P.E.R.C. NO. 91-81

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CO-H-89-251

RUTGERS COUNCIL OF AAUP CHAPTERS,
PART-TIME LECTURER FACULTY CHAPTER,

Charging Party.

RUTGERS, THE STATE UNIVERSITY,

Petitioner,

-and- Docket No. SN-H-90-20

RUTGERS COUNCIL OF AAUP CHAPTERS,
PART-TIME LECTURER FACULTY CHAPTER,

Respondent.

SYNOPSIS

The Public Employment Relations Commission finds that negotiations proposals dealing with names of titles, notice of openings, consideration for vacancies, length of appointments, reappointments, non-reappointments without just cause, priority in schedules, and library privileges are mandatorily negotiable. The Commission also finds, however, that proposals concerning broadening the scope of the certified unit, the consequences of denying an appointment, priority in course assignments, indefinite reappointment, academic freedom, and leaves of absence are not mandatorily negotiable.

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Respondent.

Appearances:

For Rutgers, the State University
Frances E. Loren, attorney

For Rutgers Council of AAUP Chapters, Part-time Lecturer Faculty Chapter, Reinhardt & Schachter, attorneys (Denise Reinhardt, of counsel)

DECISION AND ORDER

On March 8, 1989, the Rutgers Council of AAUP Chapters, Part-time Lecturer Faculty Chapter ("AAUP") filed an unfair practice charge against Rutgers, the State University. The charge alleges that Rutgers violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1)

and (5),[1/] by refusing to negotiate over a number of contract proposals which the AAUP claims are mandatorily negotiable.

On October 25, 1989, Rutgers petitioned for a scope of negotiations determination. It contends that the proposals are not mandatorily negotiable.

The matters were consolidated and a hearing conducted on the scope petition. The parties stipulated a documentary record and argued orally.

On November 5, 1990, Hearing Examiner Alan R. Howe issued a report limited to scope of negotiations issues. H.E. No. 91-11, 16 NJPER 602 (¶21267 1990). He recommended that these proposals be found not mandatorily negotiable: Recognition, paragraphs 2 and 3 (except compensation for new unit titles); Academic Freedom; second sentence of paragraph 6 of Departmental Facilities; Leave of Absence; Miscellaneous, Library; Appointment; Reappointment B.1; Reappointment B.2., third sentence; and Reappointment B.3, B.4. and B.5. He recommended that these proposals be found mandatorily negotiable: first sentence of paragraph 6 of Departmental Facilities; first two sentences of Reappointment B.2; and Non-reappointment C.1.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act," and "(5) refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit...."

The parties filed exceptions, cross-exceptions and replies by December 20, 1990. We will address these arguments in the course of deciding the negotiability of the disputed proposals.

We begin with some background facts. On June 22, 1988, the Director of Representation certified the AAUP as the majority representative of:

> [a]ll persons employed by Rutgers...as a "Visiting Part-time Lecturer"...for a full semester or equivalent[2/] and who are employed for at least their second semester as a "Visiting Part-time Lecturer"...in any two consecutive academic years."

Excluded from the unit are:

> persons otherwise employed by Rutgers...in another capacity for 50% or more of a full-time position; persons otherwise employed by Rutgers...who are presently represented for purposes of collective negotiations by another employee organization; also excluded is employment during the summer; "Visiting Faculty;"[3/] "Co-adjutants"...;[4/] individuals employed by law firms; part-time faculty; and persons employed for 50% or more of a full-time position by...[certain state and federal offices and departments.]

The number of visiting part-time lecturers ("VPLs") varies each semester. There may be as many as 500-600 eligible for the unit in a particular semester.

2/ Equivalents are defined in a footnote.

3/ University policies limit visiting appointments to three years.

4/ Co-adjutants are defined as persons who do not teach a full course for a full semester or equivalent.

According to the Vice-President for University Administration and Personnel, hiring VPLs allows Rutgers flexibility in scheduling courses, including which courses will be offered, how many sections of a particular course will be offered, and when courses and sections will be offered. She stated that each semester the university decides, based on a variety of academic factors, how many VPLs will be hired for that semester, which courses will be taught by VPLs, and which VPLs are best qualified to teach those courses.

According to the Vice-President of the Part-Time Lecturer Faculty Chapter, Rutgers Council of AAUP Chapters, if a course is to be taught, if it is to be taught by a VPL, and if enrollment is sufficient and the budget adequate, the VPL who has taught the course before will be routinely assigned to teach it again. She stated that experience in teaching the course appears to be the only factor in assigning courses. In addition, she states that at the beginning of the fall semester, many VPLs are assigned to their courses for the full year.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets 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 making these negotiability determinations, we recognize that many of these proposals have significant consequences associated with them.

> It is necessary to distinguish between the wisdom of agreeing to a particular proposal relating to a term or condition of employment and whether that proposal relates to a term and condition of employment. The fact that it would not be responsible or prudent to accept a proposal does not by itself render the proposal something other than a term and condition of employment and therefore nonnegotiable. The task confronting us is to decide whether the disputed matters are terms and conditions of employment, not whether the...[employer] should accede to the...[employee organization's] proposals. [In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977, quoting from P.E.R.C. No. 76-27, 2 NJPER 143 (1976)]

A number of the AAUP's proposals concern job security. We will address that issue first.

Job security intimately and directly affects the work and welfare of public employees. In discussing tenure, the Supreme Court recognized that:

> in the context of the public school teacher tenure statute, N.J.S.A. 18A:28-5, tenure "prevents school boards from abusing their superior bargaining power...in contract negotiations." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 74 (1982). It protects employees from dismissal for "unfounded, flimsy

> or political reasons." Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 71 (1962), cert. denied 371 U.S. 956, 83 S.Ct. 508, 9 L.Ed. 2d 502 (1963). Once the status of tenure is earned, it provides a measure of job security to those who continue to perform their jobs properly; and "[n]othing more directly and intimately affects a worker than the fact of whether or not he has a job." [State v.] State Supervisory Employees [Ass'n], 78 N.J. [54,] 84 [(1978)].

Job security for VPLs is not preempted by statute or regulation. No statute or regulation establishes tenure rights for these employees. Contrast N.J.S.A. 18A:28-5 (public school teachers tenure provisions). Nor does any statute or regulation deny them tenure. Contrast N.J.S.A. 18A:16-1.1 (no tenure for substitute teachers). Accordingly, job security for these employees is mandatorily negotiable unless it significantly interferes with educational policy. Local 195.

Absent preemptive statutes or regulations, job security for nonprofessional employees, subject to removal for cause, does not significantly interfere with any educational policy. See Wright v. East Orange Bd. of Ed., 99 N.J. 112, 121-123 (1985); Local 195; Plumbers and Steamfitters Local No. 270 v. Woodbridge Bd. of Ed., 159 N.J. Super. 83 (App. Div. 1978); Bergen Community College, P.E.R.C. No. 89-41, 14 NJPER 680 (¶19286 1988). Although we have not decided the issue of non-statutory tenure for professional employees, we do not believe that all such forms of job security significantly interfere with educational policy. We note in particular that job security in the form of tenure for teachers is well-established in our educational system. See, e.g., N.J.S.A.

18A-28-5 (teachers shall have tenure after three years of employment); Rutgers, the State Univ., P.E.R.C. No. 76-13, 2 NJPER 13 (1976) (university-wide scope of tenure university-wide is mandatorily negotiable but not quotas of tenured faculty members).

Rutgers has an uncontested right to decide what courses to offer, how many sections of a particular course will be offered, when they will be offered, and whether VPLs will teach them. But the question of whether Rutgers can agree to have a pool of qualified lecturers available to teach offered courses implicates job security.

In deciding whether a particular proposal predominately involves educational policy or job security, we must weigh the nature of the term and condition of employment against the extent of its interference with that policy. Woodstown-Pilesgrove Reg. Sch. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980).

RECOGNITION

> 2. All persons employed by the University as "Visiting Part-Time Lecturer" as defined above shall hereinafter be titled "Part-Time Lecturer." A "Part-Time Lecturer" who has completed four (4) semesters of appointment, including summer sessions, shall hereinafter be titled "Senior Part-Time Lecturer."
>
> 3. No newly titled job classification covering part-time teaching employees of the University, other than those specified in the exclusions provided for in the above mentioned Certification of Representative, shall be established unless it is included within the unit represented by the PTLFC.

