P.E.R.C. NO. 2024-2

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY

PETITIONER,

-and-

Docket Nos. SN-2023-028;
SN-2023-029
CONSOLIDATED

AFSCME LOCAL 888, AMERICAN FEDERATION
OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,
AFL-CIO,

RESPONDENT.

SYNOPSIS

The Public Employment Relations Commission denies the petition of Rutgers, the State University of New Jersey for a restraint of binding arbitration of grievances filed by AFSCME Local 888, a union of maintenance and service employees employed by Rutgers, alleging Rutgers terminated without just cause the employment of two unit members in violation of the parties' collective negotiations agreement. Following investigations of complaints by coworkers, Rutgers terminated both grievants as disciplinary sanctions for violating Rutgers' Title IX Policy, among others. The Commission finds: (1) disciplinary review procedures are mandatorily negotiable and legally arbitrable; and (2) a federal regulation requiring a "grievance process" for formal complaints of sexual harassment under Title IX does not preempt collectively negotiated grievance procedures that may be available to represented employees after discipline has been imposed based upon determinations of misconduct under the Title IX Policy.

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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RESPONDENT.

Appearances:

For the Petitioner, Julianne Apostolopoulos, Associate General Counsel; Andy Jong, Assistant General Counsel

For the Respondent, Mets, Schiro & McGovern, LLP (Kevin P. McGovern, of counsel and on the brief)

DECISION

On February 2, 2023, Rutgers, the State University of New Jersey (Rutgers), filed separate petitions for scope of negotiations determinations (docketed SN-2023-028 and SN-2023-029) seeking a restraint of binding arbitration of grievances filed by AFSCME Local 888, American Federation of State, County and Municipal Employees, AFL-CIO (Local 888). The grievances allege Rutgers terminated the employment of two Local 888 negotiations unit members, I.R.M. and J.M., without just cause, in violation of Article 4 of the parties' collective negotiations agreement (CNA). On February 9, 2023, the matters were

consolidated.

Rutgers filed briefs, exhibits, and the certifications of Melissa Ercolano, Rutgers' Director of the Office of Employment Equity (OEE), and Harry Agnostak, Rutgers' Associate Vice President for Labor Relations. Local 888 filed a brief and the certification of its President, Michael Messner. These facts appear.

Local 888 represents all full and part time (20 hours or more per week) regular maintenance and service employees employed by Rutgers. Rutgers and Local 888 are parties to a CNA with effective dates from July 1, 2018 through June 30, 2024. The CNA's grievance procedure, at Article 4, defines "grievance" as "any difference or dispute concerning the interpretation, application, or claimed violation of any provision of this Agreement or of any Rutgers policy or an administrative decision relating to wages, hours, or other terms or conditions of employment of the employees, as defined herein." The grievance procedure further provides:

> No employee shall be discharged, suspended, or disciplined in any way except for just cause. The sole right and remedy of any employee who claims that he or she has been discharged, suspended, or disciplined in any way without just cause shall be to file a grievance through and in accordance with the grievance procedure.

The terminal step of the grievance procedure provides for binding arbitration by a neutral arbitrator "to be chosen jointly ... from a panel provided by the Public Employment Relations Commission ... in accordance with the rules and procedures of the agency."

The record reflects that prior to the termination of their employment at Rutgers, I.R.M. held the title of "Cook B, Dining Services," and J.M. held the title of "Custodian, Institutional Planning & Operations - Facilities."

Ercolano certifies that as Director of the OEE at Rutgers, she is involved in and familiar with investigations concerning complaints of discrimination and harassment based on, among other things, membership in a protected class and sexual misconduct under Title IX.[1/] She certifies that all of the procedures required by Title IX implementing regulations (issued by the U.S. Department of Education in May 2020) are incorporated in Rutgers' Policy 60.1.33, Title IX Policy and Grievance Procedures (the Title IX Policy).

The Title IX Policy prohibits "Covered Sexual Harassment" defined to include "any conduct on the basis of sex" that

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1/ Title IX is a federal civil rights law that was enacted as part (Title IX) of amendments to the Higher Education Act of 1965, known as the Education Amendments of 1972. Public Law No. 92-318, 86 Stat. 235; 20 U.S.C.S. § 1681, et seq. Title IX prohibits sex-based discrimination in any school or any other education program that receives funding from the federal government.

constitutes, among other things: an employee conditioning educational benefits on participation in unwelcome sexual conduct (i.e., quid pro quo harassment); and unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University's education program or activity. The Policy defines "education program or activity" as including "locations, events, or circumstances over which Rutgers exercises substantial control over both the Respondent and the context in which the Covered Sexual Harassment occurs"; and further specifies that current Rutgers employees "are considered to be participating in a Rutgers program or activity," and that "[c]onduct that occurs in the workplace or in the course of performing one's duties at Rutgers is considered to take place in a Rutgers program or activity."

