

I.R. NO. 2021-30

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY  
OF NEW JERSEY,

Petitioner,

-and-

Docket No. SN-2021-043

UNION OF RUTGERS ADMINISTRATORS,  
AMERICAN FEDERATION OF TEACHERS  
LOCAL 1766, AFL-CIO,

Respondent.

SYNOPSIS

A Commission Designee denies the request of Rutgers, the State University of New Jersey (Petitioner) for an interim restraint of binding arbitration of a grievance during the pendency of a scope of negotiations petition before the Public Employment Relations Commission. The grievance, and a demand for binding arbitration, was filed by the Union of Rutgers Administrators, American Federation of Teachers Local 1766, AFL-CIO (Respondent), asserting that the Petitioner violated layoff notice and seniority provisions in the parties' collective negotiations agreement (CNA) when it laid off a unit member. Respondent asserts the grievant has more seniority than another employee with the same title as the grievant, who was not laid off and who works in the same work unit, and therefore the grievant had "bumping" rights to the less-senior employee's position. The Designee finds that Petitioner's contention that it did not violate the CNA because the two positions at issue are not in the same work unit, as defined by the CNA, is a contractual defense, concerning a disputed material fact as to that defense, that may be determined by an arbitrator. The Designee finds that because material facts are in dispute, Petitioner has not demonstrated a substantial likelihood of success warranting a grant of interim relief. The Designee further finds that because Petitioner has not demonstrated a substantial likelihood of prevailing on the merits, it will not suffer irreparable harm if required to submit to arbitration prior to a final Commission decision and, for the same reasons, the relative hardship to the parties weighs in favor of the Respondent.

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

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Appearances:

For the Petitioner, Timothy D. Cedrone, Associate  
General Counsel

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

INTERLOCUTORY DECISION

On June 11, 2021, Rutgers, the State University of New Jersey (Rutgers) filed an application for interim relief requesting temporary restraints pending the disposition of Rutgers' May 24, 2021 petition for a scope of negotiations determination seeking restraint of binding arbitration of a grievance filed by the Union of Rutgers Administrators, American Federation of Teachers Local 1766, AFL-CIO (URA-AFT or Union).

The grievance, initiated on September 14, 2020, alleges that Rutgers violated layoff notice and seniority provisions in the parties' collective negotiations agreement (CNA) when, on notice

dated August 7, 2020, Rutgers laid off a URA-AFT member, effective September 21, 2020. The grievance sought a rescission of the layoff, reinstatement, or a settlement. Rutgers denied the grievance at step two on October 16, 2020, and at step three on December 7, 2020. URA-AFT then filed for arbitration (AR-2021-255), which was docketed on December 27, 2020.

An arbitrator was assigned on February 3, 2021 and, after conferring with the parties, he set June 28, 2021 as the date for the arbitration hearing. On May 24, 2021, the same date it filed the scope petition, Rutgers requested URA-AFT's consent to an adjournment of the June 28 arbitration. On May 26, 2021, Rutgers requested an adjournment from the arbitrator. After URA-AFT refused to consent to an adjournment, and the arbitrator, on June 2, 2021, denied Rutgers' request for same, Rutgers filed its June 11 interim relief petition.

Acting as Commission Designee pursuant to N.J.A.C. 19:14-9.2(d)3, I issued an Order to Show Cause without temporary restraints on June 14, 2021, setting June 24, 2021 as the return date. Rutgers filed briefs, exhibits, the certifications of Ryan Kelly, Frances Bartkowski, and Anonda Bell, and the affidavit of Timothy D. Cedrone, Esq. URA-AFT filed a brief, exhibits, and the certifications of Gregory Rusciano and the grievant, A.J.

After hearing oral argument from the parties on the return date, I issued an Order, pursuant to N.J.A.C. 19:14-9.5(a), denying temporary restraint of arbitration pending the Commission's scope decision.

