P.E.R.C. NO. 2006-7

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

GLOUCESTER COUNTY COLLEGE,

Petitioner,

-and-

Docket No. SN-2005-072

GLOUCESTER COUNTY COLLEGE
FACULTY ASSOCIATION/NJEA,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of Gloucester County College for a restraint of binding arbitration of a grievance being processed by the Gloucester County College Faculty Association/NJEA. The grievance contends that faculty members were deprived of due compensation when the College cancelled certain on-line courses. The Commission concludes that the College has an indisputable right to cancel courses. The College's financial interest in not paying full or partial payment for cancelled coursed does not outweigh the faculty's interest in enforcing an alleged agreement that they receive at least some compensation for courses assigned and subsequently cancelled.

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, Archer & Greiner, P.C., attorneys (Christopher R. Gibson and David A. Rapuano, on the brief)

For the Respondent, Oron Nahom, Chair, Grievance/Negotiations Committee

DECISION

On April 25, 2005, Gloucester County College petitioned for a scope of negotiations determination. The County seeks a restraint of binding arbitration of a grievance being processed by the Gloucester County College Faculty Association/NJEA.[1/] The grievance contends that faculty members were deprived of due compensation when the College cancelled certain on-line courses.

1/ The grievance was filed by the Gloucester County College Federation of Teachers, AFT Local 2338. On July 6, 2005, the Gloucester County College Faculty Association/NJEA was certified as the new majority representative.

The parties have filed briefs and exhibits. The College has submitted the affidavit of Charles Abasa-Nyarko, Vice-President for Academic & Student Services. These facts appear.

The Association represents full-time teaching staff and other employees. The parties' collective negotiations agreement is effective from July 1, 2001 through June 30, 2004. The parties are in negotiations for a successor agreement. The grievance procedure ends in binding arbitration.

The College offers both regular classroom courses and on-line courses. The two types of courses are treated differently for purposes of faculty compensation. Appendix B contains the compensation formula for on-line study courses. It provides:

Number of students enrolled	Base Rate	Faculty Compensation
1 to 7 students	$500	# of students/8* Contact Hours* Overload rate
8 to Maximum class size	None	Contact hours

Maximum class size is defined as 75% of the maximum enrollment in a face-to-face section of that course for that semester.

Traditional lecture courses are credited to faculty in terms of contact hours. For each course taught, there is an assigned number of contact hours that represents the number of hours in a given week that the faculty member is instructing students. In return for their contractual salary, faculty members are assigned a base load of between 15 and 18 contact

hours each semester. Faculty members are also allowed to teach up to 12 contact hours as overload, or contact hours above the base load. The overload rate from the 2003 Fall semester to the present has been $875 per contact hour. Abasa-Nyarko states that the College decides overload assignments and faculty members have no right to an overload.

According to Abasa-Nyarko, faculty members do not receive any compensation for an on-line course if the course is cancelled due to insufficient enrollment. The Association, however, contends that the contractual formula compensates faculty for services rendered before as well as after the teaching of an on-line course and that the enrollment of even one student triggers the compensation formula, even if the course is later cancelled. It maintains that this unique compensation method was developed to encourage faculty to participate in the time-consuming task of developing the content of on-line courses, despite the fact that there was a significant risk of low enrollment in, and cancellation of, such courses. It stresses that the compensation formula was designed to induce faculty to forgo the off-campus employment opportunities that they had traditionally pursued to supplement their income.

The College offers courses each academic year during the regular Spring and Fall semesters and two summer sessions. Each

year a course catalog lists the courses that may be offered by the College in the subsequent academic year.

Abasa-Nyarko states that historically, a certain number of courses or course sections are cancelled before the start of classes due to insufficient enrollment. He states that cancelling courses due to low enrollment is an essential tool for the College to maximize the educational value of its curriculum expenditures and to reallocate resources where they are most needed. When a course is cancelled, the faculty member is assigned replacement contact hours to ensure that every member meets the contractual base load. Historically, each academic period, the College is unable to cover all overload with faculty members and is required to hire adjunct faculty to teach courses.

Out of the 904 courses offered for the Fall 2004 Semester, 44 courses were cancelled due to low enrollment. The cancellations were made before the start of the semester. Of the cancellations, five were on-line courses. Abasa-Nyarko states that no faculty member has been deprived of a base load or lost salary due to the course cancellations.

On September 24, 2004, the union filed a grievance alleging that the College violated Appendix B of the agreement when on September 1, 2004 it cancelled various on-line courses, thus depriving "affected bargaining unit members their due compensation."

On November 24, 2004, the College's grievance committee denied the grievance. On January 4, 2005, the union demanded arbitration. This petition ensued.

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. 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 questions appropriate for determination by an arbitrator and/or the courts.

Thus we do not consider the merits of the grievance or any contractual defenses the employer may have.

The College acknowledges that compensation is normally a mandatorily negotiable subject, but argues that eliminating a course for budgetary or educational policy reasons is a managerial prerogative. It asserts that a compensation demand for cancelled courses would frustrate its ability to exercise that prerogative. It adds that the only possible compensation claim would be for overtime or overload compensation, and an employer has a prerogative to determine whether and when overtime shall be worked.

The Association counters that compensation is mandatorily negotiable and that faculty members should not be deprived of compensation for services rendered before the courses were cancelled. It asserts that the special compensation formula for on-line courses was developed in light of the significant risk of course cancellation due to low initial enrollments and the extraordinary amount of preparation a faculty member must provide prior to teaching an on-line course. The College has not responded to these arguments.

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. [Id. at 404-405]

No statute or regulation is alleged to preempt negotiations.

We now apply the negotiability balancing test to the facts

and arguments presented. The employees have a strong interest in being compensated for work associated with on-line courses that are subsequently cancelled. The rate of compensation for work performed is a core term and condition of employment. Woodstown-Pilesgrove Reg. Sch. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 589 (1980); Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1, 8-9 (1973). The College has an indisputable right to cancel courses and a financial interest in not paying full or partial payment for cancelled courses, but that interest does not outweigh the faculty's interest in enforcing an alleged agreement that they receive at least some compensation for courses assigned and subsequently cancelled. See, e.g., City of Camden, P.E.R.C. No. 94-62, 20 NJPER 48 (¶25016 1993) (employer's decision to not have employees complete tour of duty did not negate validity of promise to pay for full time initially assigned). We note, however, that some arbitrable remedies may significantly interfere with the exercise of a managerial prerogative and thus be enforceable. See, e.g., Old Bridge Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523, 533-534 (1985) (limiting penalty for breach of layoff notice provision to 61 days of late notice). We express no opinion as to whether the parties' agreement in fact provides for compensation as outlined by the union. Nor do we speculate about the appropriateness of any remedy. Deptford Bd. of Ed., P.E.R.C. No. 81-84, 7 NJPER 88

(¶12034 1981). However, should the arbitrator issue an award that the College believes would significantly interfere with its managerial prerogatives, it may re-file its petition.

We note that the parties are in the midst of successor contract negotiations. Whatever an arbitrator may decide about these four cancelled classes from 2004, the parties now have the opportunity to reach an unambiguous agreement about on-line courses that will avoid any future disputes over what compensation, if any, faculty should be paid should on-line courses be cancelled. We encourage the parties to avail themselves of this opportunity.

ORDER

The request of Gloucester County College for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed. Commissioners Katz and Mastriani were not present.

DATED: July 28, 2005
Trenton, New Jersey
ISSUED: July 28, 2005