations, concluding generally that, subject to the Act's mandate that the University deal exclusively with the AAUP concerning unit members' grievances and terms and conditions of employment, "there is no reason why the systems of collegiality and collective negotiations may not function harmoniously." With respect to the disputed contract demands, the Commission finds the following to be required subjects for collective negotiations: procedures to be followed in the selection of department chairmen; scope of tenure (university-wide versus something less than university-wide); aspects of affirmative action plans relating to, or impacting upon, terms and conditions of employment; implementation of academic calendar as it impacts upon terms and conditions of employment; hours, compensation and working conditions of teaching assistants and graduate assistants. The Commission finds the balance of the demands to relate to permissive, but not required, subjects for collective negotiations: contractual provisions granting the AAUP a role in the formulation of certain managerial and educational decisions (as opposed to their impact); composition of administrative committees performing strictly managerial functions;

contractual provision precluding the University from conducting productivity studies without prior negotiations with the AAUP; educational decisions concerning the academic calendar (as opposed to their impact); number of employees to employ; faculty involvement in search committees for administrative positions; salaries and fringe benefits of unit members employed in summer session, where University disputes the inclusion of summer session work within the parties' collective negotiations relationship; educational decisions concerning course combination and class size (as opposed to their impact); quotas or limits on tenure (as opposed to their impact); agency shop when legal; AAUP approval of affirmative action plans prior to their submission to federal and state compliance authorities.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,
Petitioner,

-and-

Docket No. SN-12

RUTGERS COUNCIL OF AMERICAN ASSO-
CIATION OF UNIVERSITY PROFESSORS
CHAPTERS,

Respondent.

RUTGERS COUNCIL OF AMERICAN ASSO-
CIATION OF UNIVERSITY PROFESSORS
CHAPTERS,

Petitioner,

-and-

Docket No. SN-13

RUTGERS, THE STATE UNIVERSITY,
Respondent.

Mr. S. Joseph Fortunato argued for the University (Messrs. Pitney, Hardin & Kipp, attorneys; Mr. Robert R. Bickal, Director of Employee Relations and Mr. Fortunato, on the brief).

Mr. Michael J. Herbert argued for the AAUP (Messrs. Sterns and Greenberg, attorneys; Mr. Herbert and Dr. Sandra Walther, on the brief).

DECISION AND ORDER

On May 21, 1975 Rutgers, The State University (the "University") filed a Petition for Scope of Negotiations Determination (Docket No. SN-12) with the Public Employment Relations Commission (the "Commission") seeking a determination as to whether certain matters in dispute are within the scope of collective negotiations pursuant to N.J.S.A. 34:13A-5.4(d)^{1/}

^{1/} N.J.S.A. 34:13A-5.4(d) provides: "The Commission shall at all times have the power and duty, upon the request of any
(Continued)

and N.J.A.C. 19:13-1.1 et seq. On that same date, the Rutgers Council of American Association of University Professors Chapters (the "AAUP") also filed a Petition for Scope of Negotiations Determination (Docket No. SN-13). In its petition, the AAUP raised several additional issues not submitted by the University, stated that several items listed in the University's petition had been withdrawn by the AAUP, modified one other item listed on the University's petition, and joined with the University in seeking determinations on the remaining issues listed by the University. Also, the AAUP simultaneously filed an Unfair Practice Charge (Docket No. CO-110) alleging that the University had engaged in an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A.34:13A-1 et seq. (the "Act") and, more particularly, N.J.S.A. 34:13A-5.4(a)(5).^{2/}

Briefs and reply briefs have been submitted by the parties on the issues in dispute. In accordance with requests from both parties, oral arguments by attorneys for both parties were heard by the Commission on September 11, 1975. At that

1/ (Continued)

public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The commission shall serve the parties with its findings of fact and conclusions of law. Any determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court."

2/ That subsection prohibits employers from "Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment..."

time, the parties agreed to defer the processing of the Unfair Practice Charge in Docket No. CO-110 pending the disposition of the scope petitions. The scope petitions are hereby consolidated for the purposes of this decision and order.

At the oral argument the Commission set some basic ground rules with respect to this rather complex scope proceeding. First, we dealt with four withdrawn demands of the AAUP. These demands had been among the many demands presented in the initial stages of negotiations with the University for a successor agreement, and had been included in the University's scope petition. When the AAUP filed its scope petition with respect to certain additional items, it also withdrew the four demands from the table. We ruled that we would not permit oral argument concerning the withdrawn demands. Neither will we consider them in this decision and order.

Secondly, the University objected that although the items listed in both petitions reflect the AAUP's demands as presented at the negotiating table, the AAUP subsequently modified or refined at least some of its demands in its briefs. It is unnecessary to determine whether the initial demands have been modified, for the initial demands certainly present all of the elements necessary for a scope determination. Both parties have agreed that the petitions accurately reflect the AAUP's demands as presented at the table, and that the University's response was that such demands are not mandatorily negotiable. We will therefore determine whether or not these demands are within the scope of collective negotiations.

