P.E.R.C. NO. 88-73

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Petitioner,

-and- Docket No. SN-87-64

AFSCME, COUNCIL 52, LOCAL 1761,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance that the American Federation of State, County and Municipal Employees, Council 52, Local 1761 filed against Rutgers, the State University. The grievance alleges that Rutgers violated the parties' collective negotiations agreement when it laid off a part-time employee in its unit while allowing students who are part-time employees performing similar work, to remain employed. The Commission finds that the students have been employed to receive practical experience to further their education and the grant requires that students be used. Under these facts, the Commission finds that to require the students be laid off instead of non-student employees would interfere with Rutgers' educational mission.

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Appearances:

For the Petitioner, John B. Wolf, Esq.

For the Respondent, Kirschner, Walters & Willig, Esqs. (Sidney H. Lehmann, of counsel and on the brief)

DECISION AND ORDER

On April 22, 1987, Rutgers, the State University, ("Rutgers") filed a Petition for Scope of Negotiations Determination. Rutgers seeks to restrain binding arbitration of a grievance that the American Federation of State, County and Municipal Employees, Council 52, Local 1761 ("AFSCME") filed against it. The grievance alleges that the Board violated the parties' collective negotiations agreement when it laid off a part-time employee in its unit while allowing students who were part-time employees performing similar work, to remain employed. It seeks the rescission of the employee's layoff.

The parties have filed briefs and documents. These facts appear.

AFSCME is the majority representative of certain clerical, office, laboratory and technical employees. AFSCME and Rutgers are parties to an agreement effective from July 1, 1983 through June 30, 1986. The grievance procedure ends in binding arbitration.

Richard Shaw has been employed by Rutgers for approximately 16 years. For the past several years, he was employed in the physics department as a scanner/measurer. Scanning involves the examination of bubble chamber photographs which depict paths of particles and the selection of frames for further analysis and measurement. Measuring is the measurement and description of particle paths.

Shaw's particular duties were to work under the direction of Physics Professor Richard J. Plano and Physics Associate Professor Mohan S. Kalelkar on a National Science Foundation ("NSF") grant entitled "Experimental Studies of the Strong and Weak Interactions." The grant's term is from December 1985 to November 30, 1988, subject to annual review by the NSF. Grant funds paid Shaw's salary and benefits. Shaw was apparently the only non-student working on the project. Three Rutgers undergraduate students also worked part-time on the grant. These students all were studying physics. One Seton Hall student also worked part-time on the grant. This student also studied physics and was recommended to the project by a Seton Hall professor who also worked on the grant. These students earned between $3.85 and $4.35 per hour. Shaw's hourly rate was $9.77.

During the 1986 summer, the project experienced financial difficulties. To contain costs, Rutgers eliminated Shaw's position. It decided not to eliminate the students' positions instead because this would have "denied students the opportunity to perform research" and receive training in their major and related fields of study and would have created financial hardship to the students. The NSF grant requires that the scientific research which it sponsors provide training for future scientists.

Shaw was not replaced by another student. The Seton Hall student who performed the same type of work as Shaw worked slightly less hours after Shaw was laid-off.

Article 42, §2

> Rutgers and the University recognize the commitment of the University to its students to provide part-time employment. Rutgers will not use students to undermine the bargaining unit.

Article 9, §5

> When Rutgers decides to reduce the number of employees in any particular job title in a particular department(s) the employee(s) so affected may displace the least senior employee, who is also less senior than the affected employee in his/her particular job title in the seniority unit, provided he has the requisite qualifications and abilities to perform the work available.

Rutgers denied the grievance and AFSCME demanded arbitration. This petition ensued.

Rutgers concedes that both contract articles are mandatorily negotiable. It specifically states that it is not seeking to restrain arbitration of any alleged violation of the

layoff procedures contained in Article 9 §5.[1/] However, it contends that the grievance challenges its determination that a layoff of a regular part-time employee rather than a student employee was necessary to save enough costs to stay within the grant. It contends that this case differs from other preservation of unit work cases because no new employee was hired or reassigned to do the work of the unit member; rather the amount of work was reduced and the unit member was laid off and not replaced by other employees. It contends that it has furthered its policy of providing educationally-related, part-time jobs to students, as recognized in Article 42, §2 and that arbitration would significantly interfere with that objective.

