P.E.R.C. NO. 2019-49

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OCEAN COUNTY COLLEGE,

Petitioner,

-and-

Docket No. SN-2019-034

OCEAN COUNTY COLLEGE FACULTY ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of two articles in the collective negotiations agreement between Ocean County College and the Ocean County College Faculty Association. The Commission finds mandatorily negotiable provisions giving Association unit members preference to faculty duties within their qualified discipline and to teach courses involving extra pay. These two articles are mandatorily negotiable preservation of unit work clauses.

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, Cleary Giacobbe Alfieri Jacobs, LLC, attorneys (Matthew J. Giacobbe, of counsel and on the brief; Gregory J. Franklin, of counsel and on the brief)

For the Respondent, Detzky, Hunter & DeFillippo, LLC, attorneys (Stephen B. Hunter, of counsel and on the brief)

DECISION

On October 30, 2018, the Ocean County College (College) petitioned for a scope of negotiations determination. The College seeks a determination that two articles in its collective negotiations agreement (CNA) with the Ocean County College Faculty Association (Association) are not mandatorily negotiable.

The College filed briefs and exhibits. The Association filed a brief and the certification of its former President, David Bordelon. These facts appear.

The Association represents all full-time faculty members presently employed by the College, including instructors,

assistant professors, associate professors, professors, counselors, and librarians. The College and Association are parties to a CNA in effect from September 1, 2014 through August 31, 2019.

Article III, entitled "Association and Full-Time Faculty Member Privileges," Section J of the CNA provides:

> J. **Preference** - FAOCC Members shall be given preference to Faculty duties within their discipline, for which they are qualified.

Article V, entitled " Terms and Conditions of Employment," Section B(5) of the CNA provides:

> 5. **Extra Pay Assignment Priority** - Full-Time Faculty Members shall have preference, according to qualifications, as determined by the Department Dean or Vice President of Academic Affairs, to teach courses involving extra pay. The Department Dean or Vice President of Academic Affairs shall make section assignments to Full-Time Faculty Members for extra pay consistent with department scheduling needs.
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> If a Full-Time Faculty Member has requested extra pay assignment but a course in the in-load teaching assignment is cancelled, the Department Dean will adjust the Full-Time Faculty Member's in-load teaching schedule to reflect a full load and then attempt to identify an appropriate replacement course for extra pay assignment.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states: "The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations."

We do not consider the wisdom of the clauses in question, only their negotiability. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates 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.
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> [Id. at 404-405].

The College asserts that Article III, Section J and Article V, Section B(5) must be removed from the CNA because they infringe on its prerogative to make staffing assignments. It argues that these clauses require the College to assign classes pursuant to the preferences of Association members.

The Association asserts that Article III, Section J and Article V, Section B(5) do not infringe on the College's managerial prerogative to make staffing assignments. It argues

that the clauses make no reference to assigning classes pursuant to the preferences of Association members. The Association contends that the clauses can only be read as providing full-time faculty members with job security to perform their job duties, rather than allowing the College to use non-unit staff.

Article III, Section J does not mention giving faculty their preference of which classes to teach, but speaks only of Association members being "given preference to faculty duties within their discipline." Thus, the clause is phrased as a unit work preservation provision that Association faculty, if qualified (as determined by the College), are given preference for faculty duties within their discipline over individuals not represented by the Association.

Article V, Section B(5) is similarly pre-conditioned on the faculty being qualified for the duties at issue (here, "courses involving extra pay"). The disputed clause provides that "Full-Time Faculty Members shall have preference, according to qualifications, as determined by the Department Dean or Vice President of Academic Affairs, to teach courses involving extra pay." The CNA's Recognition Clause clarifies that "the term Full-Time Faculty Member as used in this Agreement applies to all of the above specified academic ranks and Faculty Members represented by the FAOCC." Thus, as with Article III, Section J, this clause is more reasonably read as concerning preference by

the College for faculty represented by the Association over individuals not represented by the Association.