Based upon the entire record herein, including the petitions, briefs, and oral argument, and on the facts of this case, the Commission finds and determines as follows.

A threshold factor in the instant case that has been given careful consideration by the Commission and the parties relates to the unique juxtaposition of two concepts: collegiality and collective negotiations. Collegiality is essentially a system that has developed historically at the University and at many other similar institutions throughout the country, whereby certain functions generally performed by management, both public and private, are either shared with, or even entirely delegated to, groups of faculty members. Collective negotiations is the statutory process whereby the University and the AAUP are required to meet and negotiate in good faith with respect to the terms and conditions of employment of faculty members and others represented by the AAUP.

Both concepts deal generally with the employer-employee relationship. Through collegiality the University has historically permitted employee participation in the employer's governance of the institution. Through entities such as faculty senates, committees and other such groups, composed entirely of faculty or in some instances a mixture of administration and faculty, the University has consented to the delegation of a broad range of its managerial functions, and to some extent faculty has thereby become a functional part of management. Collective negotiations, on the other hand, contemplates the

mandatory negotiation of grievances and terms and conditions of employment with the representative designated by a majority of the employees for that very purpose. Prior to the advent of formal collective negotiations, the resolution of grievances and the establishment of terms and conditions of employment were among the employer's management functions, and may or may not have been among the functions delegated to collegial entities. Under the Act, however, the University must deal exclusively with the AAUP with respect to the grievances and terms and conditions of employment of unit employees. That is not to say, however, that the University is precluded from delegating to collegial entities its managerial functions in this area. Nor is that to say that the AAUP, as majority representative, may not consciously elect to permit the resolution of given grievances or the establishment of given terms and conditions of employment through collegial processes rather than collective negotiations.

It is quite clear to the Commission that the collegial system does not require the University's relationship with the AAUP to go beyond the grievances and terms and conditions of employment of the employees represented by the AAUP. As is the case elsewhere, matters other than grievances and terms and conditions may be negotiated with the majority representative, but need not be. The fact that some managerial functions historically have been voluntarily delegated to collegial entities does not necessarily alter the University's relationship with

the AAUP. If the AAUP seeks to utilize the negotiations process as a means of altering the collegial system in an area beyond grievances and terms and conditions of employment, the University is in the same position as any other employer asked to negotiate with respect to a matter not mandated by law. The fact that employee involvement in management functions is an historical reality at the University does not raise a given issue to the level of a "grievance" or a "term and condition of employment" if it is not otherwise so.^{3/}

As viewed by the Commission, therefore, there is no reason why the systems of collegiality and collective negotiations may not function harmoniously. Neither system need impose upon the other, with one exception: terms and conditions of employment including grievances. The University is free to continue to delegate to collegial entities whatever managerial functions it chooses, subject, of course, to applicable law. The Act is among the law applicable to the University as a public employer, and therefore collective negotiations under the Act would only mandate a change in the collegial system if that system were to operate so as to alter the University's obligation to deal exclusively with the AAUP with regard to the grievances and terms and conditions of employment of unit employees. Beyond

^{3/} Counsel for the A.A.U.P. argued before us that, although normally an employer must only negotiate the impact on terms and conditions of employment of a management decision, at the University, because of the tradition of collegiality, there is an obligation to negotiate the decision as well as the impact of that decision on terms and conditions of employment. We do not accept that argument.

that, both systems are free to operate without necessarily interfering with one another.

We turn now to the particulars of the instant proceedings. It is undisputed that the University is a public employer within the meaning of the Act, and that the AAUP is the majority representative, within the meaning of the Act, of a unit described in both petitions as approximately 3,500 faculty, faculty equivalents, teaching assistants and graduate assistants. The parties' collective negotiations relationship was established by recognition on February 2, 1970 and their most recent collective negotiations agreement had a term of July 1, 1972 to June 30, 1975. Both petitions indicate that the disputed items placed before the Commission for scope determinations arose during the course of collective negotiations for a successor agreement, that the AAUP seeks to negotiate with respect to the disputed items, and that the University contends that the disputed items are not required subjects for collective negotiations.

As previously indicated, certain of the AAUP's demands at the negotiating table constitute the disputed items before us. The University's petition listed fourteen of these demands, and the AAUP's petition withdrew four of the fourteen and added five others that had been made at the table but not included in the University's petition. We are thus presented with fifteen items, the negotiability of which is in dispute. The parties are agreed that the petitions accurately set forth the text of the disputed

demands.^{4/}

These items will be discussed seriatum and the demand, as presented, will be repeated verbatim as a prologue to the analysis of each disputed item, commencing with the items listed on the petition filed by the University.