AFSCME contends that its grievance is arbitrable under both the work preservation guarantees of Article 42 §2 and the layoff procedures contained in Article 9. It cites cases holding that in the absence of specific statutes, an employer may agree that seniority will determine which similarly qualified employees will be laid off.

1/ Rutgers contends that during the grievance process AFSCME abandoned this claim. AFSCME's brief also cites section 6 of the same article which purportedly gives Shaw rights to bump a less senior employee in a lower rated title. We do not decide whether a grievant has waived an argument to be made to an arbitrator. See Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

The focus of this dispute is whether Mr. Shaw or one of the students should have been laid off.[2/] Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets forth the test to determine whether a subject is a mandatorily negotiable term and condition of employment or a non-negotiable managerial prerogative:

> [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 403-404]

The first test has been met. AFSCME has an interest in negotiating job security and layoff protection. E.g., Wright v. City of Orange Bd. of Ed., 99 N.J. 112 (1985); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 84 (1978). The second test is not applicable. No statute or regulation preempts negotiations. The third test will resolve this negotiability question. Rutgers has raised an important policy consideration: it has an interest in

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2/ To the extent that Shaw alleges that he had the right to bump a less senior non-student employee, that may be submitted to binding arbitration. Rutgers does not contest the negotiability of that claim.

seeing that student employees remain on the job so that they can further their education. Therefore, this is another case in which we are required to balance the legitimate interests of the public employees and the public employer. In doing so, we eschew the use of such labels as "work preservation," "job security" and "managerial prerogative." Such conclusory phrases serve only to cloud the issue. Rather, it is our obligation to carefully study the particular record and render the difficult scope decision on that record. See, e.g., Mt. Laurel Tp., 215 N.J. Super. 183 (App. Div. 1987). We have consistently upheld provisions establishing that seniority as it relates to layoffs, recalls, reemployment and bumping is mandatorily negotiable. State Supervisory; see also Wright; Lyndhurst Bd. of Ed., P.E.R.C. No. 87-111, 13 NJPER 271 (¶18112 1987); City of Jersey City, P.E.R.C. No. 85-78, 11 NJPER 84 (¶16037 1985); Atlantic Comm. Coll., P.E.R.C. No. 82-58, 8 NJPER 34 (¶13015 1981). Likewise, we have held that preservation of unit work is mandatorily negotiable. See City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300, 302 (¶16106 1985); Rutgers, The State University, P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd App. Div. No. A-468-81T1 (5/18/83), ("Rutgers II"); Rutgers, The State University, P.E.R.C. No. 79-72, 5 NJPER 186 (¶10103 1979), recon. den. P.E.R.C. No. 79-92, 5 NJPER 230 (¶10127 1979), aff'd. App. Div. Docket No. A-3651-78 (7/1/80) ("Rutgers I"); Middlesex Cty., P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979), aff'd App. Div. A-3564-78 (6/19/80). But all of these cases merely

involved the replacement or shifting of unit employees with non-unit employees. No particular policy implications were present in such decisions. This case is fundamentally different. The record establishes that the students have been employed to receive practical experience to further their education and the grant requires that students be used. No student was hired to replace Shaw. Under these facts, to require that students should be laid-off instead of a non-student employee would unquestionably interfere with Rutger's educational mission. Cf. University of Medicine and Dentistry, P.E.R.C. No. 86-110, 12 NJPER 355 (¶17133 1986).

ORDER

Arbitration is restrained to the extent the grievance alleges that students should have been laid off instead of Shaw.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. Commissioner Bertolino was opposed. Commissioner Reid abstained.

DATED: Trenton, New Jersey
January 21, 1988
ISSUED: January 22, 1988