The first sentence of paragraph 2 would drop "visiting" from the current "part-time lecturer" title. The proposal neither

creates titles nor changes the duties of any titles. Absent a showing of significant interference with educational policy, we find the first sentence of the proposal mandatorily negotiable.

For similar reasons, we find the second sentence of paragraph 2 mandatorily negotiable. The proposal simply ascribes a label to employees who have completed four semesters. The proposed redefinition does not concern promotions or change duties. Contrast Bergen Pines Cty. Hosp., P.E.R.C. No. 87-25, 12 NJPER 753, 754 (¶17283 1986)(employer had prerogative to create new position); Trenton Bd. of Ed., P.E.R.C. No. 85-62, 11 NJPER 25, 26 (¶16013 1984)(employer has prerogative to reorganize operations and realign positions).

Clauses preserving work traditionally performed by unit employees are mandatorily negotiable. See Rutgers, the State Univ., P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd App. Div. Dkt. No. A-468-81T1 (5/18/83). But paragraph 3 is not simply a work preservation clause. It broadens the scope of the certified unit to include any new part-time teaching titles not already excluded from the unit. Such proposals are only permissively negotiable by operation of law. Wood-Ridge Bor., P.E.R.C. No. 88-68, 14 NJPER 130 (¶19051 1988). If new part-time teaching titles are created and the AAUP believes they properly belong in its unit, it may file a unit clarification petition.

DEPARTMENTAL FACILITIES

> 6. Notices of full-time openings within the department shall be distributed to part-time lecturers

(VPLs) in advance of publication in professional journals. Consideration for such positions shall be given to qualified part-time lecturers (VPLs) employed in the department before looking to outside applications.

The first sentence of paragraph 6 requires notice to unit employees of full-time departmental openings. The Hearing Examiner found the proposal mandatorily negotiable and Rutgers has not excepted to that recommendation. We agree that this sentence is procedural and mandatorily negotiable.

The second sentence requires that consideration for full-time openings be given to qualified part-time lecturers before looking to outside applications. An employer cannot be required to favor current employees for vacancies or promotions. In re Byram Tp. Bd. of Ed.; N. Bergen Tp. Bd. of Ed., 141 N.J. Super. 97 (App. Div. 1976). However, it may agree, as a procedural matter, to look at current employees before looking at outside applicants. Garfield Bd. of Ed., P.E.R.C. No. 90-48, 16 NJPER 6 (¶21004 1989). Since this proposal does not obligate the employer to promote or assign from within, it is mandatorily negotiable. Contrast Piscataway Tp. Bd. of Ed., P.E.R.C. No. 87-151, 13 NJPER 508 (¶18189 1987).

APPOINTMENT

A.General Provisions

3. Appointments shall be made for an academic year.

Consistent with long-established precedent, this proposal is mandatorily negotiable. See Burlington Cty. Coll. Faculty Ass'n v. Burlington Cty. College, 64 N.J. 10, 14 (1974); Piscataway Tp.

Bd. of Ed., P.E.R.C. No. 77-37, 3 NJPER 72 (1977), aff'd 164 N.J. Super. 98 (App. Div. 1978). The proposal does not preclude layoffs due to lack of work or restrict the size, composition and deployment of University staff. Nor does it require the University to schedule any particular courses.[5/]

REAPPOINTMENT

B. Reappointment

1. Where possible, assignments shall be made according [to] the part-time lecturer's record of employment. A new employee with no record of employment shall not be assigned, or reassigned, courses in advance of any part-time lecturer with a satisfactory record of employment, except where major educational policy dictates otherwise.

2. Each department shall publish an eligibility list for part-time lecturer reappointments at least 90 days before the semester begins. This list shall include the names of all those who have taught in the department and requested reappointment. Reappointments shall come from this list unless major educational policy dictates otherwise.

3. A part-time lecturer who does not accept a particular appointment shall suffer no adverse consequences in future semesters.

4. Part-time lecturers who complete 4 semesters of teaching shall be titled "senior part-time lecturers." Semesters taught prior to the signing of this agreement shall be applicable to this 4 semester total and each summer session shall constitute a semester under this provision.

5/ Jersey City Bd. of Ed., P.E.R.C. No. 87-14, 12 NJPER 686 (¶17260 1986) is inapposite. There the provision set minimum staffing levels and did not involve the length of the workyear.

> 5. "Senior Part-Time Lecturers" shall be appointed indefinitely and shall have priority in course assignments and schedules.

We begin with paragraph B.2. because it helps us draw the line separating job security, which is mandatorily negotiable, and assignments, which are not.

To examine the limits of negotiability in this area, we must distinguish between the decisions to hire, reappoint and assign. Rutgers has a prerogative to hire employees. But once hired, those employees may be protected by a job security provision which affords their employer an opportunity to evaluate their performance before tenure is granted. See discussion supra at 5-7. Whether or not the employees have negotiated job security, Rutgers must also retain its prerogative to assign particular teachers to particular courses.

The Hearing Examiner found the first two sentences mandatorily negotiable and Rutgers has not excepted to that determination. Those sentences are procedural and mandatorily negotiable. See Jersey City Bd. of Ed., P.E.R.C. No. 82-52, 7 NJPER 682 (¶12308 1981).

The third sentence gives those who have taught in a department priority in reappointment. It does not restrict Rutgers' right to deviate from the list for major educational policy reasons. It is a limited job security provision, providing a right to be considered for continued employment to those who have already taught at least two semesters,[6/] but preserving Rutgers' right to

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6/ AAUP only represents lecturers employed for at least their second semester in two consecutive academic years.

deviate from the list for major educational policy reasons. Those reasons include judgments about academic qualifications and thus the sentence does not prevent the employer from appointing from off the list and does not significantly interfere with the determination of governmental policy. See Local 195. The sentence does not interfere with hiring, since it concerns continued employment, or with the right to assign particular VPLs to particular courses.7/ The sentence relates predominately to job security and is therefore mandatorily negotiable.

Paragraph B.1., however, requires, where possible, that assignments shall be made according to VPLs' records of employment. Particularly in an educational setting, assignments are reserved to management. This paragraph is therefore not mandatorily negotiable.

The AAUP characterizes paragraph B.3. as a leave provision. It relies on Maurice River Tp. Bd. of Ed., P.E.R.C No. 87-91, 13 NJPER 123, 124 (¶18054 1987), where we found mandatorily negotiable a clause requiring that employees returning from an extended leave be placed in a substantially equivalent position.

7/ Rutgers, the State Univ., P.E.R.C. No. 83-136, 9 NJPER 276 (¶14127 1983), adopting H.E. No. 83-26, 9 NJPER 177 (¶14083 1983), relied on the Hearing Examiner's finding that negotiations would unduly restrict Rutgers' ability to match the qualifications of particular instructors with particular courses. Here, VPLs would only achieve "tenure" if Rutgers decided to reappoint them for four semesters. Before "tenure" is granted, Rutgers retains the right not to reappoint based on academic qualifications. After "tenure" is granted, Rutgers retains the right to decide which "tenured" lecturers will teach what specific courses.

Leaves of absence are mandatorily negotiable, but this clause is apparently broader than the clause in Maurice River. By guaranteeing against no adverse consequences if a VPL declines an appointment, the proposal would affect subjects that are not mandatorily negotiable and is therefore not mandatorily negotiable.

Paragraph B.4. defines senior part-time lecturers as those who complete four semesters of teaching. Standing alone, this proposal is mandatorily negotiable. But paragraph B.5. reaches too far. Indefinite appointment after four semesters, subject to removal for just cause, is a form of job security and is mandatorily negotiable.[8/] But the AAUP may not negotiate guarantees of indefinite appointment with no right to remove for cause. Nor may it negotiate priority in course assignments. Rutgers must retain the right to decide which qualified lecturers will teach what specific courses. Priority in schedules is mandatorily negotiable to the extent it means the right to determine one's work hours by choosing among different sections of the same course.

NON-REAPPOINTMENT

C. Non-reappointment

> 1. Any part-time lecturer who is not reappointed shall be given written notice of non-reappointment specifying the reason(s) for the non-reappointment decision at least 90 days before commencement of the semester in question. The PTLFC shall receive copies of all notices of non-reappointments. A part-time lecturer shall not be denied reappointment without just cause, or in an arbitrary manner.

8/ Under the AAUP proposals, Rutgers retains the right not to reappoint through the fourth semester.