The Commission has held that clauses for the preservation of unit work are mandatorily negotiable. Burlington County College, P.E.R.C. No. 90-13, 15 NJPER 513 (¶20213 1989) (clause in regular faculty member contract stating "no adjunct faculty member shall be assigned a full teaching load" was negotiable); Borough of Belmar and PBA Local No. 50, P.E.R.C. No. 89-73, 15 NJPER 73 (¶20029 1989), aff'd, NJPER Supp.2d 222 (¶195 App. Div. 1989); Middlesex Cty. and PBA Local 152 Correction Officers of Middlesex Cty. Workhouse, P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979), aff'd in pt., rev'd in pt. 6 NJPER 338 (¶11169 App. Div. 1980); and Flemington-Raritan Bd. of Ed. and Flemington-Raritan Ed. Ass'n, P.E.R.C. No. 2011-28, 36 NJPER 363 (¶141 2010), aff'd, 38 NJPER 32 (¶4 2011), certif. den., 209 N.J. 100 (2012) (alleged shifting of some summer work duties of unit members to non-unit members was arbitrable).[1/]

1/ Compare City of Passaic, P.E.R.C. No. 2000-8, 25 NJPER 373 (¶30162 1999) (in light of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998), the Commission held that "we reaffirm that this type of work preservation clause is mandatorily negotiable in the abstract, but for police officers, the clause must specify that it is subject to the employer's right to civilianize for demonstrated governmental policy reasons") and Gloucester Tp. Fire District No. 2, P.E.R.C. No. 2016-89, 43 NJPER 55 (¶13 2016) (preservation of unit work clause for firefighters was held mandatorily negotiable, but Commission noted "we caution that we may find the provision not to be enforceable if, in its

(continued...)

In Burlington County College, supra, 15 NJPER at 514, the Commission considered and rejected similar arguments as those made here by the College, holding:

> The employer argues that this provision interferes with its ability to deploy its personnel. . . . This language does not significantly interfere with the Board's ability to determine what courses to offer or which faculty members to assign to particular courses. . . . Paragraph 2 involves the preservation of unit work, a mandatorily negotiable subject.

In Union County College, P.E.R.C. No. 2018-38, 44 NJPER 379 (¶107 2018), a case cited by the Association, the Commission held that the alleged assignment of winter term courses to non-unit part-time faculty members instead of full-time faculty unit members was arbitrable. The grievance was based on an alleged violation of contract language stating, in part: "A non-unit member may not teach a course in a department where a faculty member in that department is qualified to teach that course, and is willing to teach that course." Union County College, 44 NJPER at 381. The College argues that Union County College is not dispositive of the current dispute because it arose in the context of grievance arbitration. That argument simply acknowledges the fact that in a grievance arbitration scope of negotiations case, the Commission analyzes the negotiability of

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1/ (...continued)
application, it were found to substantially interfere with the Fire District's managerial prerogatives.")

the dispute that is sought to be arbitrated, and does not determine whether any allegedly violated contract clause that underlies the grievance is itself a negotiable clause as written. See, e.g., West Orange Bd. of Ed., P.E.R.C. No. 2016-86, 43 NJPER 44 (¶10 2016). However, the holding of Union County College remains relevant to this case because the reasoning applied to that arbitrability determination concerned the assignment of unit work from qualified full-time faculty to part-time faculty, which invokes the same preservation of unit work concepts used to analyze the disputed clauses here.[2/]

Finally, we note that the College's reliance on Rutgers, the State University, P.E.R.C. No. 91-81, 17 NJPER 212 (¶22091 1991) is misplaced. The disputed clause in that case concerned the criteria for which part-time faculty should be assigned to teach particular courses.[3/] The Commission held the clause not mandatorily negotiable, noting that "particularly in an

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2/ We also noted in Union County College that the College could seek restraint of binding arbitration of future disputes in which the union relies on the same contract language but that actually raise different issues than the arbitration in that case. Similarly, here, as we often state in negotiability scope decisions, if the disputed clauses are included in the successor contract and the Association seeks to arbitrate a claim based on an application of these clauses that the College believes significantly interferes with managerial prerogatives, then the College may file a scope petition to restrain arbitration at that time.

3/ The clause stated, in part: "Where possible, assignments shall be made according [to] the part-time lecturer's record of employment." Rutgers, 17 NJPER at 215.

educational setting, assignments are reserved to management." Id. at 216. The disputed clauses here do not infringe on that prerogative because they do not concern how the College should select which unit members to teach which courses.

Accordingly, applying the above-cited precedents to the disputed clauses in this case, we find that Article III, Section J and Article V, Section B(5), as written, are mandatorily negotiable and may remain in the CNA.

ORDER

Article III, Section J and Article V, Section B(5) are mandatorily negotiable.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Boudreau, Jones, Papero and Voos voted in favor of this decision. None opposed. Commissioner Bonanni recused himself.

ISSUED: May 30, 2019

Trenton, New Jersey