

P.E.R.C. NO. 2015-17

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,

Petitioner,

-and-

Docket No. SN-2013-058

HEALTH PROFESSIONALS AND
ALLIED EMPLOYEES, LOCAL 5089,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part and denies in part the request of the University of Medicine and Dentistry of New Jersey for a restraint of binding arbitration of grievances filed by Health Professionals and Allied Employees, Local 5089. The grievances assert that UMDNJ violated the parties' collective negotiations agreement (CNA) by creating .9 part-time nursing positions in the Family Health Unit at University Hospital and transferring full-time Family Health Unit nurses to other departments. Finding that UMDNJ was responding to a decline in patient population and reallocating staff to meet patient needs of University Hospital, the Commission restrains arbitration of the parts of the grievances challenging the work schedule change and the staff reorganization, but declines to restrain arbitration over aspects of the grievances concerning seniority and bumping rights of affected reassigned, transferred, or laid off nurses.

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. 2015-17

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,

Petitioner,

-and-

Docket No. SN-2013-058

HEALTH PROFESSIONALS AND
ALLIED EMPLOYEES, LOCAL 5089,

Respondent.

Appearances:

For the Petitioner, John Jay Hoffman, Acting Attorney
General (Eva M. Serruto, Deputy Attorney General, on
the brief)

For the Respondent, Lisa Leshinski, attorney, on the
brief

DECISION

On March 14, 2013, the University of Medicine and Dentistry of New Jersey (UMDNJ) filed a scope of negotiations petition seeking a restraint of binding arbitration of two grievances filed by the Health Professionals and Allied Employees, Local 5089 (HPAE). The grievances allege UMDNJ violated the parties' collective negotiations agreement (CNA) when it allegedly created .9 part-time nurse positions in the Family Health Unit (FHU) at University Hospital (UH) and transferred full time FHU nurses to other departments.

The parties have filed briefs and exhibits. UMDNJ has filed the certification of Patricia Scully, Collective Bargaining Agreement Coordinator for the Labor Relations Department. HPAE has filed the certification of Chris Whalen, HPAE Assistant Director for public sector locals. These facts appear.

UMDNJ operates eight schools, UH and several other health care facilities. UH is located in Newark and is the principal teaching hospital for New Jersey Medical School. There are 18 medical departments at UH, including FHU which includes: Neonatal Intensive Care (FICN); Intermediate Nursery (FIN); Newborn Nursery (FNN); Obstetrics and Gynecology (F-Green); Pediatric Intensive Care (PICU); and Pediatrics (F-Blue).

HPAE represents a unit of non-supervisory full and part time registered nurses, including nurse clinicians, research nurse clinicians, staff nurses, case managers, advanced practice nurses, and certified registered nurse anesthetists. HPAE and UMDNJ are parties to a CNA for the period July 1, 2006 through June 30, 2010. The parties further signed a memorandum of agreement (MOA) dated November 3, 2011 and most recently signed an MOA covering the period from June 1, 2010 through June 30, 2013.

Article 4 is entitled "Employee Status" and section 4.04 provides:

A part time employee is an employee who works twenty (20) hours or more each week, but less

than the full time equivalent for the title.
A part-time employee shall be entitled to
pro-rated benefits.

Section 4.07 is entitled "Probationary Period" and provides the method for new employees to accrue and use sick and other leave time. Section 4.09 is entitled "Seniority" and provides the method for accrual and provides the procedures for notice and seniority in the case of a layoff.

Article 5 is entitled "Work Time" and provides, in part:

5.01 Normal Workday:

For purposes of determining the application of any employee's regular compensation rate, the employees normal workday will be eight (8), ten (10) or twelve (12) work hours. The workday of employees regularly scheduled to work greater than eight (8) hours shall be defined under the specific Scheduled sections of this Agreement.

All defined workdays shall include rest periods as specified in section 7.14 and a thirty (30) minute unpaid scheduled meal period.

A Full Time employee shall normally be scheduled to work a full eight (8) hour shift.

Article 7 is entitled "Monetary Benefits: Time Not Worked" and provides the accrual and use of holiday, sick, vacation and other leave entitlements for full and part-time employees.

Appendix B is entitled "Twelve Hour Shifts - Payment & Scheduling" and provides the method of accrual and use of compensation, overtime and leave for twelve-hour employees.