Rutgers excepts to the third sentence only. The first two sentences are mandatorily negotiable notice provisions. AAUP concedes that the third sentence must be read in conjunction with Reappointment B.2 which allows Rutgers to deviate from the reappointment eligibility list for major educational policy reasons.[9/] Thus this proposal does not affect non-reappointments based upon academic qualifications. It simply provides that non-reappointment decisions for disciplinary reasons must be for just cause. Such a clause does not significantly interfere with any educational policy and is mandatorily negotiable. See also N.J.S.A. 34:13A-5.3 (making disciplinary review procedures mandatorily negotiable).

ACADEMIC FREEDOM

> The parties hereto recognize the principles of academic freedom set forth in the New Jersey State Administrative Code, 9:6-3.1.
>
> This provision shall be grievable only to the extent that the grievance alleges that discipline or discharge has violated academic freedom.

Provisions guaranteeing academic freedom are matters of educational policy and are not mandatorily negotiable. N. Hunterdon Bd. of Ed., P.E.R.C. No. 85-100, 11 NJPER 233 (¶16090 1985). Rutgers cannot be bound through negotiations to follow the definition of academic freedom found at N.J.A.C. 9:6-3.1. The clause is therefore not mandatorily negotiable.[10/]

9/ We note that because of the unit description, only those lecturers who are seeking reappointment to at least their third semester would be protected by this clause.

10/ AAUP did not except to the Hearing Examiner's recommendation that this clause be found not mandatorily negotiable.

LEAVE OF ABSENCE

> Part-time lecturers may take unpaid leaves of absence for any reason of disability (including pregnancy or childbirth), professional development (including dissertation research), or personal convenience. The part-time lecturer shall notify his/her department at least 90 days before the beginning of the semester(s) in question of the dates of departure and return. Such leaves of absence shall not affect the part-time lecturer's status in the bargaining unit, his/her eligibility for promotion and other positions at Rutgers, or his/her salary rate (including annual cost-of-living increases.) Part-time lecturers who take such leaves shall suffer no adverse consequences.

While leaves of absence are mandatorily negotiable, see, e.g., Hudson Cty. Area Vo-Tech Sch. Bd., P.E.R.C No. 85-7, 10 NJPER 497 (¶15225 1984), this clause reaches too far by requiring that lecturers who take leaves shall suffer no adverse consequences. See discussion of paragraph B.3 supra at 12-13.

MISCELLANEOUS

2. Library

> Part-time lecturers shall receive full faculty library privileges, including during unpaid leaves of absence.

Use of library facilities intimately and directly affects employees' work and welfare. See Local 195, IFPTE v. State, 88 N.J. 393 (1982). Such use may be for recreation or for enhancing teaching ability. Rutgers argues that our caselaw establishes that library privileges are not mandatorily negotiable. We disagree. Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 87-83, 13 NJPER 78, 81 (¶18036 1986) and Delaware Tp. Bd. of Ed., P.E.R.C. No. 87-50, 12 NJPER 840, 843 (¶17323 1986) relied on Jersey City Bd. of Ed., P.E.R.C. No. 82-52 and Byram Tp. Bd. of Ed. which held that the

decision whether to use textbooks or other teaching materials infringed on a Board's discretion over curriculum and course content. Here, Rutgers has not shown how agreeing to grant lecturers library privileges would significantly interfere with any educational policy. Accordingly, we find that the proposal is mandatorily negotiable.

ORDER

The following proposals are mandatorily negotiable: Recognition, paragraph 2; Departmental Facilities, paragraph 6; Appointment, paragraph A.3; Reappointment, paragraphs B.2, B.4; B.5 (schedules); Non-Reappointment, paragraph C.1; and Miscellaneous, paragraph 2 Library.

The following proposals are not mandatorily negotiable: Recognition, paragraph 3; Reappointment, paragraphs B.1, B.3, B.5 (course assignments); Academic Freedom; and Leave of Absence.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Johnson, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
March 28, 1991
ISSUED: March 28, 1991

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SYNOPSIS

In a consolidated unfair practice and scope case, a Hearing Examiner recommends that the Public Employment Relations Commission find that a series of 14 AAUP contract proposals, currently at issue in the parties' negotiations for a unit of visiting part-time lecturers (VPL), are either negotiable or non-negotiable, as follows: Proposals on "Recognition" and "Academic Freedom" are found to be non-negotiable because they are enmeshed in the prerogative of Rutgers to hire, to create job titles or to make educational policy decisions. Proposals on "Leave of Absence" and "Library" privileges together with a series of proposals with respect to the Appointment or Reappointment of VPLs are deemed non-negotiable because of undue intrusion upon Rutgers' prerogative

to deploy its work force, allocate its educational resources, or to hire, appoint or reappoint its employees, including the VPLs. The only proposals found to be negotiable involved procedures pertaining to notice of non-reappointment, the AAUP's receiving copies of all notices of non-reappointment, the opportunity of the AAUP to arbitrate non-reappointments based upon the absence of just cause, the publishing of eligibility lists and the distribution of notices of full-time openings in advance or contemporaneous with the publication of such openings in professional journals.

By agreement, the Unfair Practice Charge has been held in abeyance pending the Hearing Examiner's decision on the scope issues since the parties agreed that the scope determination might moot the unfair practice.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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Appearances:

For Rutgers, The State University
Frances E. Loren, Attorney

For Rutgers Council of AAUP Chapters, Part-time Lecturer Faculty Chapter, Reinhardt & Schachter, Attorneys
(Denise Reinhardt, of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND INTERIM DECISION ON RUTGERS' PETITION FOR SCOPE OF NEGOTIATIONS DETERMINATION[1/]

1/ The issuance of an "Interim" decision arises from the fact that, notwithstanding that these cases have been consolidated for hearing and disposition, infra, the parties by agreement have requested that the Hearing Examiner first address and decide Rutgers' Petition for Scope of Negotiations Determination.

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") March 8, 1989, by the Rutgers Council of AAUP Chapters, Part-Time Lecturer Faculty Chapter ("AAUP") alleging that Rutgers, The State University ("Rutgers") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that since January 1989, Rutgers has refused to negotiate in good faith with the AAUP concerning a series of contract proposals concerning terms and conditions of employment, i.e., Rutgers' representative has engaged in surface bargaining; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[2/]

It appearing that the allegations in the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 18, 1989, which scheduled hearings for November 29 and December 7 and 8, 1989, in Newark, New Jersey.

Prior to filing its Answer, Rutgers filed a Petition for Scope of Negotiations Determination with the Commission on October

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2/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

25, 1989, in Docket No. SN-90-20, with a supporting brief. Rutgers contended that the subject matters, which the AAUP is seeking to negotiate "are not within the scope of negotiations." On October 31, 1989, the AAUP requested that the Unfair Practice Charge and the Scope Petition be consolidated for disposition.[3/]

On November 13, 1989, the Commission referred the Scope Petition to the undersigned for possible consolidation;[4/] Rutgers requested a stay of the Unfair Practice Charge proceeding on November 22, 1989, pending the disposition of the Scope Petition, which resulted in the adjournment of the original hearing dates. The AAUP filed its response to the Scope Petition on January 31, 1990 and Rutgers filed a reply to the AAUP's response on February 26, 1990.

On March 23, 1990, the AAUP advised the undersigned that the parties were "going back to the table" to negotiate on modified proposals submitted to Rutgers by the AAUP. The status quo continued until May 23, 1990, when the undersigned convened a meeting with counsel for the parties to review their respective positions as of that date. On May 23rd, it was deemed necessary to hold a plenary hearing to adjudicate the Scope Petition, based upon the stated positions of the parties.

3/ Rutgers filed its Answer to the Complaint on November 3, 1989.

4/ Consolidation was not ordered until June 6, 1990.

Thereafter, the undersigned set forth the procedures for the plenary hearing, which was held on June 18, 1990, in Newark, New Jersey. A documentary record was stipulated and counsel argued orally from their briefs previously filed (Tr 14-109). Neither party filed a post-hearing brief.[5/]

A Petition for Scope of Negotiations Determination having been filed with the Commission, and there existing a dispute between the parties as to the negotiability or non-negotiability of certain contract proposals submitted to Rutgers by the AAUP and, after hearing, and after consideration of the briefs filed by the parties prior to the hearing, and upon the stipulated record, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

* * * *

Upon the stipulated record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. Rutgers, The State University is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Rutgers Council of AAUP Chapters, Part-Time Lecturer Faculty Chapter is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

5/ Rutgers initially considered filing an additional brief but decided not to do so on July 19, 1990.

