

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BURLINGTON COUNTY COLLEGE,

Respondent,

-and-

Docket No. SN-2004-19

BURLINGTON COUNTY COLLEGE
FACULTY ASSOCIATION,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of portions of two clauses in an expired collective negotiations agreement between the Burlington County College Faculty Association and Burlington County College. The portions declare that the position of lecturer is not eligible for tenure. The Commission finds that the policy goal of maintaining a balance between tenured and non-tenured faculty does not authorize the College to designate, or the parties to agree, that a position is not eligible for statutory tenure if its duties are determined to fall within the ambit of N.J.S.A. 18A:60-8. The educational and management goals of creating a balance of tenured and non-tenured faculty must take place within the statutory scheme for tenure acquisition. That framework contemplates that disputes over whether an individual is tenure-eligible will be decided not by a negotiated agreement, but by a college's board of trustees applying N.J.S.A. 18A:60-8. The Commission also holds that N.J.S.A. 18A:60-12f and 12g do not authorize the College to designate positions as non-tenure track where the duties performed by the incumbents would make them tenure-eligible under N.J.S.A. 18A:60-8. The Commission concludes that the disputed sentences are not mandatorily negotiable.

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.

P.E.R.C. NO. 2004-71

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Petitioner.

Appearances:

For the Petitioner, Selikoff & Cohen, P.A., attorneys
(Keith Waldman, on the brief)

For the Respondent, Capehart Scatchard, P.A., attorneys
(Alan R. Schmoll, on the brief)

DECISION

On October 16, 2003, the Burlington County College Faculty Association petitioned for a scope of negotiations determination. The Association asserts that portions of two clauses in an expired collective negotiations agreement between the Association and Burlington County College are not mandatorily negotiable and cannot be retained in a successor collective negotiations agreement. The portions declare that the position of lecturer is not eligible for tenure.

The parties have filed briefs and exhibits. The Association has filed the certification of its president, Armen Gnepp. These facts appear.

The Association represents all full-time teaching faculty, student counselors and librarians holding the academic rank of instructor, assistant professor, associate professor or professor. It also represents all lecturers and clinicians. The agreement specifies that these latter titles "may be given to individuals employed . . . to perform duties similar to those performed by faculty, counselor, and librarian staff."

The parties' most recent collective negotiations agreement is an Extension Agreement covering the period from July 1, 1999 through June 30, 2003. That agreement extended the July 1, 1994 through June 30, 1999 agreement. Paragraphs B(3) through (6) of the Extension Agreement address the length of employment and tenure status of lecturers and clinicians. They provide:

3. The maximum total employment period for Lecturers and Clinicians initially appointed as Lecturers and Clinicians prior to January 1, 1998, shall be as follows.

- A maximum of three (3) one-year appointments
- One (1) additional two-year appointment
- Total of five (5) years of employment as a Lecturer or Clinician

4. The maximum total employment as Lecturer or Clinician for Lecturers and Clinicians initially appointed as Lecturers and Clinicians on or after January 1, 1998, shall be as follows:

- A maximum of four (4) one-year appointments
- One (1) additional two-year appointment
- Total of six (6) years of employment as a Lecturer or Clinician

5. The specified maximum total employment periods pertain only to service as a Lecturer or Clinician and do not include prior service in other positions at the College nor do they preclude service in other College positions after the maximum time periods as a Lecturer or Clinician have been attained.

6. These positions are not in a tenure track.

Article One, Paragraph B of the 1994-1999 agreement stated:

The Board further recognizes the Burlington County College Faculty Association as the exclusive bargaining representative for all lecturers and clinicians. This title may be given to individuals employed by the College to perform duties similar to those performed by faculty, counselor, and librarian staff. The total employment period for this category shall be limited to thirty-six (36) months for the life of the individual. **These positions are not in a tenure track.**

These contract provisions exist alongside statutes and cases that address tenure for teaching staff at state and county colleges. N.J.S.A. 18A:60-7 and -8, part of the County and State College Tenure Act (Tenure Act), provide that instructors, assistant professors, associate professors and professors acquire tenure "in their academic rank" after completion of five consecutive calendar years of service; five consecutive academic

years together with employment at the beginning of the next academic year; or the equivalent of more than five academic years within a period of any six consecutive academic years. This legislation makes tenure a mandatory term and condition of employment that may not be waived, altered or superseded by contract. Dugan v. Stockton State College, 245 N.J. Super. 567 (App. Div. 1991); cf. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 72 (1982) (tenure for public school teachers is a matter of statute, not contract). The Tenure Act does not permit avoidance of tenure by "manipulation of job titles." Dugan.

N.J.S.A. 18A:60-7 and -8 do not set criteria for tenure and colleges have broad discretion not to renew faculty contracts, thereby precluding an individual from acquiring statutory tenure. Association of State College Faculties, Inc. v. New Jersey Bd. of Higher Ed., 64 N.J. 338, 351 (1974). A 1972 report by the Department of Higher Education expressed concern that the high percentage of tenured faculty at some state colleges could impede the colleges' ability to start new programs, introduce young scholars, and recruit minority and female faculty members. Accordingly, the Department adopted regulations requiring colleges to implement tenure appointment policies aimed at achieving a reasonable balance between tenured and non-tenured faculty. See N.J.A.C. 9A:7-3.1 et seq.