Items Submitted by the University (Docket No. SN-12)

1. The administration and the AAUP shall develop a program for the evaluation of administrators, with appropriate limitations on the terms of administrators.

This item has been withdrawn by the A.A.U.P. and we shall not consider it because it is not a matter in dispute.^{5/}

2. The AAUP shall be consulted and have a role with respect to those items of the University budget that have an impact on terms and conditions of employment.

By this demand the AAUP does not seek to establish any particular term and condition of employment for the term of the parties' successor agreement. Rather, the AAUP seeks the inclusion of a contractual clause calling for AAUP involvement and participation in certain aspects of the process whereby the University develops its annual budget. The AAUP's concern is with those budgetary items that have an "impact on terms and conditions of employment", and it is with respect to such items that

^{4/} In its petition the AAUP pointed out that its demand concerning class policies was listed by the University in a form that had been modified and superseded by the AAUP prior to the filing of the University's petition. At oral argument the University agreed that the Commission should consider the later form set forth in the AAUP's petition.

^{5/} See N.J.S.A. 34:13A-5.4(d) which requires that a matter must be in dispute in order for the Commission to have the power to make a determination as to whether the matter is within the scope of collective negotiations.

the AAUP would be guaranteed the right to be "consulted and have a role" under the proposed contract clause if the University were to agree to this demand. The demand does not specify the "role" to be played by the AAUP, nor does it indicate when, in the University's budget preparation process, the AAUP's right to be "consulted and have a role" is to take place. It is unnecessary to clarify these matters, however, in order to determine whether the demand relates to a subject that is within the scope of mandatory negotiations.

In order to properly analyze this and other AAUP demands, it is helpful to set forth some of the fundamental concepts underlying the collective negotiations obligation envisioned by the Act. Stated simply, the Act precludes a public employer from unilaterally establishing or modifying terms and conditions of employment.^{6/} Rather, the public employer must notify the majority representative of any such proposed establishment or modification and, upon demand, negotiate the same prior to its implementation.

In this regard a distinction must be drawn between a public employer's activities concerning terms and conditions of employment, and on the other hand a public employer's activities concerning matters other than terms and conditions of employment,

^{6/} N.J.S.A. 34:13A-5.3 in pertinent part provides that, "Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representative of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment."

but having an effect or impact on terms and conditions of employment. In the first instance, the employer's activities deal with terms and conditions of employment and thus are subject to the negotiations obligations indicated above. An obvious example would be an employer's proposal to increase or decrease salaries. As the proposal concerns a term and condition of employment, it may not be effectuated unilaterally.

In the second instance, the employer's activities deal with matters other than terms and conditions of employment and may therefore be undertaken unilaterally, except that the resultant impact on terms and conditions of employment is subject to the negotiations obligations. An example would be a private employer's decision to manufacture an additional product line, creating a need to purchase new manufacturing equipment and to hire new unit employees. The managerial decision may be undertaken unilaterally, but the wages, hours, fringe benefits, etc. of the new unit employees -- terms and conditions of employment -- may not be effectuated unilaterally.^{7/}

The instant demand relates to the University's budget preparation process. As an instrumentality of the State, the University's budget is incorporated within the State's budget, and the University derives a substantial portion of its funds

^{7/} We have recognized the distinction between a decision and the impact of that decision as it effects terms and conditions of employment in several earlier decisions. See Fair Lawn Board of Education et al, P.E.R.C. No. 76-7, 1 N.J.P.E.R. 47 (1975) and City of Trenton et al, P.E.R.C. No. 76-10, 1 N.J.P.E.R. 58 (1975).

from the monies appropriated to it by the State Legislature. The University must prepare an annual budget for ultimate presentation to the Governor and Legislature. The University's Board of Governors must, pursuant to N.J.S.A. 18A:65-25(b):

Study the educational and financial needs of the university, annually acquaint the Governor and Legislature with the condition of the university, and prepare and, jointly with the Board of Higher Education, present the annual budget to the Governor and Legislature, in accordance with law; ***

The budget prepared by the University and proposed ultimately to the Governor and Legislature, will obviously reflect and seek to fund many managerial and educational decisions made by the University. It will also reflect and seek to fund the University's needs and commitments with regard to its employees' terms and conditions of employment.

The AAUP has not demanded a role in the budget preparation process insofar as that process concerns the establishment of terms and conditions of employment. This is understandable, for the AAUP has the right under the Act to negotiate such matters with the University and does not need a contract clause to assure that the budget will be prepared so as to reflect the fruits of such negotiations.