3. The Commission certified the AAUP as the collective negotiations representative for a unit of persons employed by Rutgers as a "Visiting Part-Time Lecturer" (VPL) on June 22, 1988 [Certification of Representative: Docket No. RO-88-8] (J-2; Tr 29). The definition of a VPL is complex and is set forth in full on Exhibit J-2, p. 2. Essentially, to qualify for unit inclusion, the VPL must have taught the equivalent of a full course for a full semester [with several permutations and combinations as set forth in footnote 1 of J-2], following which the VPL becomes a member of the negotiating unit at the commencement of his or her second semester, provided, however, that he or she has been employed for at least a second semester in any two consecutive academic years.

4. Exhibit P-1 contains a series of initial contract proposals, which the AAUP had presented to Rutgers during negotiations for an initial collective negotiations agreement covering the VPL unit. Rutgers responded by filing its Scope Petition on October 25, 1989. It was agreed that Exhibit P-1 serves two purposes: first, it sets forth in full the AAUP contract proposals, which were pending as of October 1989; and second, it reflects Rutgers' position that each and every one of these proposals were not negotiable (see its Scope Petition and Tr 12, 13). The subject headings, but not the text, in the initial AAUP contract proposals were as follows:

ACADEMIC FREEDOM

COMPENSATION FOR EXTRA DUTIES

PENSION BENEFITS AND OPTIONS

RECOGNITION

EVALUATION

DEPARTMENTAL FACILITIES

APPOINTMENT/REAPPOINTMENT

LEAVE OF ABSENCE

MISCELLANEOUS (Parking, Library, and Child Care)

5. Exhibit J-1, which was prepared by Rutgers and adopted by the AAUP, is entitled "Stipulated AAUP Contract Proposals at Issue as of June 13, 1990" (Tr 14). This exhibit contains only the six contract proposals of the AAUP, which are currently at issue. Further, only those specific parts of these six contract proposals indicated by an asterisk (*) in the left margin and emphasized in "red" are to be decided in this proceeding. Finally, the subject headings and text of the proposals at issue are set forth separately and discussed seriatim under the **Analysis** which follows.

ANALYSIS

RECOGNITION

> 2. All persons employed by the University as "Visiting Part-Time Lecturer" as defined above shall hereinafter be titled "Part-Time Lecturer." A "Part-Time Lecturer" who has completed four (4) semesters of appointment, including summer sessions, shall hereinafter be titled "Senior Part-Time Lecturer."
>
> 3. No newly titled job classification covering part-time teaching employees of the University, other than those specified in the exclusions provided for in the above mentioned Certification of Representative, shall be established unless it is included within the unit represented by the PTLFC.
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> * * * *

First, the AAUP argues that its "Recognition" proposal is actually a "work preservation clause" and that ¶3, in particular, "...is intended to ensure that this unit is not eroded..." (Tr 32). In so proposing, the AAUP contends that it has thwarted any subterfuges by Rutgers involving the hiring of persons to "...teach a course for a semester or...for a whole year...and then not include them in this unit..." (Tr 32, 33).

The AAUP also suggests that the proposed language in ¶2 enhances the status of the VPL as a person whose employment is "continuous" and who has an "expectation of continued employment," consistent with the Commission's certification (Tr 24, 25, 27, 28; J-2). A final reason for defining the VPL as "Part-time Lecturer" or as a "Senior Part-time Lecturer" in ¶2 is that persons within the VPL title do not like to be referred to as "visitors" since they have had continuing, long-term relationships with Rutgers (Tr 34-36).[6/]

The position of Rutgers regarding ¶2 and ¶3 of the AAUP's Recognition proposal is that they intrude upon the University's managerial prerogative to establish new titles when it elects to do so. The proposed language also trenches upon its managerial prerogative to create criteria for any new titles created, i.e., AAUP's proposed ¶2 provides that one who has completed four

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6/ See also, AAUP's Opposition Brief of January 31, 1990 at p. 34 (hereinafter "AOB, p. 34").

semesters of appointment is without more a "Senior Part-Time Lecturer" (Tr 20, 21).[7/]

The Hearing Examiner finds that the position of Rutgers with respect to ¶2 is more persuasive than that of the AAUP. Recognition clauses historically track the certification (or voluntary recognition as the case may be) and set forth the inclusions and exclusions of job titles which thereby define the unit. Exhibit J-2, supra, describes in great detail the requisites for unit inclusion of the VPLs together with the many exclusions of specific job titles, professional groupings and enumerated departments of the State and Federal governments. Plainly, the AAUP is cognizant of this fact since, at oral argument, it addressed the matter of the exclusions in J-2 (Tr 27-32). In fact, it was the AAUP that offered Exhibit J-2 in evidence (Tr 28, 29).

The Hearing Examiner is also persuaded that the AAUP's proposal in ¶2 to define the VPL beyond that appearing in the certification is an intrusion upon Rutgers' managerial prerogative to create job titles: Bergen Pines County Hospital, P.E.R.C. No. 87-25, 12 NJPER 753, 754 (¶17283 1986) and Trenton Bd. of Ed., P.E.R.C. No. 85-62, 11 NJPER 25, 26 (¶16013 1984). Further, to the extent that AAUP's proposal seeks to create a promotional track for the VPL from "Part-Time Lecturer" to "Senior Part-Time Lecturer," it has exceeded the limit of mandatory negotiability since matters of

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7/ See also, Rutgers' Original Brief of October 25, 1989 at pp. 31, 32 (hereinafter "ROB, pp. 31, 32").

promotion are a managerial prerogative reserved to the employer: Tp. of North Bergen Bd. of Ed. v. North Bergen AFT, 141 N.J. Super. 97 (App. Div. 1976); Byram Tp. Bd. of Ed. & Ed. Ass'n, 152 N.J. Super. 12 (App. Div. 1977); Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983); and Brookdale Community College, P.E.R.C. No. 84-84, 10 NJPER 111, 112 (¶15058 1984). Therefore, ¶2 of the AAUP's proposed Recognition clause is non-negotiable.

* * * *

Paragraph 3 of the AAUP's Recognition proposal provides that no newly titled classifications covering part-time teaching employees shall be established unless they are included within the unit. Rutgers responds that such a restriction on the creation of new job titles is not negotiable under Bergen Pines County Hospital, supra. Also, this proposal could significantly interfere with Rutgers' rights to reorganize its operations, realign positions and make assignments: Trenton Bd. of Ed., supra. The AAUP claims that ¶3 is intended "...to preserve the work of part-time faculty...and to preserve the right to negotiate over compensation of new titles..."[8/]. Rutgers concedes that if a new title is created within the unit, then "...the compensation for that title would be negotiable..." (Tr 23).

The Hearing Examiner's conclusion as to the negotiability of ¶3 is that to the extent that it seeks to restrict the creation

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8/ See AOB, p. 34

of new job titles, it improperly interferes with a non-negotiable managerial prerogative. However, recall that Rutgers has conceded that it is obligated to negotiate the compensation for any newly created job titles within the unit.

ACADEMIC FREEDOM

> The parties hereto recognize the principles of academic freedom set forth in the New Jersey State Administrative Code, 9:6-3.1.
>
> This provision shall be grievable only to the extent that the grievance alleges that discipline or discharge has violated academic freedom.

* * * *

This proposal first provides that the parties recognize the "principles" of academic freedom as set forth in the Administrative Code. The second paragraph then mandates that academic freedom shall be grievable but only to the extent that discipline or discharge has violated academic freedom.

Rutgers points out initially that academic freedom addresses what is said in a classroom, what kind of research "an academic" may follow, what he or she may say in publications, and that these are "matters of educational policy" and "not matters for negotiation..." (Tr 44). Rutgers cites in support of this proposition: North Hunterdon County Bd. of Ed., P.E.R.C. No. 85-100, 11 NJPER 233 (¶16090 1985), Rutgers, The State University,

P.E.R.C. No. 84-44, 9 NJPER 661, 662 (¶14286 1983) and Edison Tp. Bd. of Ed., P.E.R.C. No. 83-100, 9 NJPER 100 (¶14055 1983).[9/]

The AAUP insists that academic freedom is a right derived from the First Amendment but concedes that it is a matter of educational policy "...to determine what guarantees of academic freedom do exist..." and that its proposal was intended as "a starting point for discussions" of the issue.[10/].

