

P.E.R.C. NO. 2007-46

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY COLLEGE,

Petitioner,

-and-

Docket No. SN-2007-017

ESSEX COUNTY COLLEGE FACULTY
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of several provisions in an expired collective negotiations agreement between Essex County College and the Essex County College Faculty Association. The Commission finds mandatorily negotiable a provision concerning release time; a portion of a provision on class size to the extent it involves the computation of contact hours; a portion of a provision entitled promotion procedure; and a portion of a provision entitled successor agreement which requires the Board to provide copies of Board minutes to the Association in certain circumstances. The Commission finds not mandatorily negotiable a provision requiring the College to negotiate over who will advise its management team; a portion of a provision entitled class size to the extent it sets class size; a provision on filling professional vacancies; portions of a provision on curriculum development; portions of a provision on evaluation and non-tenured faculty; and portions of a provision entitled promotion procedure.

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. 2007-46

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY COLLEGE,

Petitioner,

-and-

Docket No. SN-2007-017

ESSEX COUNTY COLLEGE FACULTY
ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Lum, Danzis, Drasco & Positan, LLC,
attorneys (Richard A. West Jr., on the brief)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum
& Friedman, PC, attorneys (Robert A. Fagella and
Genevieve Murphy-Bradacs, on the brief)

DECISION

On October 13, 2006, Essex County College petitioned for a scope of negotiations determination. The College seeks a determination concerning the negotiability of several contract provisions in an expired agreement between the College and the Essex County College Faculty Association. We find some provisions to be mandatorily negotiable and others not.

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

The Association represents full-time teaching faculty and half-time lecturers. The parties' collective negotiations agreement expired on August 31, 2006. The parties are in

negotiations for a successor agreement. The College questions the negotiability of several contract provisions that the Association seeks to continue in the new agreement.

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. [Id. at 404-405]

Article 8 is entitled Association Representative on Board.

Section 8.1 provides:

The Association Representative shall sit in an advisory capacity before the Board of Trustees at all public meetings of the board. The Association representative shall participate in Committee meetings or approved sessions when approved by the Chairperson of the Board. Whenever requested by the Association Representative, the said Representative shall have the right to address an issue prior to any vote being taken by the Board.

The College argues that under the Open Public Meetings Act, N.J.S.A. 10:4-7 et seq. ("OPRA"), anyone may attend Board meetings, but that it is the Board's prerogative whether to allow Association members or the public to serve in an advisory capacity. The Association rejects the College's argument that OPRA preempts this provision and maintains that employees have an important interest in attending and participating in meetings that might affect their terms and conditions of employment.

OPRA does not require or prohibit permitting the Association to advise the Board of Trustees or participate in committee meetings or other sessions. However, short of being required to permit the Association to participate in sessions concerning terms and conditions of employment and to present grievances concerning workplace issues, the College cannot be required to negotiate over who will advise its management team. Such

negotiations would significantly interfere with the College's ability to set educational and governmental policy.

Article 9 is entitled Association Officers' Load. Section 9.1 provides:

The Association shall receive a total of thirty-six (36) hours of release time for each year of the Agreement. Distribution of such release time to Associate Executive Board members will be made by the Association and communicated to the College as soon as possible preceding the year in which it takes effect but not later than the date when class schedules are distributed.

The College acknowledges that release time is mandatorily negotiable, but argues that it should not be required to negotiate the specific individual or entity to which release time should be granted. It maintains that this limited exception would not undermine the Association's rights and would protect the College's educational goals. The Association argues that issues related to release time, such as classroom coverage, are mandatorily negotiable.

We have long held that release time for union business is mandatorily negotiable. See, e.g., City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394 (¶21164 1990). We reject the College's request that we carve out an exception that effectively permits it to deny release time for specific Association officials. The College can raise any concerns it might have in negotiations.