What the AAUP seeks is a role with respect to matters set forth in the budget having an impact on terms and conditions of employment. If no such role were provided the AAUP in the collective negotiations agreement, the Act would require the

University to negotiate with regard to such impact, but not with regard to the University's managerial and educational decisions reflected in the budget and from which the impact flows. Thus we view the AAUP as seeking a role in the formulation of the managerial and educational decisions themselves. This subject-matter does not itself constitute a term and condition of employment, and is therefore not a required subject for collective negotiations. On the other hand we do not see the Act as precluding the University from voluntarily negotiating with respect to AAUP involvement as demanded, or even agreeing to same. As such the demand relates to a permissive subject.

3. The administration and AAUP shall appoint a committee to provide for faculty representation on the Promotion Review Committee equal to administrative representation.

The Promotion Review Committee, according to the University in its brief and uncontroverted by the AAUP, is composed of "academic administrators" presumably outside the negotiations unit. It reviews the recommendations made at the school and college level concerning unit members' promotions within the unit to senior academic ranks and recommendations with respect to the grant of tenure. Ultimately, the President makes recommendations to the Board of Governors which, pursuant to N.J.S.A. 18A:65-25(h), makes the final decisions in these areas. Thus, it appears that the PRC is a managerial entity performing an intermediate function between peer group evaluators and the

Board of Governors in the promotion and tenure decision-making process.

The AAUP's demand would ultimately provide for equal representation on the PRC by faculty members and administrators although the demand literally only provides for the joint establishment of a committee whose function would be to provide for such equal representation.

In determining the negotiability of this demand, it is necessary to distinguish between the subjects (promotions and tenure within the unit) being considered by the PRC and the composition of the PRC. The former are terms and conditions of employment and, as such, are mandatorily negotiable.

However, this demand goes beyond the procedures utilized in reaching these decisions to who actually makes or assists management in making such decisions. The University cannot be required to negotiate the composition of a body created by the University to assist the University's Board of Governors in making these decisions. This is completely up to management. If it chooses to share this function at a particular level in the decision-making process with an equal number of AAUP or faculty members, it may do so. However, it is not required to negotiate regarding such matters.

What the AAUP is seeking to accomplish is the injection of collegiality into a committee that at present is not collegial. It thus appears to be nothing more than the extension of collegiality one step beyond its present limits. But it must be

pointed out that the present collegial system of peer evaluation regarding tenure and promotions within the unit also is beyond the required scope of negotiations.

We thus find this item to be a permissive but not a required subject of collective negotiations.

4. The AAUP shall appoint one member to any standing or ad hoc committee appointed by any administrator and which has a bargaining unit member among its members.

It is assumed, although unspecified in the demand, that the functions of these committees are managerial, i.e., they have been delegated certain management functions by the University. As discussed above, the composition of such committees is not a required subject of collective negotiations although the University could negotiate and agree regarding the composition of these committees.

Nevertheless, the AAUP is not without protection in this area as we discussed in our introductory remarks. It is the exclusive representative of unit members regarding grievances and terms and conditions of employment. Thus, no committee can have the power to effect terms and conditions of employment or to make decisions which impact upon terms and conditions without negotiating with the AAUP. This right to negotiate regarding such matters appears to be a greater right than the right to demand membership on the management committee. In fact, if there were AAUP representatives on such a committee, it would have the anomalous effect of putting the AAUP to at

least a certain extent on both sides of the negotiations table: as a management representative on the one hand and as the exclusive representative of unit members regarding terms and conditions of employment on the other.

Therefore, we find this demand not to be a required subject of collective negotiations although it is permissive.

5. Three members of the bargaining unit selected by AAUP shall serve as full voting members of the Board of Governors and Board of Trustees.

This item has been withdrawn and will not be considered.

6. Proposals for expansion, reduction, or reallocation of any of the University's physical facilities which affect the terms and conditions of employment of members of the bargaining unit shall be submitted to AAUP for review and consultation prior to their implementation.

The AAUP wants a clause in the next contract giving it the right to review and consult, prior to implementation, regarding University decisions to expand, reduce or reallocate physical facilities, where such decisions have an impact on terms and conditions of employment. In our view, the AAUP has the right under the law, even in the absence of a contractual provision, to negotiate the impact on terms and conditions of employment of such a decision, but not the decision itself. The decision is a managerial decision not subject to the obligation to negotiate but the impact of such decision on terms and conditions of employment is mandatorily negotiable. Our analysis

of this issue is similar to that set forth more fully regarding Item 1.

The AAUP seeks to preclude unilateral decision-making with respect to matters that are not mandatorily negotiable. The demand relates to a permissive, but not required subject. This result flows whether or not the right to "review and consultation" is less than the right to "negotiate", for either way it would "fetter" an otherwise "unfettered" management prerogative.

7. The University administration may not participate in any study of productivity of the bargaining unit or any segment thereof without the entire matter having been bargained with the AAUP.