#### FINDINGS OF FACT

Rutgers and URA-AFT are parties to a CNA currently in effect from July 1, 2018 to June 30, 2022. URA-AFT is the certified collective negotiations representative for all regularly employed administrative employees employed by Rutgers at its New Brunswick, Piscataway, Newark and Camden campuses and all off-campus and other locations, all term contract and temporary employees who perform unit work of URA-AFT Local 1766, and all casual employees who work an average of at least four hours per week over a period of 90 calendar days who perform unit work. The CNA contains a four-step grievance procedure which culminates in binding arbitration.

A.J. is the Rutgers employee whose layoff is the subject of the grievance at issue. Prior to the layoff, A.J. held the title of Administrative Assistant at the Rutgers University-Newark (RU-N) campus, where he worked at Express Newark. The record indicates that Rutgers created Express Newark in January 2017 as an "arts incubator," part of RU-N's plan to cultivate local artistic expression through artistic engagement and public scholarship. A.J. served as Administrative Assistant at Express

Newark from October 10, 2018 until his layoff on September 21, 2020. The layoff stemmed from a decision to reorganize Express Newark, made by Express Newark leadership in consultation with the RU-N Chancellor's Office. The reorganization entailed, among other things, the elimination of certain positions, including A.J.'s, and the decision to leave certain vacant positions unfilled.

Article 42 of the CNA is entitled "Seniority and Layoff." It states at Section II, "Layoffs," in pertinent part:

- A. Layoffs shall be defined as the elimination of a position or positions within a particular work unit. A work unit is a budgetarily discrete academic or administrative entity. The URA-AFT shall be informed of all notices of layoff.
- B. In the event of a layoff, the following shall apply:
  - 1. Where one or more employee(s) in the same title performing the same functional tasks in the same work unit is being laid off, layoff shall be implemented in reverse order of seniority, provided the senior employee has the requisite qualifications and abilities to perform the work available.

Although the above provision defines "work unit" as a "budgetarily discrete academic or administrative entity," Rutgers conceded at oral argument that the CNA does not otherwise or elsewhere define what is meant by the phrase "budgetarily discrete academic or administrative entity."

According to Rutgers' grievance determinations, URA-AFT contended at steps two and three of the grievance proceeding that the layoff violated the contract because A.J. has more seniority than another employee with the title of Administrative Assistant, B.L., who was not laid off and who works at the Paul Robeson Galleries at RU-N. URA-AFT contended that Express Newark and Paul Robeson Galleries are part of the same work unit, and therefore A.J. had "bumping" rights to B.L.'s position.

The record indicates that Paul Robeson Galleries began in 1979 at the RU-N Campus Center as a student collaboration, and has since grown to be a network of galleries across RU-N. The Galleries' mission is to encourage visual literacy and artistic expression through partnerships with artists, the University and Greater Newark communities.

As confirmed in oral argument, URA-AFT does not challenge Rutgers' right to implement the layoff. The parties dispute whether Express Newark and the Paul Robeson Galleries are part of the same work unit as defined by the CNA, or are separate, budgetarily discrete academic or administrative entities.<sup>1/</sup> The parties also dispute whether A.J. and B.L. perform the same functional tasks as Administrative Assistants. Finally, the

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<sup>1/</sup> At step two of the grievance proceeding, Rutgers' hearing officer initially determined that A.J.'s and B.L.'s positions were funded by the same funding source, but later reversed herself, stating that this determination was incorrect and was due to an administrative error.

parties dispute whether A.J. possesses the requisite skills and qualifications to perform the work of B.L.'s position.