The Title IX Policy provides for the filing of a formal complaint, defined as "a written document (hard copy or electronic) that alleges that a Respondent committed Covered Sexual Harassment within a Rutgers education program or activity and requests initiation of the procedures consistent with the Policy to investigate the allegation of Covered Sexual Harassment." Ercolano contends in her certification that the phrase "covered sexual harassment" in the Title IX Policy "is intended to distinguish conduct that falls within the Title IX

definition of 'sexual harassment' from conduct that might constitute 'sexual harassment' under other University Policies or other state and federal laws, such as the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et.seq.*, or Title VII, 42 U.S.C.A. § 2000e *et seq.* . . . [that] is prohibited by separate University Policy and governed by other University procedures." These "other University procedures," Rutgers further contends in its statement of facts, "are not at issue in this matter."

The record in this case includes certain formal complaints filed by employees utilizing the OEE's "Formal Complaint Form." This form specifies that in addition to alleged Title IX Policy violations, it is "to be used when a complaint alleges conduct by University employees . . . in violation of: the University's Policy Prohibiting Discrimination and Harassment, 60.1.12 (the "Discrimination Policy"); the Workplace Violence Policy, 60.1.3; [and] the Conscientious Employee Protection Policy, 60.1.16 . . . (referred to collectively as "Covered Policies)."[2/]

The Title IX Policy further provides for, among other things: notice of a complaint filing; investigative procedures; an investigative report and opportunity to respond to same; a live hearing attended by two impartial Title IX "Decision-

2/ The record includes a copy of Rutgers' Title IX Policy, but does not include copies of the Discrimination Policy or others covered by the OEE's Formal Complaint Form.

makers"[3/] (one to oversee the hearing and make a written determination regarding responsibility, the other to make a determination regarding sanctions, if applicable) at which the parties are allowed to present evidence, testimony and cross-examination; a written determination of responsibility; and an appeals process specifically pertaining to the determination of responsibility.

Sanctions for employee respondents found to have violated the Title IX Policy "may include discipline up to and including termination of employment, consistent with the terms of all University Policies concerning personnel actions and the terms of any applicable collective negotiations agreements." (Title IX Policy 60.1.33, § VIII(L)(3), emphasis added.) The Title IX Policy further provides that in addition to any sanction imposed, "the University may also recommend counseling or other support services" for an employee respondent, and that other remedial measures may include: increased monitoring, supervision or security; additional training; revision of the University's policies relating to sexual misconduct; and climate surveys regarding sexual misconduct.

3/ Ercolano certifies that to fulfill the function of neutral and unbiased "Decision-makers," Rutgers retains outside attorneys who do not serve as legal counsel to Rutgers in connection with Title IX matters.

In matters not involving students,[4/] Rutgers' Title IX Policy limits appeals from a determination of responsibility to three specified grounds:

> 1. Procedural Irregularity that Affected the Outcome of the Matter: (i.e. The University failed to follow its prescribed procedures).
>
> 2. New Information: that was not reasonably available at the time the determination regarding responsibility or sanction was made, that could affect the outcome of the matter.
>
> 3. A Conflict of Interest or Bias: held by the Title IX Coordinator, investigator(s), or Decision-maker(s) for or against an individual party, or for or against Complainants or Respondents in general, that affected the outcome of the matter.

In February of 2022, the OEE received three separate formal complaints filed by employees utilizing the OEE's Formal Complaint Form. Two of the employees, each a different co-worker of I.R.M., filed separate complaints against I.R.M. on February 3 and 5, respectively. The third employee, a co-worker of J.M., filed a complaint against J.M. on February 22.

