P.E.R.C. NO. 2013-22

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY,

Petitioner,

-and- Docket No. SN-2012-010

UNION OF RUTGERS ADMINISTRATORS
AMERICAN FEDERATION OF TEACHERS,
LOCAL 1766, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denied, without prejudice, the request of Rutgers, The State University of new Jersey for a restraint of binding arbitration of a grievance filed by the Union of Rutgers Administrators, American Federation of Teachers, Local 1766, AFL-CIO. The grievance challenges the layoff/termination of a unit member. The Commission holds that there is a dispute of fact as to whether the employee was terminated for disciplinary reasons or as the result of a layoff that must be decided by the arbitrator.

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, Office of the Senior Vice President and General Counsel (Sarah A. Luke, of counsel)

For the Respondent, Weissman & Mintz, LLC, attorneys (Steven P. Weissman, of counsel)

DECISION

On September 16, 2011, Rutgers, The State University of New Jersey petitioned for a scope of negotiations determination. Rutgers seeks a restraint of binding arbitration of a grievance filed by the Union of Rutgers Administrators, American Federation of Teachers, Local 1766, AFL-CIO (URA-AFT). The grievance challenges the layoff/termination of a Development Specialist I (DS I)in Rutgers' Office of Development without just cause.

The parties have filed briefs. Rutgers has filed exhibits and the certification of Philip L. Yeagle, Dean of the Faculty of

Arts and Sciences at the Rutgers Newark campus. The URA-AFT has filed a certification of the grievant. These facts appear.

The URA-AFT represents Rutgers' regularly employed, non-supervisory, administrative employees. Rutgers and URA-AFT are parties to a collective negotiations agreement effective from July 1, 2007 through June 30, 2011. The grievance procedure ends in binding arbitration.

Article 18 is entitled Just Cause/Discipline and provides:

> No employee shall be discharged, suspended, disciplined or receive a deficiency downgrade except for just cause.
>
> The parties to this Agreement affirm the concept of progressive discipline.
>
> The sole and exclusive remedy for employees receiving written disciplinary action shall be to file a grievance in accordance with the Grievance Procedure set forth in this Agreement.
>
> Written reprimands, letters of suspension, letters of termination and letters of deficiency downgrade given to an employee will contain the reasons for such action. All such notices shall be sent registered mail or delivered in person to the employee.
>
> An employee shall, upon request, be entitled to have a union representative present at any investigatory meeting or questioning which the employee reasonably believes could result in disciplinary action.

Article 39 is entitled Seniority and provides, in part:

> B. The Office of Labor Relations shall maintain seniority lists of employees, including the date of hire, and if applicable, the date of transfer into the

> bargaining unit. Copies of seniority lists shall be furnished quarterly to the URA-AFT.
>
> C. Layoff shall be defined as the elimination of a position or positions within a particular work unit. A work unit is a budgetarily discrete academic or administrative entity. The URA-AFT shall be informed of all notices of layoff.

The remainder of the section provides the recall rights for laid off employees.

The grievant worked as a DS I, Grade 5, in the Office of the Dean for Faculty of Arts and Sciences at Rutgers-Newark. The DS I, Grade 5 position was created in October 2008 by Dean Yeagle to focus on fund raising through cultivation of relationships with small donors and solicitation of gifts and pledges from those donors. Prior to the creation of the DS I position, the Office focused solely on large donors. According to the Dean, when he created the position, he was not aware that because it was categorized as a Grade 5 position in the University Human Resources categorization system, the position could not be held to numerical fund raising goals. The Dean certifies that when he realized the position was not accomplishing the goals it was intended, he decided to return to focusing development efforts solely on large donors and eliminated the position effective March 3, 2011.

According to the grievant, she was hired by Rutgers on December 15, 2008 after an extensive interview process. Her

Classification & Recruitment Form (CARF) specified that she was to solicit and close gifts ranging from $1000 to $24,999, but did not include any dollar-amount goals. In January 2009, she had meetings with Brian Agnew, Director of Development, to identify 250 potential donors and was then expected to call prospective donors, set up meetings and ask for financial support. In January and February 2009, the grievant was also requested to write letters on behalf of Agnew and Yeagle based on her writing ability. These letters included solicitations.

The grievant certifies that in or about May-June 2009, she was called into a meeting with Agnew and told that she would have new fund raising goals as she was not meeting her goals. According to the grievant, she then advised Agnew that she previously did not have any goals set and that she was both writing and soliciting to which Agnew responded that she must find a way to balance both as the unit had a new fund raising goal of $700,000 for the academic year.

On June 16, 2009, the grievant certifies that Agnew sent her an e-mail indicating that she should realign her focus to average 12 qualified contacts a month with a goal of $100,000 in new gifts and pledges. The grievant pushed back explaining that her position had no dollar-amount goals. In July-August 2009, the grievant certifies that Angew lowered her goal to $50,000 resulting in the grievant going to see her union representative

and Elena Serra, Associate Director for Human Resources who questioned whether someone in the grievant's salary grade could be required to raise specific dollar amounts.

The grievant certifies that in October 2009, she was advised by Agnew that Yeagle wanted her to resign or be terminated. Grievant responded by e-mail that she did not want to resign and requested a meeting with Agnew, Yeagle and an HR representative to discuss her job duties. Agnew then rescinded his request that she resign or be terminated. Grievant then communicated with Serra over the next couple of months regarding her job duties.

In the interim, on December 2, 2009, Rutgers and URA-AFT entered into a Memorandum of Agreement (MOA) that included a no-layoff pledge through December 31, 2010. Violation of that pledge would have invalidated economic concessions agreed to by URA-AFT. According to the grievant, between July and December 2009, Agnew told her that if they did not raise enough money, Yeagle would eliminate her position. In January 2010, grievant received a new CARF indicating that her position was "intended and expected to be self-supporting in relation to the gifts received." Grievant then wrote to Serra questioning the addition of dollar amount goals to her CARF without an increase in grade and salary. Serra responded that she would look into it. At the same time, grievant certifies that Agnew told her there needed to be an increase in $1000 contributors.