The record reflects that A.J. was assigned to provide administrative support to Paul Robeson Galleries from August 7 through September 9 of 2019, while the Administrative Assistant position there was temporarily vacant and before B.L. was hired into a permanent position in that role. Rutgers certifies that during this period, A.J. did not perform all the essential functions of B.L.'s position,<sup>2/</sup> that A.J. did not possess the requisite qualifications to do so (including the necessary educational background or related experience), that he lacked the necessary security clearance for some functions of the job, and that other Paul Robeson Galleries employees performed the functions requiring security clearance during this temporary period. A.J. certifies, among other things, that he and B.L. attended all the same training sessions at Rutgers, that they attended weekly budget meetings together, and that A.J. operated as B.L.'s back-up and was trained by B.L. regarding Paul Robeson Galleries. A.J. certifies that his combination of business management and arts management experience qualifies him for the

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<sup>2/</sup> Rutgers identifies B.L.'s job title at Paul Robeson Galleries as "Gallery Administrator," for "business purposes," and as "Administrative Assistant," for "human resources purposes." Appendix F of the parties' CNA identifies numerous URA-AFT job titles covered by the CNA, including the title of Administrative Assistant. The title of Gallery Administrator is not listed in Appendix F.

job, that no special certifications or trainings are required to have security clearance, and that on at least one occasion at Paul Robeson Galleries, when B.L. was absent, he was given the security code to arm and disarm the gallery alarm system.

Rutgers' denied the grievance, finding that it did not violate Article 42 when it implemented the layoff because A.J. was not in the same work unit as B.L., and because A.J. did not have the requisite qualifications and abilities to perform the duties of B.L.'s position.

#### CONCLUSIONS OF LAW

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

A substantial likelihood of prevailing on the merits cannot be established when there are disputed material facts. Rockaway Tp., P.E.R.C. No. 2018-30, 44 NJPER 308 (186 2018), citing



Crowe v. De Gioia, 90 N.J. 126, 133 (1982) ("a preliminary injunction should not issue where all material facts are controverted"). Where a restraint of binding grievance arbitration is sought, a showing that the grievance is not legally arbitrable warrants issuing an order suspending the arbitration until the Commission issues a final decision. See Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 155 (1978); Board of Ed. of Englewood v. Englewood Teachers, 135 N.J. Super. 120, 124 (App. Div. 1975)<sup>3/</sup> and City of Newark, I.R. No. 2005-4, 30 NJPER 459, 460 (¶152 2004).

The Commission's jurisdiction is narrow. Ridgefield Park at 154, 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.

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3/ In Englewood the court held, at 125:

We find that in vesting PERC [the Commission] jurisdiction over questions of scope of negotiability the Legislature intended to include the jurisdiction and power to grant interim relief in such proceedings.

Thus, the Commission does not consider the contractual merits of the grievance or any contractual defenses Rutgers may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulated 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.

[88 N.J. at 404-405]

Scope of negotiations determinations must be decided on a case-by-case basis. Troy v. Rutgers, 168 N.J. 354, 383 (2000), citing Jersey City v. Jersey City Police Benevolent Assoc., 154 N.J. 555, 574 (1998).

Contractual provisions requiring layoffs among qualified employees by order of seniority are mandatorily negotiable. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 84 (1978). Public employers have a non-negotiable prerogative to assign employees to meet the governmental policy goal of matching

the best qualified employees to particular jobs. See, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park. An arbitrator may not second-guess a public employer's determination as to whether an employee is qualified to perform a particular job. City of Vineland, P.E.R.C. No. 2013-37, 39 NJPER 221 (¶74 2012).

I find that Rutgers' contention that it did not violate Article 42 of the CNA because the two positions at issue are not in the same work unit, as defined by Article 42, is a contractual defense, concerning a disputed material fact as to that defense, that may be determined by an arbitrator. Because material facts are in dispute, Rutgers has not demonstrated a substantial likelihood of success warranting a grant of interim relief.

I further find that, given that Rutgers has not demonstrated a substantial likelihood of prevailing on the merits, it will not suffer irreparable harm if required to submit to arbitration prior to a final Commission decision on Rutgers' scope petition. For the same reasons, I find that the relative hardship to the parties weighs in favor of the Union.

ORDER

The application of Rutgers, the State University of New Jersey, for a restraint of binding arbitration pending the final decision or further order of the Commission, is denied.

/s/John A. Boppert  
John A. Boppert  
Commission Designee

DATED: June 30, 2021

Trenton, New Jersey