

P.E.R.C. No. 86-110

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERSITY OF MEDICINE AND  
DENTISTRY OF NEW JERSEY,

Petitioner,

-and-

Docket No. SN-86-35

HOUSESTAFF ORGANIZATION OF THE  
UNIVERSITY OF MEDICINE AND  
DENTISTRY OF NEW JERSEY  
COMMITTEE OF INTERNS AND RESIDENTS

Respondent

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance the Housestaff Organization of the University of Medicine and Dentistry of New Jersey Committee of Interns and Residents filed against the University of Medicine and Dentistry of New Jersey. The grievance alleges the University violated its agreement with the Committee when it allowed two volunteer unpaid physicians to become residents in the University's Ophthalmology Residency Program. The Commission finds the grievance to be not arbitrable because the University has a compelling interest in training residents in the practice of ophthalmology and the use of volunteers was for the sole purpose of furthering its educational mission.

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Appearances:

For the Respondent, W. Cary Edwards, Attorney General  
(Andrea M. Silkowitz, Deputy Attorney General, Of Counsel,  
Katherine L. Suga, Deputy Attorney General, On the Brief)

For the Respondent, Irwin Geller, General Counsel,  
Committee of Interns and Residents,  
Robert Greene, Deputy General Counsel, Of Counsel and On  
the Brief, Rachel Roat, Associate Counsel, On the Brief

DECISION AND ORDER

On December 3, 1985, the University of Medicine and  
Dentistry of New Jersey ("UMDNJ") filed a Petition for Scope of  
Negotiations Determination. UMDNJ seeks to restrain binding  
arbitration of a grievance that the Housestaff Organization of the  
University of Medicine and Dentistry of New Jersey/Committee of  
Interns and Residents ("CIR") has filed. The grievance asserts that  
UMDNJ violated its collective negotiations agreement with CIR when  
it allowed two volunteer unpaid physicians to become residents in

UMDNJ's Ophthalmology Residency Program. It contends the physicians must be paid the compensation rate set forth in the parties' collective negotiations agreement.

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

CIR is the majority representative of UMDNJ's full-time and regular part-time physicians and dentists occupying titles of intern, resident and fellow. CIR and UMDNJ are parties to a collectively negotiated agreement covering the period from July 1, 1983 to June 30, 1986. The agreement contains a grievance procedure which ends in binding arbitration.

Beginning with the 1982-1983 academic year and continuing to the present, UMDNJ accepted the services of two ophthalmology residents who volunteered to work without compensation. The ophthalmology program has 15 other salaried residents whose terms and conditions of employment are set by the negotiated agreement. During this year, the College had budgeted for 15 positions and therefore, did not have funds to compensate any other residents in this program. The number of salaried positions in the program is expected to decline to 13 over the next two years. The last of the volunteer residents will complete the program in June, 1986 and no volunteers have been accepted into the program for the 1986-1987 academic year. The volunteers work the same schedule, perform the same duties and services and are evaluated in the same manner as the salaried residents. They are accorded the same vacation and leave

time, although all such time off is uncompensated. The volunteers are covered by the hospital's malpractice carrier, but they do not receive life insurance or medical, prescription drug, dental or eye care coverage. <sup>1/</sup> They receive on-call meals, uniforms, parking privileges and the use of on-call rooms.

On July 25, 1983, CIR filed a grievance alleging that the use of the volunteer residents violated several provisions of the UMDNJ-CIR agreement, including Article VII, Section A which provides, in pertinent part:

Any written individual contract between the University and an individual House Staff Officer, hereinafter executed, shall be subject to and consistent with the terms and conditions of this Agreement. Where such contract is inconsistent with this Agreement, this Agreement, during its duration, shall be controlling...

The thrust of the CIR's grievance was that UMDNJ had negotiated individually with these residents in violation of CIR's right to represent residents as set forth in the recognition clause of the contract. The grievance also alleged that the volunteer residents should receive the salary and fringe benefits set forth in the contract.

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<sup>1/</sup> The New Jersey State Health Program Benefits Act, N.J.S.A. 52:14-17.25(c), excludes coverage for persons whose "compensation from the State is limited to reimbursement of necessary expenses actually incurred in the discharge of their official duties."

The grievance was processed through the steps of the grievance procedure and on October 7, 1983, CIR demanded arbitration. Arbitration was originally scheduled for November, 1984, but was postponed four times, once at CIR's request, the other three times at UMDNJ's urging.<sup>2/</sup> This petition was then filed.<sup>3/</sup>

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

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

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<sup>2/</sup> Because UMDNJ did not raise a negotiability issue until two years after the demand, CIR urges that we apply the doctrine of laches and dismiss the petition. While we agree that negotiability issues should be raised as soon as binding arbitration is requested, we have barred only post-arbitration negotiability challenges which have not been referred to us by a court. See Ocean Tp. Bd. of Ed. and Tp. of Ocean Teachers Ass'n., P.E.R.C. No. 83-164, 9 NJPER 397 (¶14181 1983). As the arbitration hearing had not been held when this petition was filed, we will consider the negotiability issue.

