P.E.R.C. NO. 99-98

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY COLLEGE,

Petitioner,

-and- Docket No. SN-99-48

ESSEX COUNTY COLLEGE
FACULTY ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines whether an arbitrator exceeded the negotiability limitations set by the Commission in a previous decision addressing the legal arbitrability of a grievance filed by the Essex County College Faculty Association. The grievance asserted that Essex County College violated a contractual provision allowing faculty members to receive half-year contracts under certain conditions and the demand for arbitration asserted that the College violated the grievance procedure by not timely responding to this grievance. The Commission initially restricted the arbitrator's review because of a 1992 staffing proposal restricting the number of adjuncts. That proposal is no longer relevant and since the College did not adopt or implement a policy restricting the number of adjuncts, the award cannot interfere with such a policy. The Commission notes that it does not have power to review the contractual merits of the grievance, but does have the power to make sure that any award does not significantly interfere with any prerogatives and the delivery of effective instruction is such a prerogative. It concludes that, on this record, no showing has been made that the instructional delivery of the educational program will be impaired by complying with the arbitration award.

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, Genova, Burns & Vernoia, attorneys (Courtney M. Gaccione, on the brief)

For the Respondent, Zazzali, Zazzali, Fagella & Nowak, attorneys (Robert A. Fagella, on the brief)

DECISION

On December 29, 1998, Essex County College refiled a petition for scope of negotiations determination. The College seeks a determination that an arbitrator exceeded the negotiability limitations set by the Commission in a previous decision addressing the legal arbitrability of a grievance filed by the Essex County College Faculty Association. Essex Cty. College, P.E.R.C. No. 98-115, 24 NJPER 175 (¶29087 1998). The grievance concerned the denial of a faculty member's request that he be granted a half-year contract. We declined to restrain arbitration, but held that the College could refile its petition if the arbitrator found a violation and issued a remedy the College believed to be inconsistent with the limitations we set forth.

The parties have filed briefs and exhibits.[1/] These facts appear.

Facts

A. The Contract and the Grievance Proceedings

The Association represents the College's full-time faculty and half-time lecturers. The College and the Association are parties to a collective negotiations agreement effective from September 1, 1996 to August 31, 2000. The grievance procedure ends in binding arbitration of disputes over contractual provisions and certain other disputes, but excludes "[m]atters involving the discretion of the Board."

Article 16 is entitled "Half Year Contracts." It provides, in part:

> 16.1 Application for a Half Year Contract will be made to the appropriate Dean by December 31 of the previous academic year. The Dean will forward the application, through channels, for recommendation to the Board of Trustees.
>
> 16.2 The Board of Trustees will consider all applications, and maintains the right to approve said applications which provide adequate savings to the College. If there are such savings, and the instructional delivery of the program will not be adversely affected, then Board approval will not be arbitrarily or capriciously withheld.

1/ N.J.A.C. 19:13-3.5 provides for the filing of these briefs: the petitioner's brief, the respondent's brief, and the petitioner's reply brief. No further briefs are permitted without leave being granted. The Association moved to file a response to the College's reply brief, but we deny that motion -- a further brief is not necessary to elaborate upon the issues or correct any alleged misimpressions.

* * *

16.9 In the event that this Article or any part hereof shall be ruled invalid, any individual granted such a contract will be deemed to have been granted a special sabbatical for the time during which employment duties were not rendered.

Faculty members who receive half-year contracts are considered full-time employees and receive 60% of their salaries as well as fringe benefits for the entire year. Other articles address sabbaticals and other leaves of absence.

Professor Joseph O'Connell is a full-time mathematics instructor. On December 14, 1995, O'Connell applied for a half-year contract for the 1996-97 academic year.

On June 18, 1996, the Dean of Science and Technology, in a letter to the College president, responded to O'Connell's request. She stated that she could not recommend a half-year contract for O'Connell based on the educational needs of the students and the programmatic desire not to have math adjuncts teaching over fifty percent (50%) of all mathematics credits. Her recommendation was based on a "Faculty Staffing Proposal" recommended by the Deans' Council on March 6, 1992. That proposal set forth a three-year plan to employ more full-time teachers and specified a goal that no more than 50% of the course load in a program should be taught by adjunct instructors.

On June 21, 1996, the College denied O'Connell's request for a half-year contract.

On July 5, 1996, O'Connell responded to that denial. He asserted that he should be granted a half-year contract because the College could "save on overall salary costs and increase the number of credits taught by full-time faculty." He requested that his response be considered as a first step grievance. A grievance was then filed asserting that the College had violated Article 16 by arbitrarily denying O'Connell a half-year contract.

The parties then tried to settle the grievance. During these efforts, the Association claimed that the College had not timely responded to O'Connell's grievance and the parties' contract therefore required that the grievance be upheld.

