

P.E.R.C. NO. 2023-24

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX COUNTY COLLEGE,

Petitioner,

-and-

Docket No. SN-2022-036

FACULTY UNION OF MIDDLESEX COUNTY
COLLEGE, LOCAL 1940 AFT, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission dismisses the College's request for a scope of negotiations determination concerning a severance compensation clause (Appendix E) contained in the College's expired collective negotiations agreement (CNA) with the AFT. The Commission finds that because the AFT withdrew its original proposal to maintain Appendix E in a successor contract, the contested language of Appendix E is no longer an issue in dispute in the parties' negotiations for a successor agreement. The Commission further finds that the College has not identified any intervening legislation or court case to warrant exercise of the Commission's scope of negotiations jurisdiction under "special circumstances" to remove Appendix E from the expired CNA. Therefore, the Commission dismisses the petition without prejudice to the College's filing of another scope of negotiations petition should another negotiability dispute arise during collective negotiations, or should the AFT seek binding grievance arbitration over a dispute concerning Appendix E.

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, Weiner Law Group, LLP, attorneys
(Mark A. Tabakin, of counsel and on the brief; Rachel
E. Smith, on the brief; Stephen Edelstein, on the
brief)

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

DECISION

On March 31, 2022, Middlesex County College (College) filed a scope of negotiations petition seeking a determination that a provision of the expired collective negotiations agreement (CNA) between the College and the Faculty Union of Middlesex County College, Local 1940 AFT, AFL-CIO (AFT) is non-negotiable and should not be included in the parties' successor agreement. Specifically, the College asserts that Appendix E, a contract provision regarding severance pay, is non-negotiable because it is an impermissible early retirement incentive.

The College filed briefs, a letter responding to the AFT's request to dismiss the petition, an exhibit, and the certification of Jeffrey Herron, Vice President of Institutional Effectiveness, Planning, and Compliance. The AFT filed a letter seeking dismissal of the College's petition as moot, a response brief, and the certification of its President, Patricia Payne. These facts appear.

The AFT represents a unit of all full-time faculty members employed by the College. The College and the AFT are parties to a CNA effective from July 1, 2016 through June 30, 2020. AFT members are enrolled in either the Alternative Benefit Program (ABP) defined contribution retirement plan or the Public Employees Retirement System (PERS) pension plan.

Appendix E of the CNA is entitled "Severance Compensation Program." It provides:

1. A bargaining unit member who has attained the age of fifty-five (55) on or before June 30, 2017, 2018, 2019, or 2020 and who has completed at least fifteen (15) years of full-time service at Middlesex County College on or before June 30, 2017, 2018, 2019, or 2020, may elect to participate in the severance compensation program outlined below. Bargaining unit members who elect to participate in the program must inform their Department Chairperson/Director, in writing, of their intention to participate on or before October 15 of any given year as set forth above. Participants may elect to leave on December 31 or June 30 of any given year as set forth above.

2. This program cannot be used in conjunction with any other severance compensation program.

3. Bargaining unit members who elect to participate in this Program will receive a lump sum payment from the College in July of appropriate year in accordance with the following table:

a.	<u>Number of Years of Service</u>	<u>Payment*</u>
	15-20	100%
	21	80%
	22	70%
	23	60%
	24	40%
	25	30%
	26	20%
	27	20%
	28	10%
	29	10%

*Calculated by applying the indicated percentage to the last active year's contractual salary.

- b. To allow a bargaining unit member who completes fifteen (15) years of service prior to the minimum eligibility age of fifty-five (55) to take full advantage of this program, for purposes of this provision only, such individuals will have their service total reset to fifteen (15) years at age 55 to determine eligibility and payment level.
- c. The parties agree that "years of service" for determining percentage of salary to be paid shall be calculated based upon full years of service time, which will be or would have been completed by June 30 of the academic year in which the bargaining unit member shall leave the College. Individuals must meet the minimum age and length of service criteria on or before the date they leave, either December 31 or June 30.

