

P.E.R.C. NO. 2016-6

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,  
ROWAN UNIVERSITY,

Petitioner,

-and-

Docket No. SN-2015-030

COMMITTEE OF INTERNS AND  
RESIDENTS SEIU HEALTHCARE,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the State of New Jersey, Rowan University's request for a restraint of binding arbitration of a grievance filed by the Committee of Interns and Residents SEIU Healthcare (CIR). The grievance contests the University's termination of a physician resident from the urological surgery residency program without just cause. Finding the University's medical and academic judgments implicated in this dispute over the grievant's alleged performance of an unauthorized medical procedure, the Commission holds that academic freedom interests predominate over the right to challenge discipline via binding arbitration.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, John J. Hoffman, Acting Attorney General of New Jersey (Brian M. Scott, of counsel and on the brief)

For the Respondent, Weissman & Mintz, LLC, attorneys (Ira W. Mintz, of counsel and on the brief)

DECISION

On October 17, 2014, the State of New Jersey, Rowan University ("University") filed a scope of negotiations petition seeking restraint of binding arbitration of a grievance filed by the Committee of Interns and Residents SEIU Healthcare ("CIR").<sup>1/</sup> The grievance challenges the termination of a resident physician from Rowan University School of Osteopathic Medicine's Urological Surgery Residency Program without just cause.

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<sup>1/</sup> On February 3, 2015, the State filed an application for interim relief which, after oral argument, the Commission Designee denied on March 16, 2015.

The University has filed briefs, exhibits, and the certifications of Dr. Joanne Kaiser-Smith, Assistant Dean of Graduate Medical Education, and Dr. Thomas A. Cavalieri, Dean of the School of Osteopathic Medicine. CIR has filed a brief, exhibits, and the certification of the Grievant. These facts appear.

CIR represents full and regular part-time physicians and dentists titled intern, resident, or fellow who are designated as Housestaff Officers at Rowan University School of Osteopathic Medicine. The University and CIR are parties to a collective negotiations agreement effective from November 1, 2009 through October 31, 2012. The grievance procedure ends in binding arbitration.

The Grievant is a resident physician formerly employed as an osteopathic urological surgical resident in the University's Residency Training Program. On June 20, 2014, during his second year of residency, the Grievant was called into a meeting by Dr. Gordon Brown, Director of the Urological Surgery Residency Program, and accused of intentionally misplacing or "floating" a stent during a surgical procedure. The Grievant denied ever intentionally placing a stent, and told Dr. Brown that the basis of his accusation was a statement he made in jest at a May 24, 2014 social gathering that had been misinterpreted and taken out of context. On June 30, 2014, the Grievant was called into a

meeting with Dr. Brown, Assistant Dean Kaiser-Smith, and Terry Brown, Director of Graduate Medical Education. Drs. Brown and Kaiser-Smith again accused the Grievant of intentionally misplacing a stent during a surgical procedure, which the Grievant again denied. At the conclusion of the June 30 meeting, the Grievant was given a letter signed by Assistant Dean Kaiser-Smith advising him that his residency training was discontinued.

Kaiser-Smith certifies that the Grievant was terminated from the program for the following reasons:

7. Effective June 30, 2014, I discontinued [Grievant]'s training in the Residency Training Program because he performed surgical procedures during his training that, in my academic and medical judgment, were medically unnecessary, posed a substantial risk to patients and were inconsistent with the Association's Core Competencies and the School's academic standards.
8. Specifically, [Grievant] deliberately and unnecessarily floated ureteral stents on two patients in order to gain experience on how to retrieve them. When ureteral stents are floated, the end usually in the bladder is pushed into the ureter, thereby risking obstruction of the ureter and the upper urinary tract. Retrieval of the stents requires either a ureteroscopy or interventional radiology. Either one of these approaches is another distinct procedure, with additional risks to the patient from the procedure and from the additional anesthesia.

As the terminal step of an internal appeal procedure, Dean Cavalieri upheld the termination of the Grievant, certifying:

6. After carefully considering his appeal, I upheld the decision to discontinue his training in the Residency Training Program. I concluded, in my academic and medical judgment, that [Grievant]'s

performance of medically unnecessary and dangerous surgical procedures was antithetical to his responsibility to promote patient care and demonstrate professional conduct, as well as inconsistent with the Association's Core Competencies and the School's academic standards.

The Grievant certifies that the basis of his termination was a statement he made in jest at a social gathering. He certifies:

5. On Saturday, May 24, 2014, I was at a social gathering with my resident physician colleagues during which we discussed our work, among many other topics. At this gathering while discussing a specific surgical procedure, I joked with my colleagues about how if a stent is misplaced during a surgical procedure at least one would be able to gain experience in retrieving and correctly placing the stent. This statement was made in jest. At no point did I ever state that I had intentionally misplaced a stent for the purpose of gaining experience on how to retrieve it.
  