At oral argument, the parties spent most of their time addressing the second paragraph, which seeks to make discipline or discharge arising from a violation of "academic freedom" grievable (Tr 38-45). Rutgers argues that grievances concerning discipline or discharge where academic freedom is alleged to have been violated would require an inquiry into "...fundamental educational policy...," namely, determining whether or not the guarantee of academic freedom has been violated in instances where discipline or discharge has been imposed. In urging that such grievability cannot be permitted, Rutgers cites: Wayne Tp. v. AFSCME, 220 N.J. Super. 340 (App. Div. 1987) and East Brunswick Bd. of Ed. v. Ed. Ass'n, P.E.R.C. No. 81-123, 7 NJPER 242 (¶12109 1981), aff'd in part, rev'd in part, App. Div. Dkt. No. A-4488-80T2 (1982.

The AAUP contends that the second paragraph of its proposal merely limits the first paragraph by setting a standard for

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9/ See ROB, p. 33.

10/ See AOB, p. 39

discipline and a procedure within which it may be grieved (Tr 41). Since the parties are free to agree to a grievance procedure with final and binding arbitration, the AAUP is merely seeking to set the standard of just cause" for discipline and discharge in cases of alleged violation of academic freedom. Further, "...academic freedom as a species of just cause is extremely different from the kind of managerial decisions..." which the Supreme Court barred from arbitration in Teaneck Bd. of Ed., supra, and other cases. [Tr 41-43].

The Hearing Examiner is persuaded, on balance, that the AAUP's proposal on Academic Freedom is non-negotiable in its entirety since it is enmeshed in major educational policy. There is no practical way to separate or sever the non-negotiable subject of "academic freedom" from the otherwise negotiable subject of submitting matters of discipline or discharge to the parties' negotiated grievance procedure.

DEPARTMENTAL FACILITIES

> 6. Notices of full-time openings within the department shall be distributed to part-time lecturers (VPLs) in advance of publication in professional journals. Consideration for such positions shall be given to qualified part-time lecturers (VPLs) employed in the department before looking to outside applications.
>
> * * * *

The first sentence of ¶6 in this proposal provides for distribution of notices of full-time departmental openings to

part-time VPLs in advance of publication in professional journals. Rutgers argues that this provision is non-negotiable since it requires advance notification to VPLs of "full-time openings within the department," which necessarily includes "openings" for positions not within the VPL unit (Tr 84, 85). This proposal is, thus, at odds with Matawan-Aberdeen Reg. Bd. of Ed., H.E. No. 86-46, 12 NJPER 255, 263 (¶17108 1986), adopted P.E.R.C. No. 87-117, 13 NJPER 282 (¶18118 1987) where it was decided that the Association lacked standing to assert as a violation of the Act the fact that its members were not given an opportunity to bid on certain posted positions since the positions were not included within the Association's unit.[11/] The AAUP responds that there is nothing in Matawan, which supports the blanket proposition that public employees may not negotiate procedures for promoting unit employees to non-unit positions.[12/]

At oral argument, the Hearing Examiner asked counsel for Rutgers how the mere giving of notice created a problem since the first sentence of this proposal says nothing about "...consideration of the employee, it just says tell him..." (Tr 87). The Hearing Examiner added that facially there appeared to be no "...interrelationship...between nailing a notice up on the wall, and having started your search...with no obligation to do anything..."

11/ See ROB, p. 9 and Rutgers' Reply Brief of February 26, 1990 at pp. 4, 5 ("RRB, pp. 4, 5").

12/ See AOB, p. 22.

(Tr 88). The response of counsel was that it was not the "notice per se" but rather it was the requirement of notice "...in advance of publication..."

The Hearing Examiner concludes that the entire first sentence in ¶6 of the AAUP's Departmental Facilities proposal is mandatorily negotiable. It would appear that Rutgers is unduly apprehensive about possible encroachment upon its managerial prerogatives or the implementation of its educational policies. The initial requirement that it send a "Notice of full-time openings within the department..." to part-time lecturers without more strikes the Hearing Examiner as a mere procedural requirement of the vintage that the Commission has held many times to be mandatorily negotiable: Jersey City Bd. of Ed., P.E.R.C. No. 82-52, 7 NJPER 682 (¶12308 1981);[13/] Tp. of Piscataway, P.E.R.C. No. 86-10, 11 NJPER 456 (¶16161 1985); and N.J. Highway Authority, P.E.R.C. No. 89-89, 15 NJPER 157, 159 (¶20066 1989). The Hearing Examiner has carefully weighed the thrust of the concluding phrase "...in advance of publication in professional journals..." as against Rutgers' contention that this requirement is part and parcel of the non-negotiability of the entire sentence. Having done so, he is in agreement with counsel for the AAUP, who stated at oral argument that "in advance" requires nothing more than the distribution of

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13/ Citing and relying in part upon Tp. of North Bergen, etc., supra, 141 N.J. Super. at 104 and State of N.J. v. State Troopers NCO, 179 N.J. Super. 80, 89, 90 (App. Div. 1981).

notices "at the same time" that the advertisement of the opening or openings is sent out for publication in the professional journals (Tr 89).

According to Rutgers, the second sentence in ¶6 is non-negotiable, because it requires that qualified part-time lecturers previously employed in the department be given a preference for full-time openings before the University can look to outside applicants. Rutgers asserts this position even though the AAUP does not seek an absolute preference but merely preferential consideration.[14/] The AAUP argues that the term "qualified" provides Rutgers with full discretion in hiring and in no way impedes it from hiring from the "outside" after "...it has considered qualified current employees for the opening..." [Id.]: Joint Meeting of Essex and Union Counties, P.E.R.C. No. 90-7, 15 NJPER 496, 498 (¶20204 1989).

However, the Hearing Examiner finds more persuasive the argument made by Rutgers that its established program of recruiting and hiring on the basis of a national search would be unduly interfered with if the second sentence in ¶6 of the Departmental Facilities proposal was deemed mandatorily negotiable (Tr 85, 86,

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14/ See, ROB, pp. 9, 10; RRB, pp. 5-8; and AOB, p. 23.

95).[15/] Further, this interference is not cured by the inclusion of the term "qualified" within the proposal nor by the suggestion that Rutgers may hire from the "outside" after it has considered "qualified" current VPLs for any opening or openings. Since there appears to be no logical way to accommodate the chronological requisites implicit in the second sentence of ¶6 of the AAUP's proposal with Rutgers' established program of recruiting and hiring through a national search, this proposal is found to be non-negotiable.

LEAVE OF ABSENCE

> Part-time lecturers may take unpaid leaves of absence for any reason of disability (including pregnancy or childbirth), professional development (including dissertation research), or personal convenience. The part-time lecturer shall notify his/her department at least 90 days before the beginning of the semester(s) in question of the dates of departure and return. Such leaves of absence shall not affect the part-time lecturer's status in the bargaining unit, his/her eligibility for promotion and other positions at Rutgers, or his/her salary rate (including annual cost-of-living increases.) Part-time

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15/ Rutgers distinguishes its recruiting methods as a university with an educational mission from those of other public employers such as school boards or departments within municipalities. Rutgers has established "Guidelines" for the recruitment and selection of faculty, who are drawn from a national pool. These mandate a "broad search" with an affirmative action component, which bars the "preselection" of a candidate or the tailoring of a job description to fit a particular individual. These "Guidelines" also provide that a qualified coadjutant or teaching assistant may not be transferred automatically into regular faculty status without a full search having first been conducted with the existing employee competing against other applicants in the pool. See RRB, pp. 6, 7.

lecturers who take such leaves shall suffer no adverse consequences.

* * * *

This proposal is broadly drawn to provide for unpaid leaves for part-time lecturers for disability, professional development or personal convenience, which, when granted, shall not affect unit status, promotional eligibility or salary, nor result in "adverse consequences."

Rutgers' problem with this proposal originates with the heading "Leave of Absence" since a leave, if granted, could span a period of time when the VPL was either not currently employed by the University or the VPL might be without employment at a subsequent time (Tr 99, 100). In its brief, Rutgers puts the situation slightly different.[16/] It there contends that the AAUP is seeking to require continuation of employment for VPLs who are on a leave of absence even though they might not be rehired for a subsequent semester. Because this result would necessarily obtain if the AAUP's proposal was granted, Rutgers contends that it unduly interferes with its decision as to whom to hire in semesters subsequent to the granting of a leave of absence.