Messner certifies that the three employee-complainants were at all relevant times members of the Local 888 negotiations unit,

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4/ Under Rutgers' Title IX Policy, an appeal on the basis that "the sanction imposed . . . was not appropriate for the offense committed" is "only available in cases involving student Respondents." (Title IX Policy 60.1.33, § VIII(M)(4), "Disproportionate Sanction".)

with access to the grievance procedure contained in Article 4 of the CNA: both employees who filed complaints against I.R.M. worked in covered titles in food service; and the employee who filed a complaint against J.M. worked in a covered title in maintenance. Messner contends in his certification that as Local 888 members, "[i]f the complainants were aggrieved by an administrative decision relating to their allegations of sexual harassment [against I.R.M. and J.M.]," including the outcome of the Title IX investigations, the complainants could appeal those administrative decisions under Article 4 of the CNA, since those decisions impact their terms and conditions of employment. Messner further contends that under the language of Article 4, the complainants would also have the right to pursue binding arbitration of any alleged violations of the Title IX Policy.

Ercolano certifies that pursuant to the Title IX Policy, the complaints resulted in OEE investigations, live hearings and written hearing determinations. The record reflects that these proceedings concluded in July 2022. The OEE conducted a hearing on the complaints against I.R.M. on July 12 and 19, and issued a written determination on July 26. It conducted a hearing on the complaint against J.M. on July 21 and issued a written determination on July 28. The written determinations respectively found both I.R.M. and J.M. "responsible" for separately charged violations of Rutgers' Title IX Policy and its

Discrimination Policy.

Specifically, I.R.M. was found responsible for two charges of violating the Title IX Policy's prohibition against "Covered Sexual Harassment" by engaging in "severe, pervasive and objectively offensive conduct that effectively deprived [the] Complainants of equal access to the educational program or activity, through a pattern of objectively offensive comments and action designed to intimidate [the] Complainants." I.R.M. was further found responsible for four charges of violating the Discrimination Policy's prohibitions against "harassment" and "sexual harassment" by engaging in "a pattern of objectively offensive comments about [the complainants'] national origin and age, repeated references to sexual acts, repeated requests for dates, and action designed to intimidate Complainants in the workplace"; and by making "unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal conduct of a sexual nature in a manner."

J.M. was found responsible for two charges of violating the Title IX Policy's prohibition against "Covered Sexual Harassment" through a course of conduct that included his "solicitations for a relationship" with the complainant, his conduct during a "bathroom incident" which was found to be a non-consensual sexual assault of the complainant, and his subsequent refusal to share "the Davison Hall work" with the complainant. J.M. was further

found responsible for one charge of violating the Discrimination Policy's prohibition against "sexual harassment" in that the same course of conduct was found to be "a series of unwelcome sexual advances and unwelcome verbal and physical conduct of a sexual nature which was severe and pervasive enough to interfere with Complainant's work performance and to create an intimidating, hostile and abusive environment."

The written determinations included recommendations by the respective Title IX sanction decision-makers that there was "just cause to terminate" I.R.M.'s and J.M.'s "employment with Rutgers effective immediately, consistent with the terms of University Policies and the collective negotiations agreement between the University and the AFSCME Local 888."

On August 2, 2022, I.R.M. and J.M. separately appealed their respective written Title IX determinations. I.R.M. appealed on asserted grounds of procedural irregularities and bias. J.M. appealed on asserted grounds of procedural irregularities, new information, and conflict of interest. On August 29 and 30, 2022, Rutgers issued written determinations respectively denying I.R.M.'s and J.M.'s appeals and further advising each, "there are no further levels of appeal available with respect to these findings and this matter is now concluded."

Rutgers terminated I.R.M.'s employment on September 7, 2022. It terminated J.M.'s employment on September 26, 2022.

On September 12 and 14, 2022, Local 888 filed step 3 grievances respectively on behalf of I.R.M. and J.M. Each grievance alleged a violation of Article 4 of the CNA, and sought to make each grievant "whole in every way including any and all losses" and further sought the withdrawal from each grievant's file of any disciplinary action taken.

Agnostak certifies that on September 16, 2022, Rutgers' Director of Labor Relations, Jeffrey Maschi, emailed Local 888's then president and denied its request to hold a third-step grievance meeting on behalf of I.R.M. Maschi further denied I.R.M.'s grievance, stating "the University's position that Title IX and its implementing regulations preempt any further review under the collective negotiations agreement." Agnostak certifies that "it was also communicated" to Local 888 that the grievance filed on behalf of J.M. "was being denied for the very same reason."