12. I appealed the termination decision to the Dean of the Medical School. During the appeal proceeding, Dr. Robert W. Goldlust, the attending physician who supervised the surgery in which I allegedly misplaced the stent, described the events to the Dean. He told the Dean that he was present for the surgery and that no misconduct occurred.

On July 14, 2014, CIR filed a grievance challenging the Grievant's termination as being without just cause. As a remedy, CIR requests that the Grievant be reinstated with back pay and that references to the termination be expunged from his files. By letter of July 23, the University denied the grievance. On August 1, CIR demanded binding grievance arbitration. This petition ensued.

The Commission's inquiry on a scope of negotiations petition is quite narrow. We are addressing a single issue in the abstract: whether the subject matter in dispute is within the scope of collective negotiations. The merits of the union's claimed violation of the agreement, as well as the employer's contractual defenses, are not in issue because those are matters for the arbitrator to decide if the Commission determines that the question is one that may be arbitrated. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

The University asserts that its decision to terminate the Grievant was an academic and medical judgment, which implicates its academic freedom and is therefore a non-arbitrable managerial prerogative. It argues that the rights guaranteed by the New Jersey Employer-Employee Relations Act (Act) can be preempted by the principle of academic freedom when they infringe on important educational policies.

CIR responds that this is not a simple case involving an academic or medical judgment because the Grievant did not actually perform the unauthorized medical procedure he was terminated for. CIR asserts that the University's contention regarding the Grievant's alleged misconduct is unsupported by any firsthand accounts or witnesses, and that the Grievant's account of the procedure he performed was corroborated by the attending physician during the internal appeal proceeding. CIR concedes

that managerial prerogatives regarding academic and medical judgments cannot be second-guessed by an arbitrator, but argues that with different versions of the facts certified to by each side, the Commission currently has no basis upon which to determine whether the Grievant's termination was indeed based on medical judgment and may not be arbitrated.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

[Id. at 404-405]

In University of Med. & Dentistry, 144 N.J. 511 (1996), the Supreme Court found that, in the context of a teaching hospital terminating a medical intern for alleged inability to treat patients in accordance with medical standards, the University's academic freedom may predominate over the rights guaranteed by

the Act if the matter truly involves an academic or medical judgment. The Supreme Court found:

Once one agrees that the intern is an employee and that the substantive rights advanced by PERC are correct applications of the Act, UMDNJ's conduct appears to violate those rules. However, this case involves a university teaching hospital deciding to terminate a student/employee for his alleged inability to treat patients in accordance with medical standards. That situation triggers a concern for academic freedom that might temper the rights provided in the Act....

To the extent that UMDNJ's actions do involve its assertion of its right to academic freedom, there is no doubt that the Employer-Employee Relations Act will not be permitted to frustrate that effort. We agree with UMDNJ that CIR should not be able to interfere with its academic and medical decisions.

[144 N.J. 511, 531-532, 534]

The Court ultimately upheld the Commission's decision, UMDNJ and CIR, P.E.R.C. No. 93-114, 19 NJPER 342 (¶24155 1993), recon. granted P.E.R.C. No. 94-60, 20 NJPER 45 (¶25014 1994), aff'd 21 NJPER 319 (¶26203 App. Div. 1995), aff'd 144 N.J. 511 (1996), in finding that granting interns and residents Weingarten rights during investigatory interviews and allowing CIR members the right to notice and information regarding pending discipline would not significantly interfere with UMDNJ's academic or medical judgment. The Court cautioned that:

However, while the intern is entitled to those rights, those rights end as soon as it is clear that the matter involves a truly

academic or medical judgment. At that point, the university's interest in academic freedom predominates over the rights guaranteed by the Act.

[144 N.J. 511, 536]

Here, Dean Cavalieri certified that, based on his medical judgment, the Grievant was terminated based on performance of unauthorized medical procedures during his residency. The Grievant never denied saying that he performed the procedure, and he did not produce certifications from anyone else such as the attending physician he claims corroborated his defense at an internal hearing. We decline to allow an arbitrator to second-guess the University's medical and academic judgment of the performance of a resident physician and suitability for continuing in the program. We find that, under these circumstances, the University's academic freedom interests predominate and the Act cannot be applied to permit binding arbitration to frustrate those interests. UMDNJ.

ORDER

The request of the State of New Jersey, Rowan University for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Voos and Wall voted in favor of this decision. Commissioner Jones voted against this decision.

ISSUED: August 13, 2015

Trenton, New Jersey