The parties are currently in negotiations for a successor agreement. In February 2022, the parties declared joint impasse and scheduled their first mediation session for March 30, 2022. The College filed the instant scope of negotiations petition on March 31 challenging the negotiability of the expired CNA's Appendix E severance provision as an impermissible early retirement incentive.

On June 7, 2022, the AFT presented a proposal to the College to replace the disputed Appendix E provision. On June 23, the College rejected the AFT's proposal as too expensive and offered to consider something similar to what other units had settled for. On June 23, the AFT asked the College to respond with a cost neutral counter-proposal. On June 27, the College asked the AFT whether it would consider a severance program similar to what the other negotiations units had agreed to. On June 27, the AFT asked the College for copies of the other units' severance language. On June 28, the College provided the AFT a copy of the Teamsters' and FOP's severance language.

On July 12, 2022, the College requested that the mediator move the matter to fact finding. On July 20, the AFT notified the College that it was prepared to have another mediation session at which it would present an economic proposal that includes a severance plan based on the Teamsters' plan. On July 20, the College requested that the AFT provide its proposal in

advance of an anticipated meeting with the mediator. A mediation session was scheduled for September 9.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). We do not consider the wisdom of the clauses in question, only their negotiability. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

The Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982):

[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.

The College asserts that Appendix E of the parties' expired 2016-2020 CNA is an impermissible early retirement incentive because it supplements State retirement benefits and is preempted

from negotiations. It argues that Commission precedent supports the proposition that public employers may not negotiate over proposals that would supplement the State's pension benefits system.^{1/} The College contends that Appendix E is non-negotiable because it offers a financial incentive to induce early retirement, which by itself constitutes a supplement to State-established retirement benefits.

The AFT asserts that this scope of negotiations petition is moot and should be dismissed because as of June 7, 2022, the AFT presented the College with a new severance proposal and has no longer sought to include the disputed Appendix E provision in a successor agreement. The AFT asserts that if the College believes that its latest severance proposal is not mandatorily negotiable, it could file a scope of negotiations petition concerning the negotiability of that language. It argues there is also no pending arbitration concerning enforcement of Appendix E. The AFT contends that the Commission should not issue an advisory opinion on a speculative dispute, but should allow the parties to continue to negotiate alternative severance language.

The College concedes that the AFT no longer proposes maintaining the disputed Appendix E in a successor contract. However, the College asserts that the Commission should

^{1/} The College cites Butler Bor., P.E.R.C. No. 99-83, 25 NJPER 160 (¶30073 1999) and City of Elizabeth, P.E.R.C. No. 99-69, 25 NJPER 103 (¶30044 1999).

nonetheless determine the negotiability of the provision under its scope of negotiations "special circumstances" jurisdiction. See N.J.A.C. 19:13-2.2(a)(4)(iv). The College argues that because it must maintain the status quo while the parties are in negotiations for a successor agreement, Appendix E must be removed from the contract because the College "anticipates additional members of the AFT will continue to attempt to utilize the provision, should it remain in the most recent contract."

N.J.S.A. 34:13A-5.4d empowers the Commission to "make a determination as to whether a matter in dispute is within the scope of collective negotiations." N.J.A.C. 19:13-2.2(a)(4) requires that a scope of negotiations petition specify that the dispute has arisen:

- i. During the course of collective negotiations, and that one party seeks to negotiate with respect to a matter that the other party contends is not a required subject for collective negotiations;
- ii. With respect to the negotiability and legal arbitrability of a matter sought to be submitted to binding arbitration pursuant to a collectively negotiated grievance procedure;
- iii. With respect to the legal arbitrability of a dispute as to whether the withholding of an increment of a teaching staff member is disciplinary or predominately relates to the evaluation of a teaching staff member's teaching performance; or
- iv. Other than in (a)4i, ii, and iii above, with an explanation of any special circumstances warranting the exercise of the

Commission's scope of negotiations
jurisdiction; . . .