Grievant certifies that she then received a poor evaluation stating that she did not meet standards. The grievant protested her evaluation and contacted Serra who informed grievant that as a Grade 5, she could not have specific fund raising goals and that HR was trying to get a new CARF.[1/] On April 23, 2010, grievant received a revised CARF without any reference to her position being self-supporting and her evaluation was changed to indicate that she had met standards.

On January 20, 2011, Agnew wrote the grievant a letter stating that due to budget cuts, her position would be eliminated effective March 8, 2011. According to the grievant, at the same time, Agnew advertised to fill a position for Public Relations Communications Specialist, a Grade 5 position for which grievant alleges she is qualified as the position reports to the Director of Development and is responsible for organizing and creating written content for the school's website, newsletter, and marketing materials.

On January 21, 2011, URA-AFT filed a grievance challenging the grievant's layoff due to budget cuts claiming that Agnew was trying to force her out the door as he had targeted her before in this manner. On February 16, Mirela Ngjela, Associate Dean for Budget and Administration responded to the second step grievance

1/ Neither party explained why a Grade 5 position could not have specific fund raising goals.

meeting concluding that the elimination of the position did not violate the URA-AFT contract. A third step grievance hearing was then held where the URA-AFT asserted that grievant was laid off as soon as the no layoff pledge of the MOA expired because the Department did not have grounds to terminate the grievant for performance-related reasons. According to grievant, at that meeting Agnew acknowledged that he requested grievant to resign or be terminated, but could not recall why he did it. On March 28, Jennifer E. Penley, Labor Relations Specialist, denied the grievance after a third step grievance hearing. URA-AFT demanded binding arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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.
>
> [Id. at 154]

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

Rutgers argues that it has a managerial prerogative to determine the number of positions it needs to carry out the Development Office functions. It asserts that URA-AFT is grieving the elimination of the DS I position which is outside the scope of negotiations.

URA-AFT responds that Rutgers does have a managerial prerogative to determine the size and organization of its work force. However, it asserts that this is not a layoff case, but rather a discharge case where the grievant was terminated in violation of the parties' Just Cause/Discipline agreement.

Rutgers replies that the decision to eliminate the DS I position was made by Yeagle and not Agnew; and, even if the URA AFT's version of the facts are accepted, they establish that a layoff took place.

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]

If a dispute is mandatorily negotiable, it is also ordinarily legally arbitrable. Old Bridge Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523, 527-528 (1985). Absent preemption, tenure and job security provisions are mandatorily negotiable. Wright v. City of East Orange Bd. of Ed., 99 N.J. 112 (1985). The discipline amendment to N.J.S.A. 34:13A-5.3 allows employees without an alternate statutory appeal forum to negotiate for binding arbitration of disciplinary sanctions. Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997). However, job security guarantees and negotiated disciplinary review procedures do not abrogate the employer's right to reduce the size of its work force for reasons of economy. Wright at 122 n.3; Union Cty. Reg. H.S. Bd. of Ed. v. Union Cty. Reg. H.S. Teachers Ass'n, 145 N.J. Super. 435 (App. Div. 1976), certif. den. 74 N.J. 248 (1977).

Rutgers is correct and URA-AFT does not challenge that a layoff made in good faith for reasons of economy cannot be set aside in arbitration. Here, there is a factual dispute as to whether the grievant's termination was a layoff or a disciplinary termination. Due to this dispute, we cannot determine at this stage whether there is a legally arbitrable disciplinary dispute,

or a non-negotiable decision to effectuate an economic layoff that would not be subject to arbitration.[2/] Therefore, the arbitrator must make a threshold determination on whether the employer laid off the grievant for economic reasons. This approach is consistent with our prior precedent permitting arbitrators, subject to our further consideration, to entertain threshold factual issues as to whether an otherwise negotiable and arbitrable action instead involved an employer's exercise of a managerial prerogative. See Edison Tp., P.E.R.C. No. 2010-4, 35 NJPER 281 (¶97 2009) (arbitrator could make threshold determination on employer's motivation for creating new shift); Borough of Paramus, P.E.R.C. No. 2002-42, 28 NJPER 137 (¶33043 2002) (arbitrator could make threshold determination regarding whether employee was laid off or disciplined); Jefferson Tp., P.E.R.C. No. 98-161, 24 NJPER 354 (¶29168 1998) (arbitrator could make factual determination whether employee had special skills for overtime assignment, allegedly made in violation of allocation procedure; jurisdiction over scope petition retained). In the event the arbitrator finds a contractual violation we retain jurisdiction to determine whether the termination was an exercise of a non-negotiable and non-arbitrable managerial prerogative to abolish the position for economic reasons.

2/ Neither party requested a timely evidentiary hearing. See N.J.A.C. 19:13-3.6.

ORDER

The request of Rutgers, the State University of New Jersey for a restraint of binding arbitration is denied without prejudice. In the event the arbitrator sustains the grievance, Rutgers may file a request, within 90 days after receipt of the arbitrator's award, that the Commission determine, based upon the arbitrator's finding of facts, whether the grievant's separation was a disciplinary action, subject to review through binding arbitration, or the exercise of a non-arbitrable managerial prerogative to abolish for economic or organizational reasons, the DS-I position held by the grievant.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson, Jones and Wall voted in favor of this decision. None opposed. Commissioner Voos recused herself. Commissioner Bonanni was not present.

ISSUED: September 27, 2012

Trenton, New Jersey