The AAUP seeks, through this demand, the right to prevent the University administration from participating in any study of productivity of the bargaining unit or any segment of the bargaining unit without this matter having been bargained with the AAUP. We do not view the decision to conduct a productivity study to be a required subject of negotiations nor do we view the method in which such a study is conducted to be a required subject of negotiations.^{8/}

However, if as a result of any productivity study, the University desires to make changes regarding terms and conditions of employment or reaches management decisions which

^{8/} If the actual conduct of the study itself affects terms and conditions of employment, then the University would be required to negotiate. For the purposes of this decision, it is assumed that the conduct of any such study would not itself effect terms and conditions of employment and our determination is conditioned upon this assumption.

impact upon terms and conditions of employment, then the University must negotiate regarding such matters with the AAUP. This obligation would include providing information to the AAUP from the study on which the decision was based in order to support the decision and to permit the AAUP to negotiate intelligently regarding any such decision as it affects terms and conditions of employment.

Thus, we find this item to be a permissive but not a required subject of collective negotiations.

8. The 16 week calendar shall include 14 weeks of classroom activity, at least one week of examinations, and/or one week of educational activity to be determined at the discretion of the instructor. No examination shall be scheduled on Saturdays or Sundays. Any calendar must be negotiated with AAUP. Proposals for specific implementation of 1975-76 academic calendar shall be negotiated.

The University contends that the format of the academic calendar is a major educational policy decision not subject to the duty to negotiate, pointing out that all segments of the university share an interest in the structure of this calendar.

The AAUP, on the other hand, argues that the academic calendar has a "critical impact on the format in which services by [unit] members...are to be performed." It cites the effect on hours of employment which flow from decisions relating to the academic calendar.

We believe that the positions and legitimate interests of each party can be protected and accommodated.

The demand has several elements. First, it contains

specific proposals regarding the University's academic calendar: number of weeks of classroom instruction, a minimum period of time for examinations, provision for a week of "educational activity to be determined at the discretion of the instructor", and a prohibition against Saturday and Sunday examinations. We view these decisions to be basic educational management decisions which need not be negotiated with the AAUP. They are not terms and conditions of employment. However, the impact of the decisions as they affect terms and conditions of employment must be negotiated. For example, the AAUP can propose and the University must negotiate regarding a proposal that no unit member shall be required to monitor an examination on a Saturday or a Sunday. The AAUP could propose and the University would be required to negotiate regarding the proposal that, if unit members are required to proctor examinations on Saturdays or Sundays or, for that matter, at all, that they be paid for this activity. The AAUP can propose and the University must negotiate regarding a proposal that unit members have an opportunity to complete their teaching responsibilities by a certain date in order to permit unit members to take additional graduate courses and to complete advanced degrees or for any other reason. This is obviously of vital importance to unit members whose promotions and tenure may be conditioned, in part, upon completion of such activities. This list could be expanded almost indefinitely. Our point is to illustrate that, while the University can establish its academic calendar without negotiating

this calendar with the AAUP, the University must negotiate with the AAUP regarding the impact on terms and conditions of employment of such decisions.

The second element of the demand calls for the negotiation of any calendar with the AAUP while the third element provides for the negotiation of proposals for the specific implementation of the 1975-1976 academic calendar. From our decision of the first element, it follows that the University is not required to negotiate the calendar with the AAUP but it must negotiate with the AAUP regarding the impact of the calendar on terms and conditions of employment of unit members (when they work, how long they work, their workload, etc.). Finally, the third element is a required subject of collective negotiations to the extent that the implementation of the calendar impacts upon terms and conditions of employment.

Therefore, this demand is a required subject of collective negotiations to the extent that the University's decisions regarding the academic calendar have an impact upon terms and conditions of employment of unit members but the actual decisions on the academic calendar are permissive subjects of collective negotiations.

9. The number of positions filled by members of the bargaining unit at the University for the term of this agreement shall be no less than the number of bargaining unit positions that were budgeted in fiscal 1974-75.

The AAUP is seeking to assure that, during the term of the contract, the number of unit positions will not be less than

the number of such positions budgeted during the 1974-75 fiscal year. Here, again, we regard the distinction between a decision and the impact of that decision as it affects terms and conditions of employment as providing the appropriate framework for analysis of the negotiability of the demand.

While we find that the decision as to how many employees to employ to be a basic management decision not subject to the duty to negotiate, we find the impact of such a decision on terms and conditions of employment to be a required subject of negotiations.

If, for example, the University decides that there will be 100 fewer teaching positions next year, it must negotiate the impact of that decision but not the decision itself. That decision will impact in two major ways in all likelihood: upon the 100 employees who are not retained (assuming not all of the reduction is achieved through attrition) and upon the workload of those remaining (assuming a less than proportionate decline in enrollment). To the extent that the stated assumptions are valid, the University would be required to negotiate the impact of that decision on the terms and conditions of employment of affected employees.