Article 19 is entitled Class Size. Section 19-1 sets student/faculty ratios. The Association concedes that this provision is not mandatorily negotiable to the extent it sets class size. We agree and so hold. Cumberland Cty. College, P.E.R.C. No. 83-95, 9 NJPER 90 (¶14048 1983). The College concedes that section 19-2 is mandatorily negotiable to the extent it involves the computation of contact hours. However, we reject the Association's suggestion that sections 19-2.1, 2.2 and 2.3 are procedural and negotiable. Those sections provide:

19-2.1 All proposals to teach a particular course under a mass lecture format must emanate from the Academic Divisions, through their Chairpersons or from the College.

19-2.2 The appropriate Dean, together with the Discipline faculty and Division Chairperson, shall be responsible for determining whether a proposed mass lecturer format for particular course is instructionally sound, including a determination as to whether the teaching methods proposed for the particular mass lecture are appropriate to the course. If the Dean and the Department/Division cannot agree, either party may bring the matter before the College Curriculum Committee for review.

19-2.3 Mass Lectures shall not be used for teaching remedial courses designed as remediation sections under 19-1.1(C) or 19-1.2 above, except by prior agreement with the Association. However, nothing shall prevent the College from utilizing other experimental modes of teaching in connection with such remedial courses.

They significantly interfere with the College's prerogative to determine class size, how curriculum will be delivered, and who will make those determinations.

Article 27 is entitled Filling Professional Vacancies. The disputed sections follow:

27-2 RECOMMENDATIONS: Whenever a vacancy exists in one of the following administrative positions (President, Executive Vice President, Vice President and Academic Dean) a selection committee, created by the Board of Trustees, shall be constituted to recommend candidates for the vacancy. The committee will be prepared to process applications within three (3) months of the date of existence of the vacancy. Representatives of the faculty designated by the Faculty Association will constitute equal representation with any other Essex County College internal group on such committee. Representatives of the Board or of the Community selected for such a committee shall not be considered "internal groups" within the meaning of this provision. The Board in its sole discretion may utilize the selection committee for other appointments within the institution.

27-3.1 The Committee shall be made up of the Department and/or Division Chairperson and four (4) tenured faculty members of that Discipline's faculty, three (3) of whom shall be selected by the Discipline's faculty and one (1) by the Dean. The Committee shall provide the Dean with its confidential written comments as to the candidacy of each individual with whom it meets, including its recommendation on hiring, within the time period set by the Dean. The Dean shall duly consider the recommendation of the Discipline Committee, but it shall in no way be considered determinative or in any way restrict the complete discretion of the College and the Board with respect to hiring

personnel. All applications for employment which are received by the Department/Division shall be referred to the Human Resources Department, where they shall be kept on file and available for inspection. A list of the names of all applicants shall be forwarded to the Department/Division Chairperson upon request.

The College argues that the decisions to fill vacancies, establish a selection committee, and appoint committee members are managerial prerogatives. The Association argues that nearly identical proposals have been found to not significantly interfere with any educational policy in that they provide for a recommendation and do not require filling the vacancy with a particular person. It maintains that given the College's unfettered discretion, the procedures in section 27-3.1 concerning the selection committee have no effective impact on managerial prerogatives. The College replies that a public employer may elect to include an employee representative on a committee, but is not required to negotiate over proposals requiring representatives to be part of the process of making personnel decisions.

As early as 1976, we held that Rutgers University did not have to negotiate over a proposal to continue to involve faculty in search committees for appointments of the President, Deans, Directors of programs, Provosts, and others. Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976). We found it difficult to imagine a more fundamental management determination

than the selection of the President. We have since found that a union may negotiate to make non-binding recommendations of candidates to fill temporary vacancies in unit positions. City of Newark, P.E.R.C. No. 2001-10, 26 NJPER 371 (¶31149 2000).

That precedent, however, does not apply to Article 27 because the article requires the College to establish a selection committee and specifies the makeup of that committee. The College cannot be required to so deeply involve the Association in selecting its management team.

