

P.E.R.C. NO. 2010-38

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BURLINGTON COUNTY COLLEGE,

Petitioner,

-and-

Docket No. SN-2009-040

BURLINGTON COUNTY COLLEGE  
FACULTY ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of portions of an expired collective negotiations agreement between Burlington County College and the Burlington County College Faculty Association. The County argued that current provisions regarding performance evaluations; course evaluations; observations; technology; evaluation conferences; video-taped observations; distance learning; work assignments; overload; and non-teaching duties are not mandatorily negotiable. The Association opposed the petition arguing that it was premature since the parties' grievance procedure ends in advisory arbitration and thus can address disputes over non-mandatory subjects unless preempted. The Commission holds that the petition is not premature because restrictions on the exercise of a managerial prerogative are not subject to mandatory negotiations. The Commission further holds that all of the disputed language is not mandatorily negotiable except for the distance learning committee and non-teaching duties.

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, Ruderman & Glickman, P.C.,  
attorneys (John A. Boppert, on the brief)

For the Respondent, Selikoff & Cohen, P.C., attorneys  
(Carol Alling, on the brief)

DECISION

On January 13, 2009, Burlington County College petitioned for a scope of negotiations determination. The College asserts that portions of an expired collective negotiations agreement between it and the Burlington County College Faculty Association are not mandatorily negotiable and cannot be retained in a successor collective negotiations agreement.

The parties have filed briefs and exhibits. 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 covered the period from July 1, 2003 through June 30, 2008. The grievance procedure ends in advisory arbitration. The parties are engaged in negotiations for a successor 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), 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]

Before ruling on the negotiability of the disputed contract language, we address the Association's argument that the College's petition is "premature" because the contract provides for advisory arbitration and thus can address disputes over non-mandatory subjects unless the subjects have been preempted. The Association cites, among other things, Englewood Cliffs Bd. of Ed., P.E.R.C. No. 82-21, 7 NJPER 507 n.5 (¶12225 1981).

The petition is not premature. Although the exercise of a managerial prerogative can be grieved to advisory arbitration, as it was in Englewood Cliffs, restrictions on the exercise of a managerial prerogative are not subject to mandatory negotiations.<sup>1/</sup>

Article Eleven: Unit Member's Rights and Responsibilities

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<sup>1/</sup> Where a collective negotiations agreement does not provide for binding arbitration, specific contract language may nonetheless be enforceable in another forum. Cf. South Orange-Maplewood Ed. Ass'n v. Bd. of Ed. of School District of South Orange-Maplewood, 146 N.J. Super. 457 (App. Div. 1977) (Association could seek to enforce contract language concerning mandatorily negotiable subject of sabbatical leaves in trial court; agreement provided for advisory arbitration).

A. Unit Member's Course and Classroom Rights and Responsibilities

1. Consistent with the stated catalog course descriptions, the primary responsibility for determining course content, course goals, learning objectives and the selection of the appropriate learning materials and strategies rests with the unit member who teaches the course.

The College asserts that while it has the discretion to allow a faculty member to determine course content, the above language is not mandatorily negotiable to the extent it restricts the determination of course content, goals and learning objectives, which are all elements of course curriculum. The Association responds with the argument on advisory arbitration that we have rejected above. A public college has a managerial prerogative to determine curriculum and the type of classes to be offered. Middlesex Cty. College, P.E.R.C. No. 78-13, 4 NJPER 47 (¶4023 1977). Accordingly, this provision is not mandatorily negotiable.

Article Seventeen: Evaluation Procedures

Several provisions of this article are in dispute including some that the College asserts are controlled by a prior scope of negotiations case between the parties, Burlington Cty. College, P.E.R.C. No. 90-13, 15 NJPER 513 (¶20213 1989).