Accordingly, while the decision as to how many positions there will be is not a required subject of negotiations, the impact of that decision on the terms and conditions of employment of unit members is a required subject of negotiations. Although the University argues that N.J.S.A. 18A:65-25(h)

"precludes the negotiability of the number of bargaining unit jobs", we do not read the statute so restrictively. It is true that the statute requires a limit on the percentage of staff in any given classification but that provision does not limit the total number of positions available. Thus, we find this demand to be a permissive as opposed to an illegal subject of collective negotiations.

10. The total number of budgeted lines available to members of the bargaining unit shall be increased to make possible the following changes: All TAs and GAs currently holding fractional lines will be offered full lines without a decrease in the number of full lines already available.

We read this proposal as calling for an offer of full-time as opposed to part-time employment to presently employed teaching and graduate assistants. These assistants are included in the negotiating unit.

Our discussion of the previous item applies to certain aspects of this demand. The University is not required to negotiate regarding the total number of positions or an increase in the number of positions or full-time equivalents which it must employ.

However, the University is required to negotiate the hours of employment that these employees work and their compensation. Nothing would preclude the parties from agreeing to increase the number of hours worked by TAs and GAs and at the same time reducing the total number of such employees proportionately. That, at least, is a mathematical possibility that would not necessarily have economic implications for the Uni-

versity. The University could counter by calling for increased teaching load for faculty members in view of the greater availability of teaching and graduate assistants. Of course, we do not intend to suggest any particular outcome to the negotiations process - that is for the parties to work out - but we do want to indicate at least some directions which the parties could pursue.

We find this item to be a required subject of negotiations as it relates to the hours, compensation and working conditions of TAs and GAs but it is a permissive subject to the extent that the thrust is to negotiate regarding the number of unit positions.

11. Recall of President, Senior Vice-President, Vice Presidents, Provosts, Deans and Directors. Each officer named shall be subject to recall in office if written charges are signed by 10 percent of the appropriate members of the bargaining unit, i.e., of the entire bargaining unit when the administrator holds a University-wide office, of the bargaining unit members in a particular geographic location when the administrator holds geographical office and by the faculty of a college or division when the administrator holds college or division office. Charges may be brought on the following grounds: a) incompetent or inefficient service in office; b) demonstrated neglect or unwillingness to perform the duties of office; or c) conduct inconsistent with accepted professional standards normally associated with the position. Charges against an administrator shall be made to the Board of Governors which will conduct such investigations and hearings as the tenets of due process prescribe, following which (but no later than 60 days after receiving the charges) the Board shall render a recommendation to the entire bargaining unit body that brought the charges. The bargaining unit shall then vote on the recall. If 60 percent vote "no confidence" in the administrator, the Board will remove the administrator

from office at the end of the semester in which the vote of no confidence has been given.

This demand has been withdrawn by the AAUP and will not be considered.

12. The Administration shall continue to involve faculty in search committees for appointment of the President, Deans, and Directors of programs and shall extend this participation by faculty to search committees for Provosts and other academic administrative offices.

Here the AAUP is attempting to compel the University to negotiate regarding the procedures to be utilized in searching for non-unit, administrative personnel including the University President, Deans, Directors of Programs, and Provosts and others.

Essentially, the AAUP justifies this proposal as constituting nothing more than an extension of an existing practice. While that is true, that fact does not render the matter mandatorily negotiable. Faculty participation in the selection process flows from collegiality but, as we have discussed, the fact that management may have delegated certain management functions or provided for faculty (as well as other interest group) input in certain management decisions - and it is difficult to imagine a more fundamental management determination than the selection of the President - does not elevate such matters to the plane of terms and conditions of employment.

This item is, therefore, a permissive subject of collective negotiations.

13. A member of the faculty shall be elected annually by the faculty of each college, school and section to preside at faculty meetings.

This item has been withdrawn by the AAUP and will not be considered herein.

Items Submitted by the AAUP (Docket No. SN-13)

14. /As modified by AAUP Petition/
Policies promulgated by the Administration on course combination and class size that affect the terms and conditions of employment of members of the bargaining unit shall first be negotiated with the AAUP."

The demand as stated would require prior negotiations with the AAUP before the University could promulgate policies on course combination and class size that affect terms and conditions of employment of unit members.

A reading of the AAUP brief suggests a desire to require not only negotiations but also approval by the AAUP before a class or section could be cancelled. The University argues that this item relates to basic educational policy decisions which are not mandatorily negotiable.

We agree that this proposal is not a required subject of collective negotiations. The AAUP is attempting to establish an obligation on the part of the University to negotiate (and possibly even agree) regarding decisions which we find to be basic educational decisions not subject to the negotiations duty. However, as the AAUP points out, such decisions do frequently impact upon unit members in a variety of ways including work load and, to this extent, the impact upon terms and conditions

of employment of unit members is a required subject of negotiations. The actual decision, however, is only a permissive subject of collective negotiations.

