

P.E.R.C. NO. 2010-45

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,

Respondent,

-and-

Docket No. SN-2009-060

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY
COUNCIL OF AMERICAN ASSOCIATION OF
UNIVERSITY PROFESSORS CHAPTERS,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of procedural protections the University of Medicine and Dentistry of New Jersey Council of American Association of University Professors Chapters seeks to negotiate in relation to a Reporting Compliance and Ethics Concerns policy adopted by the University of Medicine and Dentistry of New Jersey. The AAUP filed an unfair practice charge alleging that UMDNJ violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it refused to negotiate procedural protections the AAUP sought for its members during disciplinary proceedings. UMDNJ filed the scope petition alleging that the subjects are not mandatorily negotiable. The Commission holds that the procedural protections sought by the AAUP, specifically, notice of the allegations, an opportunity to respond, and a written determination resulting from the investigation are mandatorily negotiable subjects. Should a case arise in which UMDNJ finds a need to deviate from any negotiated procedural protections, AAUP challenges that action in binding arbitration, and UMDNJ seeks a restraint of binding arbitration, the Commission can consider the parties' specific concerns under the particular facts and circumstances of that case.

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, Crow & Associates, attorneys (Mark
D. Schorr, of counsel and on the brief)

For the Respondent, McElroy, Deutsch, Mulvaney &
Carpenter, LLP, attorneys (John J. Peirano, on the
brief)

DECISION

On March 4, 2009, the University of Medicine and Dentistry of the New Jersey Council of American Association of University Professors Chapters petitioned for a scope of negotiations determination. AAUP is the majority representative for teaching and research faculty and librarians at the University of Medicine and Dentistry of New Jersey. AAUP asserts that procedural protections afforded to members during disciplinary matters, specifically, notice of the allegations, an opportunity to respond to the allegations, and a written determination from the

investigation, are mandatorily negotiable subjects. AAUP filed an unfair practice charge on December 26, 2007.^{1/} This scope of negotiations dispute arose during a conference designed to explore the possibility of settlement. We find that the specific procedural protections sought by AAUP are mandatorily negotiable subjects.

The parties have filed briefs and exhibits. AAUP has filed a certification of its Executive Director, Alex Bernstein. UMDNJ has filed the certification of James J. Rowan, Chief of Staff, Vice President/Internal Audit and Interim Senior Vice President, Ethics and Compliance for UMDNJ. These facts appear.

On January 16, 2007, UMDNJ adopted a policy entitled "Reporting Compliance and Ethics Concerns," applicable to all faculty. The policy provides for "effective and confidential means for individuals to report allegations or concerns that include actual or suspected violations of any UMDNJ policies or procedures, or any other type of wrongful conduct." The policy further provides that "[i]ndividuals will be permitted to make such reports anonymously if they so desire, and their anonymity

^{1/} In the unfair practice charge, Docket No. CO-2008-175, AAUP asserts that in mid to late 2007, UMDNJ "unilaterally implemented a zero tolerance policy for inappropriate behavior without negotiating over its impact on the terms and conditions of employment of faculty and librarians", in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5). On November 10, 2008, AAUP amended the charge to allege that September 8, 2008, UMDNJ unilaterally instituted a policy on administrative leave in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5). The charge is currently pending.

will be protected as permitted by law." The policy provides for "serious adverse employment actions" to be reviewed by the Disciplinary Review Committee. Such actions include termination, paid or unpaid administrative leave, demotion or other reduction of job responsibilities, reduction or elimination of management responsibilities, budgetary or organizational reductions in force, or other significant changes in terms or conditions of employment.

UMDNJ asserts that in investigations conducted under the Compliance Policy, the investigative approach implemented must be tailored to address the particular investigative challenge posed. In the initial interview, the employee is informed of the nature of the allegations under investigation and is commonly interviewed on multiple occasions. If the allegations are unsubstantiated by the facts gathered during an investigation, the investigation is closed and where the investigative findings substantiate wrongdoing, UMDNJ management is responsible for notifying the subject of the findings and proposing and implementing corrective and/or disciplinary action.

On May 15, 2007, UMDNJ adopted an "Administrative Leave" policy "regarding the application of administrative leaves under special circumstances that do not fall under existing University policies." The policy is applicable to all UMDNJ staff (non-faculty). It provides for the placement of an employee on paid

or unpaid administrative leave in order "to manage special circumstances where it is in the University's best interest to retain the employee relationship for a period of time to be determined by the University. . . ." The policy provides that "an administrative leave for investigative/review purposes shall not be given for a predetermined length of time, but shall be in effect long enough to conclude the investigation/review."

According to UMDNJ, if an employee is disciplined or placed on administrative leave, the employee is then advised of the allegations and may grieve the matter in accordance with the collective negotiations agreement between UMDNJ and AAUP.