The parties entered into a Side Letter of Agreement No. 4 on May 17, 2000 that provides:

In the event of the closure or reorganization of a nursing unit, the University and the Union agree that the following procedures shall be implemented if the number of vacancies in the geographic location exceeds the number of affected bargaining unit employees:

1. The University shall provide as much notice of the closure or reorganization of the nursing unit to employees and the Union as is possible, but no less than that specified in Section 4.09 or 4.11, whichever is applicable.
2. Bargaining unit employees affected by the closure or reorganization shall be provided with a seniority list of the affected employees and a list of vacant positions in the geographic location. The list of vacant positions shall, for each nursing unit where there are vacancies, include the available shifts and the requirements of the positions.
3. Bargaining unit employees affected by the closure or reorganization shall choose, by University seniority, vacant positions for which they meet the requirements.

All other layoffs due to lack of work in the job classification or reductions due to economic considerations shall be implemented as per Section 4.09 or 4.11, whichever is applicable.

Full time positions are designated as 1.0. A full-time employee works 40 hours per week. Over a two-week period, a full-time employee works 80 hours. The full time positions serve three 12-hour shifts three weeks per month, four 12-hour shifts one week per month^{1/}, and 39 12-hour shifts per year. The part

^{1/} Eight hours of this week is paid at the overtime rate.

time .9 employees work 72 hours over a two-week period; serve three 12-hour shifts per week; and 26 weekend 12-hour shifts per year.

Prior to 2010, as a consequence of declining patient population, FHU was overstaffed with nurses. In October 2010, UMDNJ began using .9 positions to address the excess staffing instead of 1.0 full time positions in FHU.

Scully certifies that 42 full time FHU nurses were affected by the decision to use .9 employees. The nurses affected were given the option to remain in FHU as a part time .9 nurse or transfer to 70 available positions in other departments as full time nurses. The nurses who chose .9 positions kept the same hourly rate, level of health benefits and pension percentage contribution of those staying in full time positions. However, vacation, sick and float time accrues at a reduced rate per the parties' CNA.

Whalen asserts UMDNJ eliminated 29 full time FHS positions and created 14 .9 FHS positions. He certifies that in July 2010, no UH nurses worked a .9 schedule and there were only 64 part time nurses (excluding per diem) employed at UH. Whalen states that generally part time was a .6 position whereas a .9 worker is close to full time, but is only eligible for half of the uniform allowance and tuition reimbursement.

On August 18, 2010, HPAE filed a grievance alleging that UMDNJ violated the parties' CNA by treating the elimination of 29 full time positions as a "reorganization" instead of a "layoff" and that the .9 positions were created without negotiations. Whalen certifies the difference in whether UMDNJ instituted a layoff or reorganization is significant because either Article 4 of the parties' CNA or the side letter would control. By following the reorganization model, a permanent employee affected was not able to be called back within one year from the layoff. A laid off employee also would have bumping rights to a vacancy within the geographic location, including NJ Medical School, or revert to a previous title. This lack of a layoff, according to Whalen, denied unemployment benefits to nurses who refused vacancies and initially denied affected nurses to bid on vacancies for full time positions that subsequently opened in FHS. Whalen certifies the number of .9 nurses at UH has increased from 0 in July 2010 to 70.

In July 2012, UMDNJ eliminated, by shift, ten full time positions from FHS: five from PICU and five from F-Blue. Two senior staff nurse positions were eliminated leaving two less senior nurses. Whalen certifies that Article 4.7 of the parties' 2010 contract required per diem nurses to be laid off first.

On August 17, 2012, HPAE filed a grievance alleging the 2012 "reorganization" of nurses in FHS violated the seniority provision of the parties' agreement.

On September 21 and October 3, 2012, HPAE demanded binding arbitration of the grievances. 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.

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].

UMDNJ argues that it has a managerial prerogative to utilize .9 positions to respond to the decline in patient census; the parties' CNA contemplates using .9 nurses in Article 4.04 and the actions of UMDNJ were a transfer and not a layoff. It cites City of Long Branch, P.E.R.C. No. 92-53, 17 NJPER 506 (¶22248 19914).