1. Summer School Salaries and Fringe Benefits (II C4*)

A. Any bargaining unit member who is employed in a summer school course shall be paid according to the rate per course he or she would receive during the regular academic year.

B. Summer session income shall be treated as regular income and all benefit programs applicable during the 10-month academic year shall be applicable thereto.

The AAUP seeks to negotiate the salaries and fringe benefits of unit members employed during the summer to teach in the University's summer session. The AAUP represents 10-month and 12-month faculty members plus TAs and GAs but the 12-month faculty members do not teach in the summer session.

The University argues that its negotiations obligations relate only to the faculty's employment as either 10-month or 12-month employees and not to the summer session which is staffed not only by 10-month faculty members of the University but also by faculty members from other colleges and universities. The AAUP apparently does not claim to represent all faculty members who teach in the summer session but only those who are in the unit during the regular academic year. The University reads its obligation as being limited by the terms of the recognition accorded to the AAUP.

It is clear that, generally speaking, rates of pay

and fringe benefits are mandatory subjects of negotiations. That is not in dispute. Rather, the question is whether the University must negotiate these mandatory items with the AAUP. We do not think so. While the University may agree to negotiate these matters with the AAUP at this time, it need not. The AAUP could seek to clarify this situation in any of several ways by, for example, seeking to add summer session employees to the unit either by seeking recognition from the University or certification from the Commission to represent these employees, or, if it already claims to represent summer session employees, by filing a unit clarification petition with the Commission or even by filing a refusal to negotiate charge with the Commission seeking a determination that the University has violated the law by refusing to negotiate regarding summer session employees. This alternative would require a claim by the AAUP that it represents summer session employees - a claim, of course, disputed by the University.

It is possible that at some future time, an employee organization - the AAUP or another one- will claim to represent summer session employees in a separate negotiations unit. Were that situation to arise, then the recognized or certified representative would have the exclusive right to represent those employees in collective negotiations and the AAUP would be unable, even permissively, to negotiate terms and conditions of employment of those employees without the approval of the

majority representative.^{9/}

Thus, we do not find these to be required subjects of negotiations. If the AAUP claims that it represents summer session employees, it will have to pursue one of the alternatives discussed earlier. On the other hand, the University at this time may negotiate with the AAUP regarding the pay and fringe benefits of its unit members who teach in the summer session and the parties may negotiate an expansion of the negotiations unit to include summer session work if that is desired.

2. Affirmative Action Plan (III K)

The administration shall prepare an affirmative action plan which, insofar as it pertains to members of the bargaining unit shall be presented to AAUP for approval before such plan is submitted to Federal and State offices as the Rutgers affirmative action plan.

The AAUP seeks a provision in the next contract between the parties that would require the prior approval by the AAUP of any affirmative action plans insofar as such plans relate to members of the unit before such plans are submitted to Federal and State offices. Both parties acknowledge that at least certain aspects of such plans pertain to terms and conditions of employment or impact upon terms and conditions of employment.

In terms of the statutory obligations imposed by the

^{9/} The AAUP and the University could still negotiate preferences, etc. regarding the hiring of 10-month employees into the summer session. It could not, however, negotiate their salaries for the summer session.

New Jersey Employer-Employee Relations Act, terms and conditions of employment as well as the impact of management decisions on terms and conditions of employment on unit members are required subjects of collective negotiations. However, such negotiations cannot be conducted in a vacuum. If the results of such negotiations are unacceptable to Federal or State compliance authorities, then such agreements would not be enforceable. Nevertheless, there is an obligation to negotiate regarding such matters.

This situation is vastly more complex than but conceptually similar to the obligation to negotiate regarding wages and overtime. The parties must negotiate these matters because they are terms and conditions of employment but the results of such negotiations would be unenforceable and could be undone by the appropriate authorities if they contravened the Fair Labor Standards Act.

Therefore, while we find that the University must negotiate with the AAUP regarding terms and conditions of employment and the impact on terms and conditions of employment resulting from decisions undertaken to meet the Federal and State anti-discrimination and equalization mandates, the University must also maintain positions on those matters which are acceptable to the relevant authorities and in conformity with Federal and State laws.

It is not possible for us to anticipate all of the possible ramifications associated with satisfying various

anti-discrimination requirements nor shall we attempt to categorize those that we could identify as being terms and conditions of employment which must be negotiated or management decisions which need not be negotiated but the impact of which on terms and conditions of employment must be negotiated.

Therefore, we conclude that the University cannot be compelled to negotiate regarding AAUP approval prior to the submission of affirmative action plans - negotiations in no event require approval by either party to a position taken by the other - but the University is required to negotiate regarding terms and conditions of employment which are affected by such plans as well as regarding the impact of management decisions on terms and conditions of employment of unit members.