After the settlement efforts failed, the Association demanded arbitration of its claim that the College had failed to process O'Connell's grievance. The College then filed its scope of negotiations petition.

B. Our Initial Decision

Before us, the College did not dispute that Article 16 was mandatorily negotiable.2/ The College further did not dispute that Article 16 was legally enforceable. While the College's reply brief asserted (p. 6) that enforcement could be sought in court but not through arbitration, we noted that Supreme

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2/ In a May 16, 1997 letter clarifying the dispute, the College stated that it was "not contending that the subject of half-year contracts in and of itself is a non-negotiable item, or that the contractual provision in dispute is non-negotiable...."

Court case law established that disputes that are mandatorily negotiable are also legally arbitrable. West Windsor Tp. v. PERC, 78 N.J. 98, 115-116 (1978). We therefore concluded that the arbitrator could consider the contractual merits of the parties' claims and defenses.

We also concluded, however, that the College had a separate and distinct managerial prerogative to adopt an educational policy goal that no more than 50% of the course load in a program should be taught by adjunct instructors. We stated that such a policy goal could not be contested or invalidated through binding arbitration.

We next considered the narrow claim presented in the demand for arbitration: that the College had violated the negotiated grievance procedure and therefore the request for a half-year contract had to be granted. We held that the claimed violation of the grievance procedure presented a legally arbitrable claim, but we cautioned that any remedy would also have to be within the scope of negotiations. We declined to speculate before arbitration about what remedies might be awarded or legal.

Given our analysis, we declined to restrain arbitration. We added, however, that the College could refile its petition if the arbitrator found a violation and issued a remedy the College believed was inconsistent with the limitations set forth in our opinion.

C. The Arbitrator's Award

The parties chose an arbitrator. On October 2, 1998, that arbitrator sustained the grievance and directed the College to grant O'Connell a half-year contract for the 1999-2000 academic year. A summary of her award follows.

The arbitrator posed the issue before her as this:

> Did the College violate Article 16 of the Collective Bargaining Agreement when it denied the Grievant, Professor Joseph O'Connell, a half year contract for the 1996-1997 academic year? If so, what shall be the remedy?

The opinion does not specify whether the parties stipulated to that issue being considered by the arbitrator. The Association asserts that they did so, a point not contradicted by the College.

The arbitrator first considered whether the grievance was contractually arbitrable. She concluded it was. That ruling is not before us. Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n, 78 N.J. 144, 154 (1978).

The arbitrator next considered the merits of the Association's claim that the denial of O'Connell's request for a half year contract violated Article 16. She found that the College had never adopted a policy of having no more than 50% of its courses taught by adjunct instructors. While the Deans' Council had recommended such a policy in 1992, that recommendation was not approved or adopted by the president, the cabinet, or the trustees. Further, the recommendation was for a three-year period only and was not extended. And in practice, the College had not attempted to limit the use of adjuncts and the number of adjunct

professors had grown substantially in the last five or six years. According to the faculty representative to the Board of Trustees, also the Association's chief negotiator, the faculty favored limiting the use of adjuncts, but the administration did not agree. The arbitrator further found that the College would have realized "adequate savings" if it had granted a half-year contract and replaced O'Connell with either a full-time professor or an adjunct and that instructional delivery would not have been impaired. She concluded that the College had abused its contractual discretion in denying the half-year contract and directed that O'Connell be given one for the next academic year.

The College then refiled its scope petition while the Association sought confirmation of the award in the Superior Court. The court action is being held in abeyance pending this decision.

Analysis

A. The Limitations In Our Initial Decision

As a threshold matter, the College asserts that the arbitrator exceeded the limitations set forth in our initial decision by considering the contractual merits of the grievance under Article 16. We disagree.

Our decision stated that the claimed violation of Article 16 could be presented to an arbitrator. We cautioned, however, that the arbitrator could not invalidate an adopted policy goal of not having more than 50% of courses taught by adjunct

instructors. The arbitrator heeded that caution: she did not invalidate an adopted policy because no policy had been adopted.

We also noted that the demand for arbitration presented a narrow claim that the College's failure to comply with the negotiated grievance procedures mandated sustaining the original grievance. We held that this claim was within the scope of negotiations, but we added that any remedy would also have to be legally negotiable. We added this caveat because of our earlier conclusion that the College had a managerial prerogative to adopt an educational policy goal of restricting the use of adjunct instructors. We wanted to ensure that an award would not conflict with that goal. Given that such a policy was never adopted or implemented, no such conflict exists.

Our holding on the negotiability of the grievance procedure was not meant to preclude the parties from presenting or the arbitrator from considering the merits of the Article 16 claim. The parties were free to stipulate that such an issue was before the arbitrator. Compare State of New Jersey (OER) v. CWA, 154 N.J. 98, 109 (1998)(even if contract did not make a claim arbitrable, stipulation did so). Whether they did so and whether the arbitrator exceeded her contractual authority in addressing the Article 16 claim are questions we cannot answer. Ridgefield Park.