The AAUP views this proposal as permitting "...a one-time, one-semester leave or declining of a one course assignment..." without the possibility of discipline for the exercise of this

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16/ See ROB, p. 21.

right.[17/] It also argues that Rutgers has ample opportunity to evaluate the VPL during the first semester of employment before hiring him or her for a second semester, at which time the VPL becomes eligible for unit inclusion (J-2, supra). Thus, when unit inclusion is coupled with the VPLs expectation of continued employment, the benefits contained in the AAUP's leave of absence proposal are, according to the AAUP, mandatorily negotiable (Tr 101, 102).

The sabbatical leave cases decided by the Commission and the Courts leave little doubt but that a leave of absence proposal is mandatorily negotiable given the usual public employer-public employee relationship: Willingboro Bd. of Ed., P.E.R.C. No. 80-46, 5 NJPER 475, 476 (¶10240 1979), aff'd P.E.R.C. No. 80-75, 5 NJPER 553 (¶10287 1979), aff'd App. Div. Dkt. No. A-1756-79 (1980), pet. certif. den. 87 N.J. 320 (1981); Hudson County Area Vo-Tech School Board, P.E.R.C. No. 85-7, 10 NJPER 497, 498 (¶15225 1984); and So. Orange-Maplewood Ed. Ass'n v. Bd. of Ed. of So. Orange, 146 N.J. Super. 457 (App. Div. 1977). However, the uniqueness and complexity of the VPL unit definition in Exhibit J-2 imposes a severe constraint upon the negotiability of the AAUP's leave of absence proposal.

The supporting arguments provided by the AAUP offer little assistance since the Hearing Examiner is hard pressed to understand

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17/ See AOB, p. 33.

how the language proposed translates into permitting a VPL a "...one-time, one-semester leave or declining of a one course assignment." Is the Hearing Examiner to assume that one of the purposes of the leave of absence proposal is to afford the VPL a basis for declining a one course assignment without the imposition of discipline? This hardly seems to follow from a plain reading of the language proposed by the AAUP. On the other hand, is the Hearing Examiner to conclude that the leave of absence provision is intended to permit a "one-time, one-semester leave" never to be applied for or taken again? Again, the proposal seems not to suggest this.

Even without totally deciphering the AAUP's intent in proposing the above language as its leave of absence provision, the Hearing Examiner is disposed to find the proposal non-negotiable, essentially for the reasons offered by Rutgers, namely, that its managerial right to make hiring decisions with respect to VPLs in subsequent semesters is unduly intruded upon. It is, therefore, not a mandatorily negotiable subject.

MISCELLANEOUS

2. Library

> Part-time lecturers shall receive full faculty library privileges, including during unpaid leaves of absence.

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The first contention of the AAUP is that library privileges are akin to the recreational use of the University's gyms and that

such use is directly analogous to the mandatory negotiability of facilities such as lounges, telephones, mirrors, etc. for the personal use of employees. As such, these are "an amenity." [Tr 104, 105]. Following up on its "amenity" argument, the AAUP suggests that the VPLs might wish to do research in the library or use it in totally unrelated ways such as reading fiction for pleasure or "...something which makes their lives as...part-time faculty members...more pleasant..." (Tr 106; 105).

The position of Rutgers is that the AAUP is seeking to negotiate access to the libraries of the University, which is a non-negotiable subject because it involves the use of "educational resources" (Tr 103, 107, 108). Since a library is an "educational resource" it is a non-negotiable subject to the same extent as prior Commission decisions involving an employer's providing text books, teaching materials, supplies, furniture, equipment, etc.: Jersey City Bd. of Ed., supra [7 NJPER at 687: "...decisions concerning the use of textbooks, teaching materials, and supplies are an inherent managerial prerogative..."]; Delaware Tp. Bd. of Ed., P.E.R.C. No. 87-50, 12 NJPER 840, 843 (¶17323 1986)["...Board's exclusive right to decide as a matter of policy which supplies, furniture and equipment would be educationally beneficial..."];[18/]

18/ But proposals relating to physical facilities for employees such as a faculty lounge with a pay telephone or a rest room with a full-length mirror are mandatorily negotiable terms and

Footnote Continued on Next Page

and Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 87-83, 13 NJPER 78, 81 (¶18036 1986)[proposal that Board provide funds for the purchase and/or replacement of textbooks, library books, etc. is not mandatorily negotiable].[19/] While it concedes the negotiability of such employee facilities as faculty lounges, mirrors and telephones, Rutgers rejects any analogy between these facilities and the non-negotiable educational resource, which inheres in University library privileges. Finally, Rutgers rejects the contention that library privileges are perforce negotiable because this benefit has been unilaterally granted to others employed by the University (Tr 103).

It is the conclusion of the Hearing Examiner that the AAUP's "library" proposal is not negotiable[20/] The Hearing Examiner has given little weight to the contentions of the AAUP that the part-time lecturers should be allowed library privileges, either

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18/ Footnote Continued From Previous Page

conditions of employment: Delaware Tp. Bd. of Ed., supra (at 843) and Byram Tp. Bd. of Ed., P.E.R.C. No. 76-27, 2 NJPER 143, 146 (1976). However, Byram also held that "...proposals regarding the educational process -- dictionaries, chalkboards, and equipment and supplies to aid in the preparation of instructional materials..." were not mandatorily negotiable (2 NJPER at 146).

19/ See ROB, p. 28.

20/ At oral argument, the Hearing Examiner questioned counsel for Rutgers as to whether the phrase "including during unpaid leaves of absence" gave the University a larger problem than it would otherwise have had. Although counsel responded that it did, the issue was not pursued further (Tr 106).

because they have unilaterally been granted to others or because the VPL might wish to do some research, read fiction for pleasure, or do something which might make his or her life "more pleasant." No analogy is seen between the alleged nogotiability of library privileges and the conceded negotiability of such employee terms and conditions as the recreational use of University gyms or faculty lounges with pay telephones and full-length mirrors.

Of the several Commission decisions cited above, Byram is perhaps closest to the instant case since included among the demands of the Association was one which stated that each teaching station was to have a complete and unabridged dictionary. This demand was deemed not mandatorily negotiable (2 NJPER at 146). The remaining Commission decisions cited previously are sufficiently analogous to sustain the argument of Rutgers that its libraries constitute educational resources as to which it is not required to negotiate over access.

APPOINTMENT

A. General Provisions

3. Appointments shall be made for an academic year.

* * * *

This language proposed by the AAUP covering Appointments is clear and succinct. However, Rutgers objects that it is not mandatorily negotiable since VPL appointments are frequently made for only one semester may not continue for the entire school year.

This fact is recognized by the Certification (J-2, supra), which provides, in part, that unit inclusion is based upon a combination of semesters of employment [see Finding of Fact No. 3]. Thus, Rutgers argues that mandatory negotiations over appointments for an entire year, rather than for a single semester, would unduly restrict its right to make course assignments to individual VPLs. [Tr 47, 48].

Rutgers sought to illustrate the problem posed above as follows: assuming that a VPL was appointed for an academic year and, after teaching one course during one semester, it was determined that there was no need for the continuation of the course (and the VPL) in the second semester due, for example, to reduced enrollment, a budget cutback or some other unanticipated occurrence, what would the University's obligation be? Must it employ the VPL in a different capacity for the second semester or, if this could not be done, must the University pay that VPL in any event? [Tr 74].

The AAUP basically relies upon Commission precedent, which has held that the length of the work year of employees is mandatorily negotiable (Tr 54). In response to the hypothetical problem posed by Rutgers, supra, the AAUP acknowledges that its proposal "...as it stands now doesn't address financial exigency per se, nor does it address...layoff and recall..." (Tr 75). More specifically, the AAUP responded to the problem raised by Rutgers by stating that if there was no need for the teaching of a second

semester then this would raise a procedural problem and as such would be negotiable (Tr 76, 77).

It appears to the Hearing Examiner that the Certification (J-2) supports Rutgers' position that VPL employment is by semester and not by academic year. Thus, Rutgers has retained the necessary flexibility to schedule courses and decide how many sections of any course will be offered. These factors indicate clearly that non-negotiable educational policies are involved and that the AAUP's proposal, if adopted, would obligate Rutgers to retain VPLs in its employment during a semester or semesters when their services were not required.

The Commission decision which governs this issue is Jersey City Bd. of Ed., P.E.R.C. No. 87-14, 12 NJPER 686 (¶17260 1986) where a proposal that at least one assistant principal be assigned to all grammar schools was held to be non-negotiable because a public employer "...has a managerial prerogative to determine the size of its teaching staff and the deployment of those personnel..." (12 NJPER at 687). Following the same reasoning, the Hearing Examiner accepts the argument of Rutgers that the AAUP's proposal that appointments be made for an academic year is not a mandatorily negotiable term and condition of employment.