On September 20 and October 3, 2022, Local 888 submitted separate requests for grievance arbitration, respectively identifying each grievance to be arbitrated as concerning whether I.R.M. and J.M. were "terminated for just cause." These petitions ensued, as consolidated herein.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978) states:

> The Commission is addressing the abstract issue: is the subject matter in dispute

> within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the employer may have.

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.
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> [Id. at 404-405.]

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey

City POBA, 154 N.J. 555, 574-575 (1998). Where a statute or regulation addresses a term and condition of employment, negotiations are preempted only if it fixes a term and condition of employment expressly, specifically and comprehensively. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982). Statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer may not be contravened by negotiated agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

Here, Rutgers argues that binding arbitration of the consolidated grievances at issue is preempted by federal law and regulation (Title IX and its implementing regulations). Rutgers attributes preemptive effect to a particular Title IX regulation, 34 C.F.R. § 106.45(b), which requires, in pertinent part, that "[a]ny provisions, rules, or practices other than those required by this section that a recipient adopts as part of its [Title IX] grievance process . . . must apply equally to both parties." Id. (emphasis added).

Rutgers contends, in sum, that under the negotiated grievance procedure set forth in the CNA, review of a disciplinary sanction through binding arbitration is available only to the grievants, I.R.M. and J.M., and is not available to the three employee-complainants who filed formal Title IX complaints against I.R.M. and J.M. Thus, Rutgers argues (citing,

among other things, commentary by the U.S. Department of Education in the Federal Register regarding the Title IX regulations it adopted in 2020[5/]), the CNA's grievance procedure conflicts with and is preempted by the regulatory requirement that any additional Title IX grievance procedures (beyond those set forth in the regulation) must apply equally to both parties.

Local 888 counters that Rutgers' scope petitions must be denied because the Title IX regulations do not speak to the right of a union employee to appeal discipline, and because Rutgers' Title IX Policy specifically requires Rutgers to comply with the Local 888 contract if discipline is issued. Local 888 further argues that under the New Jersey Supreme Court's holding in New Jersey Turnpike Authority v. New Jersey Turnpike Supervisors' Association, 143 N.J. 185 (1986), contractual disciplinary procedures, including binding arbitration, are not preempted by laws and policies designed to eradicate sexual harassment, because statutory protections against sexual harassment and contractual protections against unjust discipline are separate and distinct rights that can be exercised independently. Local 888 also cites, among others, several federal court decisions as examples in which disciplinary Title IX sanctions were permitted

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5/ "[I]n the event of an actual conflict between a union contract or practice and the final regulations, **then the final regulations have preemptive effect.**" 85 Fed. Reg. 30298 (underscored emphasis added, bolded emphasis by Rutgers).

to be appealed through union grievances, and/or challenged in court.

Local 888 next argues that the requirements of 34 C.F.R. 106.45(b) only apply to the internal process used to investigate formal Title IX complaints of sexual harassment, while the CNA's just cause provision is only invoked after a complaint has been investigated.[6/] Local 888 further offers hypothetical examples of how Rutgers' Title IX "equal application" argument could lead to "absurd results," positing that under Rutgers' theory, the outcome of a Title IX matter would bar the statutory and regulatory appeal rights of civil service employees and tenured faculty members, as well as interfere with the rights of students and employees to pursue remedies under the New Jersey Law Against Discrimination (NJLAD).

Finally, Local 888 argues that Rutgers' "equal application" argument is based on a false premise, in that all three complainants in this case were at all relevant times Local 888 members, and all three have the right to pursue a grievance under

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6/ Local 888 highlights the following commentary by the U.S. Department of Education in the Federal Register: "These final regulations do not preclude a recipient's obligation to honor additional rights negotiated by faculty in any collective bargaining agreement or employment contract, and such contracts must comply with these final regulations... The Department has never impeded a recipient's ability to provide parties with additional rights as long as the recipient fulfills its obligations under Title IX." 85 Fed. Reg. 30298, 30442 (emphases by Local 888).

Article 4 of the CNA, including a grievance about the outcome of the Title IX investigation into their claims.