AAUP states that several of its members were investigated, disciplined and placed on administrative leave without being afforded the specifics of the allegations against them and an opportunity to respond to the allegations.^{2/}

UMDNJ argues that there are times when providing advance notice to the subject of the investigation that an inquiry is being conducted or of the outcome of the investigation may compromise the investigation or otherwise be inappropriate. UMDNJ contends that in some instances, such notice may pose a risk of loss of documentation or evidence or may provide the opportunity to prepare rehearsed answers or to influence the

^{2/} The propriety of the suspensions is the subject of pending arbitrations pursuant to the collective negotiations agreement.

accounts and information provided by other individuals. It further argues that State or federal statutes, rules and/or internal University policy may prohibit notification or that student, patient or reporter confidentiality or other legal or professional privilege may be compromised. Additionally, UMDNJ asserts that it is required by law and policy in many circumstances to protect the identity of an individual who reports allegations of misconduct, and that the extent of notice provided to the subject of an investigation must be balanced against the imperative to protect the identity of the reporter of the allegations.^{3/ 4/}

AAUP asserts that it is not seeking to challenge what UMDNJ may investigate, the investigative techniques used by UMDNJ, who conducts the investigations, or whether UMDNJ should pursue discipline. AAUP is seeking only to negotiate over the specific procedural protections of notice of the allegations, an opportunity to respond to the allegations, and a written determination resulting from the investigation before any disciplinary action, including administrative leave, is imposed.

3/ In its reply brief, AAUP states that it is not seeking identification of the names and addresses of informants or complaining witnesses.

4/ UMDNJ also asserts that it has satisfied its duty to negotiate and that AAUP's unfair practice charge regarding the implementation of the administrative leave policy is time-barred under N.J.S.A. 34:13A-5.4. These assertions are outside the scope of this matter and must be raised in the unfair practice proceedings.

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.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets the test 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]

The procedural protections sought by AAUP are fundamental protections that intimately and directly affect employees who are

the subject of an investigation and/or discipline. As a general matter, procedural protections afforded to employees after a disciplinary investigation and before the imposition of discipline are mandatorily negotiable subjects. See, e.g., Borough of Hopatcong, P.E.R.C. No. 95-73, 21 NJPER 157 (¶26096 1995), recon. den. P.E.R.C. No. 96-1, 21 NJPER 269 (¶26173 1995), aff'd sub nom Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997); Atlantic Cty. Sheriff's Office, P.E.R.C. No. 2005-28, 30 NJPER 444 (¶147 2004) (procedural protections including right to counsel, right to a written complaint as soon as possible, and right to union representation are legally arbitrable); Cherry Hill Tp., P.E.R.C. No. 93-77, 19 NJPER 162 (¶24082 1993); Middlesex Cty., P.E.R.C. No. 92-22, 17 NJPER 420 (¶22202 1991), aff'd NJPER Supp.2d 290 (¶231 App. Div. 1992); Branchburg Tp., P.E.R.C. No. 89-20, 14 NJPER 571 (¶19240 1988); City of Jersey City. Employers can agree to fair procedures for initiating and hearing disciplinary charges, subject to the employer's ultimate power, after complying with the negotiated procedures, to make a disciplinary determination. Hopatcong; New Jersey Turnpike Supervisors Ass'n v. New Jersey Turnpike Auth., 143 N.J. 185 (1996).

UMDNJ asserts that it has a prerogative to place employees on administrative leave during the course of an investigation without having to negotiate over providing notice to the employee

of the reason for the action, an opportunity to respond, or written charges. The employee interest in being able to respond to allegations before being placed on leave is substantial. So too is the employer's interest in investigating alleged wrongdoing by employees. On balance, we find that having to negotiate over procedural protections before taking the initial disciplinary step of placing an employee on administrative leave would not significantly interfere with UMDNJ's ability to conduct investigations or to impose discipline. We note that in Civil Service jurisdictions, where a suspension is immediate and without pay, the employee must first be apprised either orally or in writing of why an immediate suspension is sought, the charges and general evidence in support of the charges, and provided with sufficient opportunity to review the charges and the evidence in order to respond to the charges. See N.J.A.C. 4A:2-2.5.

We acknowledge UMDNJ's concerns about the need for flexibility in conducting investigations based on the nature of the allegations and the extent of available documentary evidence. Should a case arise in which UMDNJ finds a need to deviate from any negotiated procedural protections, AAUP challenges that action in binding arbitration, and UMDNJ seeks a restraint of binding arbitration, we can consider the parties' specific concerns under the particular facts and circumstances of that case.

ORDER

The procedural protections sought by the AAUP, specifically, notice of the allegations, an opportunity to respond, and a written determination resulting from the investigation are mandatorily negotiable subjects.

BY ORDER OF THE COMMISSION

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

ISSUED: December 17, 2009

Trenton, New Jersey