Article 30 is entitled Curriculum Development. It provides:

30-1.1 New curricula, programs, and courses or changes in existing ones shall generally be initiated by an academic division through the Discipline and Divisional Curriculum Committees. All proposals from academic disciplines shall be forwarded to the Divisional and College Curriculum Committees, which shall review the proposals in terms of academic merit and the institution's ability to implement them.

30-1.2 In the event that a proposal is rejected by the College Curriculum Committee, it shall be returned to the Divisional Curriculum Committee with explanation. The Divisional Curriculum Committee may resubmit the proposal, with modifications, to the College Curriculum Committee for action.

30-1.3 Proposals which are given final approval by the College Curriculum Committee shall be submitted to the appropriate Dean and the President, who may review and append their comments and recommendations to the proposal. The President shall submit the proposals that he has approved to the Board of Trustees for its approval or disapproval at its next meeting.

30-3 The Curriculum Committee will include twelve (12) faculty as voting members selected as stated in 30-3.1. The Director of Institutional Research (or designee) and a "Designated Dean" will serve as non-voting members of the committee.

30-3.1 SELECTION OF COLLEGE CURRICULUM COMMITTEE FACULTY REPRESENTATIVES:

30-3.1.1 Faculty representatives will be elected for a three (3) year term by the constituencies which they represent except for one (1) representative to be selected by the President.

30-3.1.2 Membership of Curriculum Committee

[The remainder of this article details how faculty representatives will be elected to the Curriculum Committee.]

The College argues that it is not required to negotiate over the development of curriculum and the establishment, membership and duties of a divisional discipline and curriculum committee. The Association responds that this article concerns a purely advisory committee and has no impact on the College's prerogative to determine curriculum. The College replies that this provision is particularly intrusive because it requires not only a presumption that faculty generate any curriculum, but a requirement that faculty review administrative proposals for curriculum changes.

A public university has a managerial prerogative to determine curriculum and the type of classes to be offered.

1977); see also Rockaway Tp. Bd. of Ed. v. Rockaway Ed. Ass'n, 120 N.J. Super. 564, 569 (App. Div. 1972); Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 87-83, 13 NJPER 78 (¶18036 1986). This article is not purely advisory and procedural. For example, it appears that no proposal can reach the appropriate Dean and President unless first approved by the College Curriculum Committee. Cf. Rutgers, The State University v. Rutgers Council of AAUP Chapters, 256 N.J. Super. 104 (App. Div. 1992), aff'd 131 N.J. 118 (1993) (requirement that promotional candidate receive two-thirds vote to qualify for positive recommendation to the dean affects promotional criteria and is not merely procedural). In addition, having to negotiate the composition of bodies that assist in curriculum development would significantly interfere with the College's prerogative to develop curriculum. Rutgers.

Article 38 is entitled Evaluation and Non-Tenured Faculty. The disputed sections are:

38-1 Evaluation of faculty shall be used for the purpose of improving instruction and aiding in determining whether a faculty member shall be retained and/or promoted. To this end, therefore, evaluations will take into consideration the faculty member's performance for his entire length of service at the College. Reference will be made to previous existing evaluations and to the growth exhibited by the faculty member for his/her length of service at the College. Effective teaching should be the most important element but other factors such as professional development, community service, additional contributions to the College, and

contribution to professional organizations will be considered.

38-1.1 Teaching observations must be based on observable instructional acts. Where deficiencies are found, there will be suggestions for improvement on all evaluation forms, and follow up observations should be arranged for the purpose of noting improvement. All observations and evaluations must be reduced to writing.

38-2 EVALUATION OF NON-TENURED FACULTY

38-2.1 Every non-tenured faculty member shall be evaluated annually. This evaluation shall include the following elements:

* * *

(B) Peer Class Observations

* * *

(F) Divisional Committee's Evaluation and Recommendation. (The Committee shall include members of the evaluatee's discipline when possible.)