In reply, Rutgers reiterates its argument that Title IX regulations "govern the entirety of a recipient's response to sexual harassment up through and including any appeals." Rutgers further argues that regardless of their union affiliation, the Title IX complainants and respondents here do not have an equal right to appeal discipline under the CNA's grievance procedure, because only I.R.M. and J.M. could file grievances challenging the discipline imposed against them, while the complainants could not file grievances seeking either to initiate or increase the level of discipline imposed upon I.R.M. and J.M. Rutgers posits that it would be "nonsensical" if the complainants could do so, as it could result in conflicting grievance arbitration awards regarding the same discipline.[7/]

Finally, Rutgers replies that the cases cited by Local 888

7/ Rutgers also argues that even if the complainants here had the ability to file a grievance due to their Local 888 membership, complainants who are students or non-aligned employees (or those represented by other unions) would "have no recourse at all" because Local 888's contractual grievance procedure is unavailable to them. Rutgers highlights U.S. Department of Education commentary stating that "students and employees should have the same protections with respect to regulations addressing sexual harassment." 85 Fed. Reg. 30026, 30441 (emphasis by Rutgers). As such, Rutgers argues that the CNA's grievance procedure "would not apply equally to both parties and would lead to inconsistent procedures depending on the status of the respondent and complainant."

are "readily distinguishable and inapposite," because, among other things, the grievances at issue in the federal cases cited by Local 888 predated the non-retroactive 2020 Title IX regulations, while the New Jersey Turnpike Authority case arose under the NJLAD, which has "no specific procedural requirements analogous to those set forth in the 2020 Title IX regulations." Rutgers argues "it was the very absence of such requirements that led the New Jersey Supreme Court to conclude the NJLAD did not preclude the right of public sector employees to grieve discipline."

We find that 34 C.F.R. § 106.45 does not preempt negotiation over the subject of the grievances at issue, that is, whether there was just cause to terminate the grievants' employment. As noted, supra, Title IX is a federal civil rights law, enacted as part of the Education Amendments of 1972, that prohibits sex-based discrimination in any school or education program that receives federal funding. On May 19, 2020, the U.S. Department of Education adopted 34 C.F.R. § 106.45, section (b) of which requires recipients of federal funds to implement "a grievance process that complies with the requirements of this section" for the purpose of addressing formal complaints of sexual harassment under Title IX.

Basic requirements of compliance with the regulation include, among other things, the equitable treatment of

complainants and respondents "by following a grievance process that complies with this section before the imposition of any disciplinary sanctions." Id. at 106.45(b)(1)(i)(emphasis added.)[8/] That is, the "grievance process" required by the regulation, in large part, covers the things that must occur (including notice, investigation, and hearing) between the filing of a formal Title IX complaint, the "determination of responsibility," and the determination of a disciplinary sanction, if any. 34 C.F.R. § 106.45(b)(1-7). Within this process, the regulation does not dictate what disciplinary sanctions may be imposed. It requires only that the Title IX grievance process include a description of "the range of possible disciplinary sanctions and remedies or [a] list [of] the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility." Id. at 106.45(b)(1)(iv) (emphasis added). There is no dispute that Rutgers followed that process here.

Under N.J.S.A. 34:13A-5.3, disciplinary review procedures are mandatorily negotiable and binding arbitration may be used as a means for resolving a dispute over a disciplinary determination. Nothing in 34 C.F.R. § 106.45(b) suggests that

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8/ See also 85 Fed. Reg. 30026, 30281 ("the recipient may not impose discipline on a respondent without first complying with a grievance process that complies with § 106.45").

the "grievance process" required by Title IX pertains to, or preempts, collectively negotiated grievance procedures that may be available to represented employees after discipline has been imposed based upon determinations of misconduct under the Title IX Policy.

Here, the parties have a negotiated grievance procedure that terminates in binding arbitration and provides, among other things, "[t]he sole right and remedy of any employee who claims that he or she has been discharged, suspended, or disciplined in any way without just cause shall be to file a grievance through and in accordance with the grievance procedure." (2018-2024 CNA, Article 4);(emphases added).

Appeals of determinations of responsibility following a Title IX investigation and hearing are permitted on grounds that procedural irregularity, newly discovered evidence, or bias or conflict of interest affected the outcome. In this regard, 34 C.F.R. § 106.45(b)(8), provides as follows (emphasis added):

> (i) A recipient [of federal funds] must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
>
> > (A) Procedural irregularity that affected the outcome of the matter;
> >
> > (B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome

> of the matter; and
>
> (C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.
>
> (ii) A recipient may offer an appeal equally to both parties on additional bases.
>
> (iii) As to all appeals, the recipient must:
>
> (A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
>
> (B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
>
> (C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;
>
> (D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
>
> (E) Issue a written decision describing the result of the appeal and the rationale for the result; and
>
> (F) Provide the written decision simultaneously to both parties.