In so concluding, the Hearing Examiner has found inapposite the AAUP's reference to Commission precedent involving the mandatory negotiability of the length of the work year. Also, he has rejected the contention that the "no second semester" problem raised by Rutgers in and of itself creates a procedure which is mandatorily negotiable.

REAPPOINTMENT

B. Reappointment

> 1. Where possible, assignments shall be made according [to] the part-time lecturer's record of employment. A new employee with no record of employment shall not be assigned, or reassigned, courses in advance of any part-time lecturer with a satisfactory record of employment, except where major educational policy dictates otherwise.
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> * * * *

Even with the qualifying phrase "Where possible," Rutgers contends that the first sentence of "B1" places an undue restriction upon its right to determine what weight, if any, should be placed upon the "record of employment" of a VPL in making an assignment (Tr 48). Thus, by this proposal, the AAUP is seeking to require the University to recognize a VPL's past record of employment as a criterion for assignment.

In arguing its position, Rutgers cites Local 195 v. State, 88 N.J. 393 (1982) where the Court held, inter alia, that a clause requiring the appointing authority (employer) to make reassignments in inverse order of job classification seniority, providing that the employees were capable of doing the work, related to substantive criteria and was, therefore, non-negotiable (88 N.J. at 414, 418). Also, Rutgers refers to an earlier Rutgers case [P.E.R.C. No. 84-45, 9 NJPER 663 (¶14287 1983)] where the Commission held that Rutgers has a "...non-negotiable prerogative to make assignments within a negotiations unit based on its assessment of employee qualifications..." (9 NJPER at 664). Also, in another Rutgers

decision [P.E.R.C. No. 83-136, 9 NJPER 276 (¶14127 1983)] the Commission held that Rutgers had a managerial prerogative "...to match the qualifications of particular instructors with the particular courses Rutgers decides to offer..." (9 NJPER at 277). See, also: City of Atlantic City, P.E.R.C. No. 87-161, 13 NJPER 586 (¶18218 1987) and Flemington-Raritan Reg. Bd. of Ed., P.E.R.C. No. 90-58, 16 NJPER 40 (¶21018 1989)[a proposal that the selection of personnel be based upon the qualifications of the individuals applying in terms of their experience and knowledge was deemed not mandatorily negotiable because it "...goes beyond notification by setting the criteria for selection...," and, also, because it appears to restrict appointments to applicants (16 NJPER at 42)].

Rutgers attacks the second sentence of proposal "B1" as an undue restriction upon the University's opportunity to hire new employees since the AAUP proposes that a new employee with no record of employment "shall not" be assigned or reassigned courses in advance of any VPL with a satisfactory record of employment "except where major educational policy dictates otherwise." According to Rutgers, it would be restricted in its assessment of the relative qualifications for hiring and assignment, which involve issues of major educational policy (Tr 49).

The AAUP views "B1" as a "...model of a permissible job security provision..."[21/] Further, this proposal has been

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21/ See AOB, p. 29.

"...carefully drafted in order to preserve the employer's rights..." and to ensure that the minimal guarantees which the Commission and the Courts have left to these employees can be protected (Tr 55). Further, the AAUP contends that this reappointment clause is in fact a protection against the layoff of VPLs who have had a "...continuing relationship" so that "...assignment and continued employment really are one thing..." and as such they cannot be separated (Tr 56).

The Hearing Examiner is compelled to opt for the position of Rutgers as to the negotiability of proposal "B1." Notwithstanding the escape phrase "Where possible," the first sentence of this proposal constitutes undue interference in Rutgers' right to assign and/or hire VPLs. If the AAUP was not seeking to infringe upon this prerogative of Rutgers, why would the proposal be made in the first instance? The Hearing Examiner does not view the phrase "Where possible" as containing mere precatory words.

Further, the second sentence of "B1" is even more objectionable than the first in that the AAUP would seriously trench upon the prerogative of the University to hire first a more qualified "new employee." The exculpatory phrase "where major educational policy dictates otherwise" does not vitiate this inherent infirmity. Also, the Hearing Examiner sees no distinction between Rutgers' use of "hire" or the AAUP's use of "assign/reassign" since the framework of reference refers in either case to a "new employee." The use of the term "new employee"

suggests that hiring is in fact at the heart of what the AAUP is seeking to limit. For all of these reasons, the Hearing Examiner concludes that the AAUP's proposal "B1" is not a mandatorily negotiable term and condition of employment.

REAPPOINTMENT

B. Reappointment

> 2. Each department shall publish an eligibility list for part-time lecturer reappointments at least 90 days before the semester begins. This list shall include the names of all those who have taught in the department and requested reappointment. Reappointments shall come from this list unless major educational policy dictates otherwise.
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> * * * *

At oral argument, the parties addressed this proposal of the AAUP in somewhat summary fashion (Tr 49, 50, 57, 58). Rutgers lumped the three sentences together and stated that the AAUP, in seeking to negotiate over hiring and reappointment, had created a criterion for hiring, namely, past employment (Tr 49, 50). It argued further, that since the third sentence appears to require Rutgers to justify why it chose to hire one person over another, the proposal interferes with major educational policy, notwithstanding the "circular" phrase, "...unless major educational policy dictates otherwise..." On the other hand, the AAUP sees this latter phrase as an escape hatch, which renders the entire clause negotiable because its objective is to preserve "...this minimal level of employment security which these people already have..." (Tr 58).

Considering the first sentence contained in proposal "B2," it appears that it is procedural in nature and only obligates Rutgers to publish by department an eligibility list for VPL reappointments at least 90 days prior to the beginning of the semester. Unlike Flemington-Raritan, supra, this sentence in no way sets criteria for reappointment. It merely mandates the publishing of an eligibility list. This appears to be completely consistent with Jersey City Bd. of Ed., supra (7 NJPER at 685). To the same effect, the language contained in the second sentence of the proposal is likewise procedural in nature since all that the AAUP is seeking is that its prior-requested "eligibility list" include the names of those VPLs who have taught in the department and who have requested reappointment. What possible harm is visited upon Rutgers if this second sentence is deemed mandatorily negotiable? The obvious answer is "none" since there is no intrusion upon any managerial prerogative nor is there any interference with a major educational policy, i.e, criteria are nowhere involved.

Finally, as to the third and last sentence in the AAUP's proposal, here it is "overreaching" since Rutgers alone has the prerogative to determine who among the VPLs shall be "reappointed" from the eligibility list. The Hearing Examiner is still not persuaded that the escape hatch phrase, "unless major educational policy dictates otherwise," is sufficient to provide Rutgers with the requisite flexibility in its otherwise unfettered right to hire, appoint or reappoint as it deems appropriate on an

applicant-by-applicant basis. Accord: Flemington-Raritan, supra (16 NJPER at 42). In summary, the first two sentences of AAUP's proposal "B2" are mandatorily negotiable while the third and last sentence is not mandatorily negotiable.

REAPPOINTMENT

> B. Reappointment
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> 3. A part-time lecturer who does not accept a particular appointment shall suffer no adverse consequences in future semesters.
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> * * * *

The AAUP views this proposal as an effort to insulate a VPL from "discipline" in instances where he or she "...says no to a particular assignment in a particular semester..." The AAUP's intent is to assure that the VPL who so refuses "...will still be eligible for continued employment and...have the right to be assigned later..." [Tr 60].

According to Rutgers, the reference to "future semesters" suggests once again that the AAUP is seeking to interfere with its prerogative as to whom it employs as part-time lecturers in the future since a VPL who declines an appointment is not an "employee" for that period of time. Further, the "no adverse consequences" phrase is "broad...and is not necessarily limited to diciplinary acts..."[22/] For example, after a VPL has declined appointment for a particular semester, Rutgers might hire another applicant who

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22/ See Tr 51; RRB, p. 15.

proved more qualified than the original VPL and this applicant might be continued thereafter in preference to the original VPL. This might appear to be an "adverse consequence" as to the VPL who initially declined appointment yet it also appears to be totally unrelated to "discipline."

The Hearing Examiner finds that proposal "B3" is sufficiently enmeshed in Rutgers' managerial prerogative to hire, appoint or reappoint, that it must be held non-negotiable. The condition subsequent that there be "no adverse consequences in future semesters" leads ineluctably to the invoking of the grievance procedure, which then involves the AAUP in the hiring and appointment process. Since such a result is impermissible under previously cited Commission and Court precedent this proposal is not mandatorily negotiable.