The College initially filed its scope petition under N.J.A.C. 19:13-2.2(a)(4)(i) because the maintenance of Appendix E of the expired CNA was a disputed issue that arose during the course of the parties' collective negotiations for a successor agreement. At that point, the Commission's scope of negotiations jurisdiction was properly invoked and the Commission Case Administrator processed the petition. However, on June 7, 2022, the AFT withdrew Appendix E from consideration for the successor agreement. The AFT has certified, and the College has not disputed, that as of June 7, it has not sought to include the disputed Appendix E language in a successor agreement. The AFT then proposed an alternative severance program modeled after the language the College had agreed to with a different negotiations unit. The College has not asserted that the AFT's new severance program proposal is non-negotiable. Therefore, there is currently no negotiability dispute under N.J.A.C. 19:13-2.2(a)(4)(i) concerning severance program language for the parties' successor agreement. The College may always re-file a scope of negotiations petition should another negotiability dispute arise during collective negotiations.

The College has also not asserted that there are any pending demands for binding arbitration by the AFT concerning the Appendix E severance program. Thus there is no active dispute

under N.J.A.C. 19:13-2.2(a)(4)(ii) concerning the enforcement of Appendix E of the expired CNA. Instead, the College seeks the removal of Appendix E from the expired CNA because it anticipates a future dispute the next time AFT members seek to obtain the severance benefits provided therein. Should the AFT seek to invoke the benefits of the expired Appendix E in the future, the College may file a new scope of negotiations petition pursuant to N.J.A.C. 19:13-2.2(a)(4)(ii) seeking to restrain binding grievance arbitration over an AFT challenge to the denial of those severance benefits. However, to determine the negotiability of the expired Appendix E language at this time would be advisory. See, e.g., Lower Tp., P.E.R.C. No. 98-57, 23 NJPER 630 (¶28306 1997) (no scope issue in dispute where alleged illegal parity clause was not the subject of contract proposal or binding grievance arbitration); Hamilton Tp. Bd. of Ed., P.E.R.C. No. 97-69, 23 NJPER 50 (¶28034 1996) (no scope issue in dispute where allegedly preempted co-pay provision was not the subject of contract proposal or binding grievance arbitration).

Finally, the College asserts that there are "special circumstances" for invoking the Commission's scope of negotiations jurisdiction. N.J.A.C. 19:13-2.2(a)(4)(iv); Cinnaminson Tp. Bd. of Ed., P.E.R.C. No. 78-11, 3 NJPER 323 (1977). The Commission has held that Cinnaminson's "special circumstances" are not met where "neither party has asserted that

the subject CNA provision is illegal due to intervening legislation or a subsequent Commission or court decision.” Harrison Bd. of Ed., P.E.R.C. No. 2020-15, 46 NJPER 155 (¶37 2019); see also Livingston Tp. Bd. of Ed., P.E.R.C. No. 86-135, 12 NJPER 451 (¶17170 1986) (no special circumstances where “no relevant court case or legislation has intervened”). Here, the College has not cited any intervening legislation or Commission or judicial decisions that have preempted the Appendix E early retirement incentive program since the parties agreed to the 2016-2020 CNA. The College has only cited older Commission and court cases that preceded the parties’ 2016-2020 CNA. See Teaneck Bd. of Ed., P.E.R.C. No. 2005-40, 30 NJPER 483 (¶162 2004) (where relevant Commission cases finding the clause was preempted “were issued before the start of the parties’ current agreement” there were no special circumstances and scope petition was dismissed). Accordingly, we find that there are no special circumstances that warrant our issuing of an advisory scope of negotiations opinion.

There being no present controversy warranting exercise of our scope of negotiations jurisdiction, we dismiss the College’s petition.

ORDER

The request of Middlesex County College for a scope of negotiations determination is dismissed without prejudice to the

College's filing of another scope of negotiations petition should a negotiability dispute arise during successor contract negotiations or should the AFT seek binding grievance arbitration over a dispute concerning Appendix E of the 2016-2020 CNA.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Ford, Papero and Voos voted in favor of this decision. None opposed. Commissioner Bonanni was not present.

ISSUED: January 26, 2023

Trenton, New Jersey