* * *

38-2.3 Peer Class Observations: A peer is defined as another faculty member, and if possible, one who has at least two (2) years teaching experience at the College and has previously taught the same or similar course. The peer shall be selected by the Division Evaluation Committee.

* * *

38.2.7 Divisional/Department Evaluation Committee

38-2.7.1 Composition: The faculty of each Division will elect members of the Division Evaluation Committee to serve a two (2) year term. The Committee shall consist of a minimum of three (3) and a maximum of seven

(7) members. Whenever possible, the membership of the Committee should be representative of the disciplines taught in the Division. The members of the Committee will be tenured whenever possible.

[The remainder of section 38-2.7 details the specific responsibilities of the faculty Division Committee with regard to evaluations of faculty members.]

38-3 Two separate recommendations for retention (non-retention), tenure, or promotion one from the Divisional Chairperson on Form A, the other (2) from the Division Evaluation Committee on Form D, will be forwarded to the appropriate Dean, who will review the recommendations of the Divisional Chairperson and the Divisional Evaluation Committee, and append comments and recommendations.

38-7 EVALUATION OF TENURED FACULTY

38-7.1 Every three (3) years, an evaluation of tenured faculty members shall be conducted within each Division, coordinated by the Division Chairperson.

* * *

38-10.7.3 Composition of Division/ Departmental Evaluation Committee for Counselors: The division/departmental evaluation committee for counselors assigned to a division/department shall be consistent with Article 38-2.7.1.

38-10.7.4 Evaluation of Lecturer (A) Faculty: Evaluation of Lecturer (A) shall include all the elements specified in 38-1 through 38-10.7.

The College argues that designating an evaluator and the role of such evaluator have consistently been held to be non-negotiable. It maintains that the creation, membership and

responsibility of an evaluation committee all relate to educational policy.

The Association argues that sections 38-1.1, -2.1, -2.3 and -7.1 are procedural and mandatorily negotiable. With respect to sections 38-2.1(F), 38-2.7, 38-10.7.3 and 38-10.7.4, the Association contends that prior case law should not apply to committees that function only in an advisory capacity and procedures for selecting members of those advisory committees. It maintains that these proposals are procedural and have no impact on the College's managerial prerogative to evaluate employees.^{1/}

The College replies that 38-1 should be found non-negotiable because the Association's brief did not address it. The College does not contend that true procedural requirements such as suggestions for improvement of deficiencies, follow-up observations, or requirements that observations and evaluations be in writing are non-negotiable. But it maintains that sections 38-2, 38-3, 38-7 and 38-10 are not mandatorily negotiable and that it does not have to negotiate over the existence of a faculty committee or a faculty committee's participation in an evaluation, or evaluation criteria (38-1 and 38-1.1).

Section 38-1 is not mandatorily negotiable. It sets evaluation criteria by requiring that effective teaching be the

^{1/} The Association's brief does not reference section 38-3.

most important evaluation criterion and that other criteria be considered. N.J.S.A. 34:13A-5.3 (PERC Act prohibits negotiations over standards or criteria for employee performance).

Section 38-1.1 is not mandatorily negotiable. It sets an evaluation criterion by requiring that a teaching observation be based on observable instructional acts.

Sections 38-2.1(B) is not mandatorily negotiable because it sets peer class observations as an evaluation criterion.

Sections 38-2.1(F), 38-2.3, 38-2.7.1, 38-3, 38-7.1, 38-10.7.3 and 38-10.7.4 are not mandatorily negotiable because they designate who will perform evaluations. Rutgers.

Article 39 is entitled Promotion Procedure. The disputed sections follow:

39-4 Written application for promotion shall be submitted to the Chairperson of the Divisional Evaluation Committee or its equivalent on or before October 15 each year.

39-5 The Division Evaluation Committee or its equivalent shall review credentials, supporting documents and interview each candidate. The committee will make its recommendations for promotion ordered within rank, following the format established by the College Promotion Committee.