B. The Scope of Negotiations Issue

The parties did not dispute before us initially that Article 16 was mandatorily negotiable and enforceable and our negotiability ruling was made in that context. We noted then that the clause protected the College's right not to have the delivery of its instructional program impaired and that it prohibited only arbitrary and capricious denials of half-year contracts. We add now that this claim is analytically analogous to (although contractually distinguishable from) clauses permitting sabbaticals or other leaves of absence for educational employees. Ever since the first Supreme Court cases addressing the scope of negotiations, such time-off clauses have been held to be mandatorily negotiable in the abstract. Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973); South Orange-Maplewood Ed. Ass'n v. Bd. of Ed. of the School Dist. of South Orange-Maplewood, 146 N.J Super. 457 (App. Div. 1977); see also Willingboro Bd. of Ed., P.E.R.C. No. 80-75, 5 NJPER 553 (¶10287 1979), aff'd NJPER Supp.2d 88 (¶70 App. Div. 1980), certif. den. 87 N.J. 320 (1987); Cliffside Park Bd. of Ed., P.E.R.C. No. 77-2, 2 NJPER 252 (1976). Similarly, clauses addressing the contours of employee work schedules and the length of employee work years have been held to be mandatorily negotiable in the abstract. See, e.g., Local 195, IFPTE v. State, 88 N.J. 393, 411-412 (1982); In re Piscataway Tp. Bd. of Ed., 164 N.J. Super. 98 (App. Div. 1978). Given the parties' positions, our prior ruling, and the case law cited, we will assume that Article

16 is mandatorily negotiable and that the College will address its concerns about the wisdom and the specifics of that article in the next round of negotiations. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989); In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977). At this juncture, we will focus instead on whether the arbitrator's award concerning O'Connell's request for a half-year contract goes beyond the scope of negotiations. Applying the balancing test set forth in Local 195 at 403-404, we will specifically consider how the award affects employee interests and whether the award significantly interferes with any demonstrated educational policymaking prerogative outweighing those interests.

Employees have a long-recognized interest in negotiating over various forms of time-off and in having time-off provided when negotiated conditions have been satisfied. The amount of compensation sought in negotiations is often related to the amount of time required at work and the availability of time-off and the viability of the negotiations process may depend upon giving the parties latitude to establish that equation and then honoring their negotiated equation. Woodstown-Pilesgrove Reg. H.S. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 591 (1980). Here the parties made a deal on a form of time-off and the employer has been found to have violated that deal. While one employee has an especially strong interest in having this award upheld, all employees have an interest in having the award

upheld too. We must review the employer's arguments to see if the interests it has identified outweigh these significant interests.

We begin that review by reiterating that the concern that initially impelled us to restrict the arbitrator's authority and remedial power has disappeared. The 1992 faculty staffing proposal is no longer relevant. The College did not adopt or implement a policy of restricting the use of adjuncts and thus the award cannot interfere with such a policy. We also note that the award does not preclude the College from replacing O'Connell with a full-time faculty member during his half-year off.

The College also articulates a concern that the arbitration award restricts its prerogative to deploy personnel by selecting teachers for specific teaching assignments. It cites Ridgefield Park, holding that teacher transfers are not mandatorily negotiable, and cases applying Ridgefield Park. See, e.g., Englewood Bd. of Ed., P.E.R.C. No. 98-75, 24 NJPER 21 (¶29014 1997); Moorestown Bd. of Ed., P.E.R.C. No. 94-21, 19 NJPER 455 (¶24215 1993); Garfield Bd. of Ed., P.E.R.C. No. 90-48, 16 NJPER 6 (¶21004 1989). But that prerogative entitles an educational institution to select the best qualified teacher among available teachers to teach a particular course; it would apply, for example, if O'Connell were demanding a right to be transferred to a different department or reassigned to teach more advanced math courses. It does not empower an employer to deny all forms of negotiated time-off. We will assume, without deciding, that

the College could deny a half-year contract if no suitable replacement for O'Connell could be found to teach his courses, but the record does not indicate that such a condition exists and we will not presume it to be the case.

Finally, we note that Article 16 subjects the granting of a half-year contract to an assurance that "the instructional delivery of the program will not be adversely affected." While we do not have power to review the contractual merits of the grievance, we do have power to make sure that this award does not significantly interfere with any prerogatives and delivering effective instruction is one such prerogative. On this record, no showing has been made that the instructional delivery of the educational program will be impaired by complying with the award.

ORDER

The arbitration award is within the scope of negotiations.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn and Ricci voted in favor of this decision. None opposed.

DATED: April 29, 1999
Trenton, New Jersey
ISSUED: April 30, 1999