Evaluation criteria are not mandatorily negotiable, but evaluation procedures, including notice of the criteria to be applied are mandatorily negotiable unless preempted. See

Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982); Lacey Tp. Bd. of Ed. v. Lacey Tp. Ed. Ass'n, 259 N.J. Super. 397 (App Div 1991), aff'd 130 N.J. 312 (1992). We now apply this standard.

The College asserts that, except to the extent it requires that unit members receive notice of dates or deadlines in the evaluation process, or notice of performance deficiencies and professional goals, the disputed portions of Article Seventeen, Sections 1 through 9 are not mandatorily negotiable. The Association argues that the language concerns negotiable evaluation procedures, and/or that the College has not established how the disputed language would significantly interfere with the establishment of educational policy.

1. Each unit member will submit an Annual Performance Report and objectives for the next year to his/her immediate administrative supervisor by April 1. These objectives will include professional responsibilities, professional growth, College contributions and community contributions. This report shall be in a format and contain such information as directed by the College.

Except to the extent this paragraph sets deadlines and notifies the unit member of the identity of the recipient, the duty to prepare and submit a self-evaluation and list of goal objectives is not mandatorily negotiable. The obligation of a faculty member to prepare such a document relates primarily to non-negotiable evaluation criteria.

Student Course Evaluations

2. The College will utilize a nationally recognized form for student course evaluations. Such form will be administered in accordance with College procedures.

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If the results of such evaluations are unsatisfactory or questionable, the College will conduct student course evaluations of all courses taught by the faculty member during the next semester. This process will continue each successive semester until the results are satisfactory or other action is taken.

3. The same student course evaluation utilized for tenured faculty members will be administered in accordance with College procedures.

\* \* \*

The College will administer student course evaluations for each non-tenured faculty member, lecturer and clinician for every course taught by the individual.

In our prior decision involving these parties we stated:

Negotiation over the content of [Student Course Evaluation, Instructor Return and Classroom Visitation] forms would constitute negotiation over evaluation criteria. However, notice of evaluation criteria is mandatorily negotiable. See Hoboken Bd. of Ed., P.E.R.C. No. 84-139, 10 NJPER 353 (¶15164 1984). Thus, a proposal to append the forms to the contract, thus providing the Association with notice of evaluation criteria, is mandatorily negotiable. Cf. Bor. of Rutherford, P.E.R.C. No. 89-31, 14 NJPER 642 (¶19268 1988) (incorporation of job descriptions into contract mandatorily negotiable in absence of assertion that employer planned to change job duties). But

appending the forms to the agreement cannot bind the College to use the forms without change for the life of the agreement. Accordingly, the Student Course Evaluation, Instructor Return and Classroom Visitation forms are not mandatorily negotiable, but may remain in the agreement in order to provide notice of evaluation criteria.

[15 NJPER at 519-520]

Consistent with our prior decision, we find that the disputed portions of 2 and 3 are not mandatorily negotiable.

4. The College has the right to make one classroom visitation during each semester/term in which a tenured faculty member teaches. A second classroom visitation may be made each semester/term for non-tenured faculty members, lecturers and clinicians. Reasonable notice shall be provided. The observation will be conducted by the immediate supervisor who shall utilize a standard College form designed for this purpose. A copy of this completed form shall be provided to the faculty member.

The underlined sentence is not mandatorily negotiable to the extent it would limit the College in its choice of an evaluator and because it requires a standardized evaluation form. Essex Cty. College, P.E.R.C. No. 2007-46, 33 NJPER 19, 22 (¶8 2007).

5. The College encourages the use of high technology and/or innovative instructional methodologies in the classroom and will consider a faculty members' proficiency in the utilization of such strategies in the classroom as part of the evaluation process. While the definition of the term "high technology" is an ever-changing one due to continuous advancements, as of Spring 1996 the term refers to the use of the "multimedia classroom" which includes, for example, television, VCR or VTR, CD Rom, computer



projection of material such as written text, graphics, illustrations, interactive video, computer exercises, and so forth subject to the availability of such technology at the College and training in the use of same provided by the College. This definition is not intended to be a precise or all-encompassing one due not only to advancements in technology which will be made but also because it would be difficult and lengthy to cover all nuances of this term.