<sup>3/</sup> UMDNJ also filed an Order to Show Cause seeking a temporary restraint of arbitration while the case is before the Commission. On February 21, 1986, Charles A. Tadduni, the Commission's designee, heard the application and issued a temporary restraint.

questions appropriate for determination by an arbitrator and/or the courts.  
[Id. at 154.]

The test for determining negotiability is set forth in Local 195, IFPTE v. State, 88 N.J. 393 (1982)

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.

UMDNJ argues that the first part of the test is not satisfied. It contends that its use of volunteer residents does not affect CIR's unit of paid residents. Alternatively, it argues that even if the practice does intimately and directly affect the work and welfare of the paid residents, public policy considerations outweigh any impact on the residents. Such public policy is embodied in N.J.S.A. 18A:64G-2 which exhorts UMDNJ to maximize the "number of trained medical personnel...and to prepare greater numbers of students for the general practice of medicine and dentistry...in the most economical and efficient manner...."<sup>4/</sup> UMDNJ maintains that using volunteer residents aids that goal.

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<sup>4/</sup> UMDNJ does not argue that this statute preempts negotiations

CIR counters that UMDNJ's practice intimately and directly affects both the volunteer residents and the unit of paid residents. It contends that UMDNJ's public policy argument, carried to its extreme, would allow a public employer to wipe out any negotiated salaries or economic benefits because providing the service without payment for such services would be more "economical". CIR contends that UMDNJ is collaterally estopped from filing this petition because in a prior case, State of N.J. Coll. of Med. and Dentistry, P.E.R.C. No. 80-127, 6 NJPER 213, (¶11104 1980), it was held that a grievance alleging that this employer was underpaying residents was mandatorily negotiable and arbitrable.

UMDNJ replies that it is not bound to compensate the volunteer residents in accordance with the collective agreement. It cites Walling v. Portland Terminal Co., 330 U.S. 148, 152-153 (1947) in which the United States Supreme Court held that individuals who worked without "promise or expectation of compensation" were not covered by federal minimum wage laws. UMDNJ also cites recent amendments to the Fair Labor Standards Act, 29 U.S.C.A. §203(e)(4)(A) which excludes from the term "employee":

"any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if--

- (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
- (ii) such services are not the same type of services which the individual is employed to perform for such public agency.

We reject UMDNJ's economic policy argument. Where an employee would be unjustly deprived of benefits, the public interest does not always lie with minimizing a public employer's expenditures. See Eaddy v. Department of Transportation, 208 N.J. Super. 156 (App. Div. 1986). While a public employer may abolish jobs to effectuate a cost savings, it may not unilaterally cut negotiated employee benefits. See Piscataway Tp. Bd. of Ed. v. Piscataway Principals Ass'n, 164 N.J. Super. 98 (App. Div. 1978)

We also reject the suggestion that the practice of using volunteers does not intimately and directly affect employees in the unit represented by CIR. This practice could mean the loss of positions for unit members. While subcontracting unit work to a private employer is not mandatorily negotiable, Local 195, supra., 88 N.J. at 408, shifting unit work to other employees of the same public employer to save money is mandatorily negotiable. See Rutgers, The State University v. American Federation of State, County & Municipal Employees, P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd App. Div. Dkt. No. A-468-81T1 (5/18/83). In both Local 195 and Rutgers, the courts recognized that removal of



unit work intimately and directly affects employee work and welfare.<sup>5/</sup>

In making scope of negotiations determinations, our Supreme Court has directed that we balance the legitimate interests of the public employer and public employee organizations. Bd. Ed. Woodstown-Pilesgrove. Sch. v. Woodstown-Pilesgrove Ed. Assn., 81 N.J. 582, 589-591 (1980). As we have seen, both parties have legitimate interests in this matter. On balance, however, under the particular circumstances of this case, we believe the University's interests predominate. It has a compelling interest in training residents in the practice of ophthalmology. Further, it had budgeted for only 15 positions -- it did not have the ability to compensate any other residents in the program. In contrast, the CIR's interest is relatively slight. The University has not replaced any unit members with volunteers nor is there any prospect that will occur. There has been no loss of negotiations unit work. Nor is there anything in the record that would suggest that the University used the volunteers to undermine the CIR's status as majority representative. Rather, the use of volunteers was for the sole purpose of furthering its educational mission. Accordingly, our

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<sup>5/</sup> UMDNJ has asserted that it does not plan to use any unpaid residents for the 1986-1987 academic year, so there is no present prospect of the practice resulting in layoffs of CIR unit members. Cf. Local 195, 88 N.J. at 409

application of the Woodstown-Pilesgrove test to the unique facts of this case convinces us that arbitration must be restrained.<sup>6/</sup>

ORDER

The University of Medicine and Dentistry's request for a permanent restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Hipp and Horan were not present.

DATED: Trenton, New Jersey  
April 18, 1986  
ISSUED: April 21, 1986

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<sup>6/</sup> Accordingly, we need not decide whether the volunteers are employees under our Act.