3. No Rationing or Quotas on Tenure (III F)

The Administration recognizes that when tenure has been conferred upon a member of the bargaining unit by the Rutgers Board of Governors, this means that the individual has tenure within the entire University system. The Administration agrees that it is the policy of Rutgers University that there shall be no tenure quotas or ranges or limits on tenure in any educational unit within the University.

This demand has two components. The first relates to the scope of tenure: is tenure to be University-wide or less than University-wide? The second relates to quotas or ranges on tenure.

The first element of this item - scope of tenure - we find is a term and condition of employment and, as such, is a required subject of negotiations. However, we view the second aspect relating to quotas on tenure to be a basic educational policy determination not subject to the duty to negotiate. However, the impact of such a decision as it effects terms and conditions of employment is a required subject of negotiations. Also, the decision regarding tenure limits appears to be a permissive subject of negotiations. While N.J.S.A. 18A:65-25(h) requires there to be limits on the percentages of educational staff that may be appointed to any given classification, that requirement does not dictate those limits. Thus, the University has discretion regarding these limits and it may negotiate with respect thereto.^{10/}

In summary, the scope of tenure is a required subject of negotiations and the quotas of tenured faculty members is a permissive but not a required subject of negotiations.

4. Selection of Chairmen (II C2, as modified 1/2/75)

Whenever a department, pursuant to University Regulation 2.86 or a New Brunswick department, pursuant to University Regulation 2.87C, nominates by ballot a member of the faculty for appointment as department or as New Brunswick Chairman, the Dean or the Provost, as

^{10/} Our previous discussion of the enforceability of a contract provision which contravenes the provisions of the Fair Labor Standards Act could be expanded to include public policy considerations. Our point is that the fact that parties could possibly reach an agreement which contravenes a statute or basic public policy does not render that subject matter non-negotiable. We are here concerned with negotiability as opposed to enforceability.

may be appropriate, shall make public to the members of the department, the name of the candidate receiving a majority of the votes, the number of votes cast for such candidate, the total number of votes cast, and the number of abstentions.

If the Dean or Provost fails to implement the departmental recommendation, he shall remand the matter to the members of the department for their reconsideration, giving the substantive reasons that compelled him to take this action. In no case shall the Dean or the Provost appoint as Chairman, a candidate receiving less than a majority of votes among the candidates considered by the department.

The AAUP is seeking to negotiate the procedure to be followed in the selection of department chairmen. Department chairmen are included in the negotiations unit. Although the University disputes the AAUP's characterization of a person's selection as department chairman as a promotion, the parties agree that the department chairmen have certain administrative responsibilities and that, among other things, they make - in consultation with other tenured members of the department - significant recommendations regarding appointments, reappointments, tenure, promotion, etc. It is significant to note that the AAUP is not seeking to negotiate regarding the qualifications for the position of department chairman. The demand relates only to procedures.

We find the procedural aspects of this demand to be required subjects of collective negotiations. The arguments advanced by the University, in our view, are factors to be considered by the University in assessing this demand and developing

its position with respect to the demand. However, the mere fact that the University may have reasons for not wanting to accede to demand does not make that demand not mandatorily negotiable.

Thus, this item is found to be a required subject of collective negotiations.

5. Agency Shop

In the event that legislation is enacted which permits public employers and employee organizations to enter into collective negotiation agreements providing for employee organization security of a type commonly known as "agency shop", the University agrees to an agency shop provision permissible in accordance with the law.

The AAUP is seeking, in effect, to get the University to agree to an agency shop subject to the requisite legislative authorization. It recognizes that the existing law has been interpreted to preclude the imposition of an agency shop. Both parties agree that union security generally and an agency shop particularly are mandatory subjects of negotiations, at least under the National Labor Relations Act.

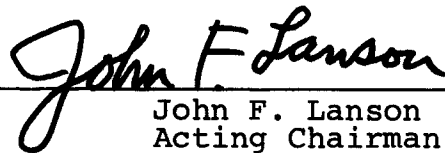
We find this subject to be a permissive subject of negotiations. It does not seek to create an illegal condition because of the prerequisite legislative action which the AAUP recognizes would be necessary. On the other hand, it is not consistent with the overall purposes of the Act - the promotion of harmony and stability in labor relations - to require negotiations on a subject that is currently illegal and which depends

upon a future contingency. Accordingly, this is a permissive but not a required subject of negotiations.

ORDER

Pursuant to N.J.S.A. 34:13A-5.4(d) the Public Employment Relations Commission hereby orders that Rutgers, The State University, upon demand of the Rutgers Council of American Association of University Professors Chapters, shall negotiate in accordance with the determinations made in the above opinion on each matter in dispute.

BY ORDER OF THE COMMISSION



John F. Lanson
Acting Chairman

DATED: Trenton, New Jersey
January 23, 1976