39-7 The College Promotion Committee shall be comprised as follows:

(A) all members must be tenured;

(B) term of service to be three (3) years on a rotating basis except for those members serving because of positions;

(C) the Vice President/Chief Academic Officer shall be the Chairperson of the Committee in a non-voting capacity;

39-7.1 The voting membership of the Committee shall be:

(A) Nine (9) faculty members elected by the faculty of each academic division/department or its equivalent as follows:

(B) One Full Professor elected at large, from the faculty;

(C) The Associate Dean of Liberal Arts and the Associate Dean of Science and Technology;

(D) One (1) appointment by the President of the College;

(E) One (1) appointment by the Faculty Association.

39-7.2 The Faculty Association shall be responsible for the election of nine (9) divisional or equivalent representatives and the Full Professor at large. Faculty representation by discipline will be on a rotating basis within the nine (9) groups. Any discipline wishing to waive its rights to have representation elected from among its members may do so, and a representative may then be elected from another discipline in the Division.

* * *

39-8 The College Promotion Committee shall review documents and interview the candidates. The committee shall make its recommendations to the President of the College ordered within rank, on or before April 15.

The College argues that promotional criteria, the designation of promotional committees, and the role of such committees are all non-negotiable issues. The Association responds that promotional procedures are mandatorily negotiable and that case law addressing promotional committees should not apply to an advisory committee.

Section 39.4 requires that application for promotion be in writing and submitted by October 15 each year. The section is procedural and the College has not identified how it would significantly interfere with its prerogative to set and apply promotional criteria.

The remaining disputed portions of Article 39 establish a committee to review candidates and make recommendations to the President. The Appellate Division in Rutgers found negotiations over a similar committee to be non-mandatory. It stated:

Involving highly subjective and sensitive considerations, the particular manner by which the evaluators at the different levels discuss internally their perceptions and analysis is critical to the judgmental decision-making that is at the heart of the process. [256 N.J. Super. at 123-124]

The Court concluded that a committee that makes promotion recommendations engages in advocacy and that "[w]hether an evaluative process should or should not be shaped, even in part, by an element of advocacy is a decision intensely managerial in

nature.” Id. at 124. Under Rutgers, the remaining disputed portions of Article 39 are not mandatorily negotiable.

Article 41 is entitled Negotiation of Successor Agreement. Section 41.2 provides:

The Board agrees to inform the Association by furnishing the Association with a copy of the minutes of the public Board of Trustees’ meetings and all addenda, whenever state or federal funds in addition to and/or in excess of those amounts previously anticipated for the fiscal year, are received by the College.

The College argues that under the Open Public Meetings Act, it may not legally negotiate the terms of Article 41-2. The Association responds that the statute is not preemptive.

The Open Public Meetings Act does not require or prohibit sending minutes to the Association when those minutes concern funding issues that may impact on terms and conditions of employment. Nor has the College explained how providing the minutes would interfere with any governmental policy determinations. Accordingly, we find that Section 41.2 is mandatorily negotiable.

ORDER

The following provisions are mandatorily negotiable:

Section 9.1; article 19 to the extent it involves the computation of contact hours; section 39.4; and section 41.2 to the extent the minutes impact on terms and conditions of employment.

The following provisions are not mandatorily negotiable:

Section 8.1; Article 19 to the extent it sets class size; sections 27-2 and 27-3.1; sections 30-1.1, 30-1.2, 30-1.3, 30-3, 30-3.1, 30-3.1.1 and 30-3.1.2; sections 38-1, 38-1.1, 38-2.1(B), 38-2.1(F), 38-2.3, 38-2.7.1, 38-3, 38-7.1, 38-10.7.3 and 38-10.7.4; and sections 39-5, 39-7, 39-7.1, 39-7.2, and 39-8.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed.

ISSUED: February 22, 2007

Trenton, New Jersey