REAPPOINTMENT

B. Reappointment

4. Part-time lecturers who complete 4 semesters of teaching shall be titled "senior part-time lecturers." Semesters taught prior to the signing of this agreement shall be applicable to this 4 semester total and each summer session shall constitute a semester under this provision.

5. "Senior Part-Time Lecturers" shall be appointed indefinitely and shall have priority in course assignments and schedules.

* * * *

The first part of Rutgers' argument is that proposals "B4" and "B5" contain the same infirmity as the "Recognition" proposal previously decided, in that: (1) the attempt of the AAUP to expand

job titles beyond the definitions contained in the Certification (J-2) intrudes upon its managerial prerogative to create job titles; and (2) these proposals again seek to create a promotional track for VPLs from "Part-time Lecturer" to "Senior Part-time Lecturer" which is not mandatorily negotiable since promotion is a prerogative reserved to the employer.

The AAUP freely admits that these two proposals are designed to create "...a species of tenure..." (Tr 61, 62), to which Rutgers objects that the AAUP is seeking to assure that hiring and future course assignments are based solely upon seniority and not upon "qualifications" (Tr 52). Further, regarding the provision for indefinite appointment in "B5," Rutgers questions why, if the AAUP's intention is to provide tenure for VPLs, it has not proposed language recognizing the University's right to establish criteria for tenure other than the mere physicial act of the VPL completing the fourth semester.[23/] Also, Rutgers objects to the retroactivity provision in "B4" where it is proposed that the semesters prior to the signing of the instant agreement are to be counted toward the four-semester total, including summer sessions, after which the VPL becomes a "Senior Part-time Lecturer." Again, Rutgers complains that it is not afforded any opportunity to establish criteria or review performance before indefinite employment or appointment is guaranteed with the additional mandate

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23/ See RRB, p. 16.

that the VPL shall have priority in course assignments and schedules.

The Hearing Examiner first concludes that no portion of either proposal ["B4" or "B5"] is mandatorily negotiable. He adopts the first part of Rutgers' argument that each proposal contains the same infirmity as that in the "Recognition" proposal, which was found non-negotiable for the reasons previously stated.

Turning next to the second sentence of the "B4" proposal, which provides that semesters taught prior to the signing of the agreement shall be counted toward the four-semester total, this sentence must be read in pari materia with the single sentence in the "B5" proposal, which mandates that a "Senior Part-time Lecturer" be appointed "indefinitely" and have priority in course assignments and schedules. The Hearing Examiner accepts as more persuasive the argument of the University that the AAUP's proposal for indefinite appointment of VPLs after the physical completion of four semesters, with or without the retroactive provision of credit for prior semesters taught, deprives it of the opportunity to establish criteria or to review the performance of VPLs before they attain indefinite appointment or employment.

Without determining whether or not these proposals of AAUP actually involve "tenure," as that term has been developed and applied over the years, the Hearing Examiner finds that the proposal that a VPL be appointed "indefinitely" with priority in course assignments and schedules is a serious intrusion upon the domain of

the public employer in establishing criteria for hire, appointment or reappointment. See Flemington-Raritan, supra; Old Bridge Bd. of Ed., I.R. No. 86-22, 12 NJPER 545, 546 (¶17205 1986); and the two prior-cited Rutgers cases [9 NJPER at 277 & 664].

In summary, neither AAUP proposal "B4" nor "B5" is mandatorily negotiable.

NON-REAPPOINTMENT

C. Non-reappointment

> 1. Any part-time lecturer who is not reappointed shall be given written notice of non-reappointment specifying the reason(s) for the non-reappointment decision at least 90 days before commencement of the semester in question. The PTLFC shall receive copies of all notices of non-reappointments. A part-time lecturer shall not be denied reappointment without just cause, or in an arbitrary manner.

At oral argument, Rutgers failed to voice any real objection to the first two sentences in this proposal, namely, notice of non-reappointment to the VPL and a copy of same to the AAUP. Rather, Rutgers focused upon the provision in the third and last sentence that a part-time lecturer is not to be denied reappointment "...without just cause, or in an arbitrary manner..." (see 52, 53, 80). Rutgers' concern with the "just cause" and "arbitrary manner" language was that the AAUP was seeking to transform an assignment decision into a disciplinary decision. Further, since VPLs are employed on an "as needed" basis, the determination as to whether a need exists is "...not a disciplinary determination..." (Tr 52; RRB, p. 17). Finally, reappointment or

rehire of VPLs is not a disciplinary determination but rather a decision within the prerogative of the employer: Teaneck Bd. of Ed.; Wayne Tp. and East Brunswick Bd. of Ed.[24/]

As to the third sentence, involving "just cause" or "arbitrary manner," the AAUP views the issue raised as one where it must have the means of challenging a non-reappointment decision. It stresses, however, that it only wishes to have a meaningful opportunity to grieve and that it has no intention of challenging Rutgers' failure to reappoint a VPL where that decision is based upon major educational policy (Tr 72, 73).

Neither party has suggested that the 1982 disciplinary amendments, which were incorporated into the final paragraph of Section 5.3 of the Act, are not applicable to the instant negotiations. When one looks closely at the language of the last sentence in this proposal, the conclusion appears inescapable that it properly seeks to subject denials of reappointment by the University to any negotiated grievance procedure and to utilize as a standard of review either "just cause" or "in an arbitrary manner." The Hearing Examiner does not per se see a problem of encroachment upon Rutgers' acknowledged right to determine which VPL shall be reappointed in the first instance. Nor does he view the proposed language as turning every denial of reappointment into a disciplinary decision as contended by Rutgers.

24/ See RRB, p. 17.

In concluding that this third and final sentence is also mandatorily negotiable, the Hearing Examiner has not relied upon two Commission decisions involving the N.J. Institute of Technology,[25/] cited by the AAUP. Rather reliance is placed upon Old Bridge Tp. Bd. of Ed., I.R. No. 89-22, 15 NJPER 387 (¶20163 1989) where the issue was whether an order restraining arbitration of a grievance was to be granted. The grievance challenged the decision not to rehire a substitute clerk. The employer relied upon Teaneck Bd. of Ed. supra, while the Association argued that the Board's action was disciplinary in nature and "arbitrary and capricious." The request for restraint was denied. The Commission's designee relied upon the cases cited by the Commission in Eatontown Bd. of Ed., P.E.R.C. No. 89-101, 15 NJPER 261 (¶20109 1989).

Under Old Bridge, and the cases cited by the Commission in Eatontown, the Hearing Examiner concludes that the third and final sentence of AAUP proposal "C1" is mandatorily negotiable, particularly within the context of the 1982 disciplinary amendments to Section 5.3 of the Act. The first two sentences are also deemed mandatorily negotiable in the absence of any serious dispute to the contrary.

25/ See P.E.R.C. No. 83-125, 9 NJPER 215 (¶14101 1983) and P.E.R.C. No. 81-45, 6 NJPER 494 (¶11252 1980).

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The Hearing Examiner, having decided the negotiability or non-negotiability of the several contract proposals of the AAUP which were at issue as of June 13, 1990, now makes the following:

RECOMMENDED ORDER

1. Paragraphs 2 and 3 of the "Recognition" proposal are not mandatorily negotiable with the caveat, in the case of ¶3, that Rutgers is obligated to negotiate the compensation for any newly created job titles within the unit.

2. The two paragraphs in the "Academic Freedom" proposal are non-negotiable.

3. The first sentence of ¶6 of the "Departmental Facilities" proposal is mandatorily negotiable but the second sentence is not mandatorily negotiable.

4. The "Leave of Absence" proposal is not mandatorily negotiable.

5. The "Miscellaneous, Library" proposal is not mandatorily negotiable.

6. The "Appointment" for academic year proposal is not mandatorily negotiable.

7. The "Reappointment B.1" proposal is not mandatorily negotiable.

8. The first two sentences of the "Reappointment B.2" proposal are mandatorily negotiable but the third sentence is not mandatorily negotiable.

9. The "Reappointment B.3" proposal is not mandatorily negotiable.

10. The "Reappointment B.4 & B.5" proposals are not mandatorily negotiable.

11. The "Non-Reappointment C.1" proposal is mandatorily negotiable.

Alan R. Howe
Hearing Examiner

Dated: November 5, 1990
Newark, New Jersey