We do not find that the above provisions fix the terms of a disciplinary appeal procedure for employee-respondents in Title

IX matters expressly, specifically and comprehensively; or speak in the imperative, leaving Rutgers with no discretion to comply with the grievance procedure it negotiated with Local 888. As noted, the regulation includes no explicit provision for appeals of disciplinary sanctions imposed following a Title IX investigation and hearing, based upon whether there was just cause for the sanction, whether it was appropriate for the offense committed, or any other basis.

Rutgers' Title IX Policy specifies that sanctions may be imposed "consistent with the terms of all University Policies . . . and the terms of any applicable collective negotiations agreements" (emphases added), and incorporates the three bases for appeals of determinations of responsibility specified in subsection (b)(8)(i)(A-C) of the regulation. The record reflects that I.R.M. and J.M. each filed appeals with the OEE under that subsection. Rutgers denied these appeals while advising the respondents "there are no further levels of appeal available with respect to these findings."[9/]

9/ The regulation allows for a recipient to "offer an appeal equally to both parties on additional bases," and Rutgers' Title IX Policy does provide one additional ground that is not explicitly stated in the regulation, an appeal based upon "Disproportionate Sanction." However, the Title IX Policy specifies that this type of appeal is "only available in cases involving student Respondents." Thus, Rutgers' preemption-based argument that permitting arbitration of the Local 888 grievances at issue would leave students with "no recourse at all" to challenge Title IX disciplinary

(continued...)

Further, our Supreme Court has held: "statutes and regulations are effectively incorporated by reference as terms of any collective agreement covering employees to which they apply. As such, disputes concerning their interpretation, application or claimed violation would be cognizable as grievances subject to the negotiated grievance procedure contained in the agreement." West Windsor Tp. v. PERC, 78 N.J. 98, 116 (1978). See also, Old Bridge Bd. of Education v. Old Bridge Education Assoc., 98 N.J. 523, 527-528 (1985). Accordingly, we have held that "grievances involving the application of controlling statutes or regulations may be arbitrable so long as the award does not have the effect of establishing a provision of a negotiated agreement inconsistent with the law."[10/] Montclair Tp., P.E.R.C. No. 2022-

9/ (...continued)
sanctions is plainly inconsistent with its own Policy. Rutgers also does not explain how its Policy allowing such recourse only to students and not employees squares with the U.S. Department of Education's statement that "students and employees should have the same protections with respect to regulations addressing sexual harassment," 85 Fed. Reg. 30026, 30441, particularly in light of Rutgers' contention that Title IX preempts grievance arbitration over the disciplinary sanctions imposed on the employees here.

10/ Here, I.R.M. and J.M. each received the maximum disciplinary sanction, termination of employment. As such, even if we accepted Rutgers' premise (we do not) that the Title IX "grievance process" conflicts with or could preempt the parties' negotiated grievance procedure, grievance arbitration in this case would present no Title IX "equal access" issues arising from the purported inability of the complainants to file Article 4 grievances seeking to initiate discipline or increase the level of discipline
(continued...)

16, 48 NJPER 215 (¶48 2021). See also, Mercer County, P.E.R.C. No. 96-76, 22 NJPER 197 (¶27104 1996).

In light of the foregoing, we find that the general holding of New Jersey Turnpike Authority, supra, (i.e. that contractual disciplinary procedures, including binding arbitration, are not preempted by laws and policies designed to eradicate sexual harassment) applies with equal force here; notwithstanding that these consolidated matters arose under Title IX and not the NJLAD, as in Turnpike Authority. Moreover, Rutgers does not explain its contention that other university policies and procedures, or laws such as the NJLAD, "are not at issue in this matter," given that both I.R.M. and J.M. were charged with and found responsible for separate and distinct violations of Rutgers' Title IX Policy and its Discrimination Policy, the latter of which, Rutgers certifies, addresses allegations of sexual harassment under laws other than Title IX, including the NJLAD.

ORDER

The requests of Rutgers, the State University of New Jersey, for restraints of binding arbitration are denied.

10/ (...continued)
imposed.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Higgins, and Papero voted in favor of this decision. None opposed. Commissioners Ford and Voos recused themselves.

ISSUED: August 24, 2023

Trenton, New Jersey