The underlined sentence predominantly relates to evaluation criteria including the methods and manner of instruction and is not mandatorily negotiable. See Middlesex Cty. College.

6. An evaluation conference of the faculty member and the immediate administrative supervisor will be scheduled at least one week prior to the first day of final examinations for the Spring Semester. During the evaluation conference(s) the unit member and her/his immediate supervisor shall finalize a written summary of measurable objects for the following year.

7. Coordination of the evaluation of a unit member who serves in two (2) or more Divisions will be the responsibility of the immediate administrative supervisor in the individual's home Division. Evaluation input from the Divisions in which the unit member serves shall be included in the unit member's evaluation.

The College asserts that the underlined portions of 6 and 7 are not mandatorily negotiable. We agree because they could limit the College's choice of the person it wishes to conduct an evaluation conference and collaborate with the faculty or staff member in preparing a summary of objectives for future performance. We agree with the Association that notice of the

identity of the person who will perform an evaluation is mandatorily negotiable.

8. Non-tenured faculty members may be videotaped in instructional settings for evaluative purposes. The videotape itself along with constructive critiquing commentary designed to assist the faculty member and improve performance will be utilized as a tool in the evaluation process. Video evaluations for tenured faculty member[s] can be conducted only with the approval of the tenured faculty member.

This provision impermissibly restricts the College's prerogative to set evaluation criteria by mandating that the "videotape itself along with constructive critiquing commentary" will be used as a tool in the evaluation process. We agree that the provision is not mandatorily negotiable to the extent it requires that constructive critiquing commentary be used as an evaluation tool.

9. Any faculty member who received an evaluation rating of questionable or unsatisfactory for the previous year shall submit no later than September 30 an interim report to her/his immediate administrative supervisor specifying the proposed corrective measures which she/he intends to take. A conference shall be held by October 15 to finalize the corrective measures to be taken by the faculty member. This process will focus on providing any such faculty member with an opportunity to concentrate her/his time and efforts on improving her/his performance in base workload and responsibilities.

We agree with the College that the underlined portions are not mandatorily negotiable to the extent they set the evaluation

criteria for requiring faculty members to submit an interim report and designate the College's evaluator. The College does not contest the language that provides faculty members an opportunity to improve.

Article Twenty-Two: C.10. Distance Learning

c. Participation in distance learning program courses shall be strictly voluntary on the part of faculty members. The Vice President of Academic Programs must approve all distance learning assignments in advance.<sup>2/</sup>

By making participation in distance learning strictly voluntary, the College argues that its ability to offer such courses could be limited if an insufficient number of faculty members sought such assignments. The Association argues that the language is mandatorily negotiable but concedes that in emergencies faculty can be assigned to distance learning courses.

Employers may unilaterally assign duties if they are incidental to or comprehended within an employee's job description and/or normal duties. Burlington Cty. College. Teaching of distance learning courses is sufficiently related to normal classroom teaching so as to make the assignment of such courses non-negotiable. But the Association may seek to

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2/ Article Twenty-Two: C.10.a. defines distance learning as the point-to-point two-way audio and/or two-way video communication of instruction from one or more locations to another location. It includes interactive television courses, Internet courses, radio courses and other multimedia delivery systems.

negotiate severable issues that may result from such assignments, such as compensation.

d. The decision by a faculty member to forego participating in distance learning programs will not be used in any evaluative manner.