Against this backdrop, the Association maintains that while the "lecturer" job title was initially intended to apply to individuals serving on an interim basis, it is now being used, in contravention of Dugan and Spiewak, to deny statutory tenure rights to individuals who perform duties identical to those of faculty members holding academic rank. It asks us to hold that Article One, Paragraph B(6) of the Extension Agreement and the last sentence of Article One, Paragraph B of the 1994-1999 contract are not mandatorily negotiable because they prohibit the accrual of service toward tenure by faculty members who are tenured or tenure-eligible under N.J.S.A. 18A:60-8. The Association states that if we rule in its favor, it will ask the college to recognize the tenure rights and tenure-eligible service of current and former lecturers.

The College recognizes that statutory tenure is not mandatorily negotiable. However, it argues that the Association does not seek a declaration to that effect but instead asks us to determine that lecturer positions are tenure-eligible. The College maintains that we do not have jurisdiction to decide that education law question, which must be resolved in the first instance by the College's board of trustees.

With respect to the merits of the Association's claim, the College stresses that N.J.S.A. 18A:60-8 provides for tenure only for those faculty members holding academic rank and that

lecturers therefore do not fall within the ambit of the statute. In addition, it maintains that it has the authority and responsibility to limit the proportion of tenured faculty, and has made a non-negotiable educational decision to do so by creating the non-tenurable instructional position of lecturer. Finally, it asserts that Dugan is inapt and contends that the parties can negotiate over such mandatorily negotiable issues as contract term.

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), sets the standards for determining whether a subject is mandatorily negotiable. It states:

[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 404-405]

We have jurisdiction to consider the Association's petition. In resolving scope of negotiations questions, we have authority to interpret laws other than the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. See Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311, 316 (1979); Hunterdon Central H.S. Bd. of Ed. v. Hunterdon Central H.S. Teachers' Ass'n, 174 N.J. Super. 468, 473-474 (App. Div. 1980), aff'd o.b. 86 N.J. 43 (1981). Thus, we have decided whether tenure statutes preempt contract provisions or demands for arbitration, and have also assessed the relationship between tenure systems and an employer's claim that it had a managerial prerogative to act unilaterally. See, e.g., Rutgers, The State Univ., P.E.R.C. No. 2000-83, 26 NJPER 209 (¶31086 2000); Long Branch Bd. of Ed., P.E.R.C. No. 92-79, 18 NJPER 91 (¶23041 1992); Bergen Cty. Community College, P.E.R.C. No. 89-41, 14 NJPER 680 (¶19286 1988).

We hold that the disputed sentences are not mandatorily negotiable. Dugan stresses that tenure under a statutory scheme is achieved by operation of law, and is not a matter of contract. As with the school district tenure scheme covering teaching staff

members, whether a particular title or an individual in a particular title is eligible for statutory tenure is not a question for collective negotiations. Spiewak; North Bergen Bd. of Ed., P.E.R.C. No. 82-29, 7 NJPER 581 (¶12260 1981) (teacher tenure scheme and disputes over whether teacher had attained tenure not negotiable or legally arbitrable). We note that we are not being asked to decide whether lecturers are in fact tenure-eligible.

The policy goal of maintaining a balance between tenured and non-tenured faculty does not authorize the College to designate, or the parties to agree, that a position is not eligible for statutory tenure if its duties are determined to fall within the ambit of N.J.S.A. 18A:60-8. In Ass'n of State Colleges, the Court held that statutory tenure rights were not impaired by regulations requiring colleges to ensure a reasonable balance between tenured and non-tenured faculty. But the regulations upheld in State Colleges, like the regulations now, contemplated that the goal would be achieved by establishing rigorous standards for making appointments that would result in tenure under N.J.S.A. 18A:60-8. Stated another way, the educational and management goals of creating a balance of tenured and non-tenured faculty must take place within the statutory scheme for tenure acquisition. That framework contemplates that disputes over whether an individual is tenure-eligible will be decided not by a

negotiated agreement, but by a college's board of trustees applying N.J.S.A. 18A:60-8. See Dugan.

Finally, N.J.S.A. 18A:60-12f and 12g do not authorize the College to designate positions as non-tenure track where the duties performed by the incumbents would make them tenure-eligible under N.J.S.A. 18A:60-8. N.J.S.A. 18A:60-12f and g are general grants of authority to hire employees that cannot supersede the specific provisions of the Tenure Act.

For the foregoing reasons, Article One, Paragraph B(6) of the Extension Agreement and the last sentence of Article One, Paragraph B of the 1994-1999 agreement are not mandatorily negotiable.

ORDER

Article One, Paragraph B(6) of the Extension Agreement and the last sentence of Article One, Paragraph B of the 1994-1999 agreement are not mandatorily negotiable.

BY ORDER OF THE COMMISSION

A handwritten signature in black ink, appearing to read "Lawrence Henderson", written over a horizontal line.

Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Katz, Mastriani and Sandman voted in favor of this decision. None opposed.

DATED: April 29, 2004
Trenton, New Jersey
ISSUED: April 30, 2004