HPAE responds that a decline in patient census is an economic reason for creating .9 positions that should have followed the layoff provision of the contract. HPAE recognizes UMDNJ's prerogative to layoff, but assert its procedural issues are mandatorily negotiable. Finally, HPAE asserts UMDNJ's scope petition is untimely.^{2/}

2/ Article 14.02(E) of the parties' agreement provides UMDNJ 90 days to notify HPAE that it intends to file a scope of negotiations petition from the date PERC notifies UMDNJ of the arbitration filing. UMDNJ then has an additional 90 days to file the petition. This is a contractual arbitrability issue outside our scope jurisdiction. Ridgefield Park.

UMDNJ replies that it was within the 180-day time period set forth in the parties' agreement to file a scope of negotiations petition.

The crux of the first grievance challenges the creation of the .9 nurse position. Court and Commission case law concerning work schedule negotiability holds that the work schedules of individual employees are, as a general rule, mandatorily negotiable, unless the facts prove a particularized need to preserve or change a work schedule to effectuate governmental policy. Local 195, IFPTE v. State, 88 N.J. 393 (1982).^{3/} Here, it is undisputed that UMDNJ was responding to a decline in patient population and therefore reallocating its staff to meet the patient needs of UH.

The first grievance also addresses whether UMDNJ violated the parties' CNA when it followed the "reorganization" rather than "layoff" procedures that the parties have negotiated. In general, layoff procedures and work schedules are mandatorily negotiable. See City of Jersey City, P.E.R.C. No. 85-78, 11 NJPER 84 (¶16037 1985) and Teaneck Tp. v. Teaneck FMBA Local No. 42, 177 N.J. 560 (2003), aff'g o.b. 353 N.J. Super. 289 (App. Div. 2002).

^{3/} We previously found a factual dispute preventing summary judgment on the issue of whether UMDNJ had a duty to negotiate with HPAE over the alleged mandatorily negotiable impact issues in the creation of the .9 positions. University of Medicine and Dentistry of NJ, P.E.R.C. No.2014-39, 40 NJPER 282 (¶108 2013). This question remains to be resolved in the unfair practice proceeding.

However, the employer retains the decision to reorganize or layoff a department to respond to the public need for its resources. Morris Cty. Sheriff's Office and Cty. of Morris and PBA Local 298, P.E.R.C. No. 2010-16, 35 NJPER 348 (¶117 2010), recon. den. P.E.R.C. No. 2010-52, 36 NJPER 24 (¶11 2010), rev'd 418 N.J. Super. 64 (App. Div. 2011). Accordingly, HPAE may arbitrate only those allegations in the second grievance concerning seniority and bumping rights of affected employees.

The second grievance concerns whether UMDNJ violated the seniority and bumping rights of nurses who were laid off while per diem and less senior nurses were retained. Stressing that "nothing more intimately and directly affects an employee than whether he has a job," our Supreme Court has stated that, unless preempted, a proposal to have layoffs among qualified employees be by seniority is mandatorily negotiable. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 84 (1978); see also Lyndhurst Bd. of Ed., P.E.R.C. No. 87-111, 13 NJPER 271 (¶ 18112 1987), aff'd NJPER Supp.2d 194 (¶ 171 App. Div. 1988); South Orange-Maplewood Bd. of Ed., P.E.R.C. No. 97-54, 22 NJPER 411, 413 (¶ 27225 1996). Likewise, work schedules are generally mandatorily negotiable. UMDNJ has not asserted any special qualifications of the nurses involved in the 2012 grievance that would impede an alleged contractual agreement that seniority should govern the shift reassignments, transfers or layoff of the

nurses. City of Trenton, P.E.R.C. No. 2014-18, 40 NJPER 202 (¶77 2013); Bedminster Tp., P.E.R.C. No. 2013-94, 40 NJPER 72 (¶28 2013); Mercer Cty. Sheriff, P.E.R.C. No. 99-46, 25 NJPER 19 (¶30006 1998). Thus, this grievance is legally arbitrable.

ORDER

The request of UMDNJ for restraints of binding arbitration is granted except to the extent the July 2012 grievance seeks review of the seniority and bumping rights of the affected nurses.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Voos and Wall voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Eskilson was not present.

ISSUED: September 18, 2014

Trenton, New Jersey