This language restricts evaluation criteria and is not mandatorily negotiable. See Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 161 N.J. Super. 75 (App. Div. 1978).

g. A committee consisting of one unit member selected by the Association President and approved by the President of the College, the Executive Director of Human Resources, and an Executive/Administrative Staff member selected by the President of the College shall maintain a list of all distance learning course sections. Such lists shall include the title/designation of the course section, semester/term of the courses section, enrollment in the course section, the name of the instructor, the amount of compensation, the payment methodology, and such other information deemed relevant by the committee. The preparation and maintenance of such list shall commence with the Summer 1998 terms. The College shall seek to develop consistency of payment methodology in all distance learning course by analyzing such factors as enrollment and curriculum development activities.

This provision establishes a committee to maintain a list of courses. It does not impact curriculum or evaluation criteria nor does it limit the College's ability to determine the composition of this committee as the College President has the power to reject the Association's designation of a unit member to sit on the Committee. Contrast Essex Cty. College (committee

assisted in curriculum development). The College makes no arguments regarding the last sentence. It appears to relate to compensation for distance learning courses. This provision is mandatorily negotiable.

Article Twenty-Two: E. Work Assignments

1. The College shall assign base load in accordance with student and institutional needs and with the objective to provide a base load for each unit member.

\_\_\_\_\_This language is nearly identical to a clause we considered in Burlington Cty. College, 15 NJPER at 518. It would impermissibly subject the College's assessment of student needs to the collective negotiations process and is not mandatorily negotiable.

Article Twenty-Two: F. Overload

5. No unit member shall be permitted a second overload course section in her/his subject field until all qualified full-time faculty members in her/his subject field desiring overload teaching have been offered at least one (1) course section.

The College asserts that this language is covered by our ruling in Burlington Cty. College, 15 NJPER at 519, that Article Twenty-Four H. was not mandatorily negotiable because "as worded it tolerates no exceptions based upon special qualifications or needs." The provision currently in dispute has some differences in wording from the language that we previously considered.

However, it still would not permit deviations for special qualifications and is therefore not mandatorily negotiable.

Article Twenty-Six: Non-Teaching Duties

A. Unit members may accept non-teaching duty assignments in order to make base workload for overload compensation. Non-teaching duties may include, but not be limited to the following: coaching, subject coordination, program coordination, course leader and/or student club advisor.

The employer maintains that this language remains non-negotiable despite the enactment of N.J.S.A. 34:13A-23, which makes many aspects of extracurricular assignments mandatorily negotiable. It notes that the law allows an employer to involuntarily assign a faculty member if no qualified outside individual seeks a position and that the above language would conflict with that reserved power. The Association asserts that the language relates to compensation by providing that extracurricular assignments could be counted as part of the base load that must be worked before a unit member is eligible for overload assignments. We agree with the Association that compensation for extracurricular assignments is mandatorily negotiable and find no conflict between this provision and the employer's right to make extracurricular assignments under N.J.S.A. 34:13A-23.<sup>3/</sup>

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<sup>3/</sup> Although N.J.S.A. 34:13A-23 is part of legislation that, on its face, applies to local school districts we note that  
(continued...)

ORDER

A. The following articles, or the disputed portions thereof, are mandatorily negotiable: Article Twenty-Two C.10.g; and Article Twenty-Six A.

B. The following articles, or the disputed portions thereof, are not mandatorily negotiable: Article Eleven A.1; Article Seventeen 1; Article Seventeen 2; Article Seventeen 3; Article Seventeen 4; Article Seventeen 5; Article Seventeen 6; Article Seventeen 7; Article Seventeen 8; Article Seventeen 9; Article Twenty-Two C.10.c; Article Twenty-Two C.10.d; Article Twenty-Two E.1; and Article Twenty-Two F.5.

BY ORDER OF THE COMMISSION

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

ISSUED: November 24, 2009

Trenton, New Jersey

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3/ (...continued)  
N.J.S.A. 18A:64A-13 provides:

The teaching staff employees and administrative officers other than the president of the county college are hereby held to possess all the rights and privileges of teachers employed by local boards of education. The president and teaching staff members shall be eligible for membership in the teachers' pension and annuity fund.