

P.E.R.C. NO. 2015-24

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNION COUNTY COLLEGE,

Petitioner,

-and-

Docket No. SN-2013-001

UNION COUNTY COLLEGE CHAPTER OF
THE AMERICAN ASSOCIATION OF UNIVERSITY
PROFESSORS,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of contract clauses in an expired collective negotiations agreement between the Union County College and the Union County College Chapter of the American Association of University Professors. The Commission finds mandatorily negotiable provision concerning: service credit for non-tenure track faculty members who are granted tenure-track appointments; requiring that the the Peer Evaluation Committee Chair be given the names of promotion-eligible faculty; requiring evaluation of tenured faculty once every five years; allowing faculty to respond to an evaluation before it proceeds to the next level; distribution of student evaluation forms to be done by a person approved by the Department Chair or Coordinator; providing for faculty committees to make recommendations to the President and for the President to comply with faculty committee requests for information; allowing faculty to object to reassignments to committee which will make a written recommendation to the President; requiring majority vote of a department's faculty for contractually required department decisions; and allowing a faculty to choose to teach a distance learning course as part of their base load or as an overload.

The Commission finds not mandatorily negotiable provisions concerning: seniority in teaching assignments; faculty involvement in the conduct of evaluations; preventing promotion evaluations from being substituted for post-tenure evaluations; requiring the College to solicit faculty advice prior to curriculum decisions; requirements of a faculty organization; prior notice of department creation, abolishment, or

reorganization; requiring administrators to be assigned to a compensation committee; faculty not being required to travel to other work sites; requiring consultation with the Department Chairperson prior to courses being canceled; requiring that the Academic Vice President consult with the department in which a faculty member desires to teach; and requiring the College to consult with department chairs prior to scheduling a large lecture section.

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, Cleary, Giacobbe, Alfieri, Jacobs, LLC, attorneys (Matthew J. Giacobbe, of counsel; Yaacov Brisman, Gina Anton & Ronald Kavanaugh, on the brief)

For the Respondent, Levy Ratner, P.C., attorneys (Carl J. Levine, of counsel; Dana Lossia, on the brief)

DECISION

On July 11, 2012, Union County College (College) petitioned for a scope of negotiations determination. On November 7, 2012, the College filed an amended petition. The College asserts that portions of its expired collective negotiations agreement (CNA) with the Union County College Chapter of the American Association of University Professors (AAUP or Association) are not mandatorily negotiable and therefore cannot be retained in a successor CNA. By mutual request of the parties, the scope petition was held in abeyance while negotiations continued. On May 27, 2014, the Commission was notified that the parties had

reached an agreement subject to this Commission's decision on 16 contract provisions. On May 29, 2014, a Commission staff member contacted the parties seeking clarification on the outstanding contract articles. On June 2, 2014, the AAUP filed a statement clarifying the issues. On July 2, 2014, the College filed a statement concurring with the AAUP's submitted issues.

The parties have filed briefs and exhibits. The AAUP submitted the certification of Carl Cuttita, a faculty member and the AAUP chapter President. These facts appear.

The AAUP represents full-time instructional and professional library staff employed by the College. The parties' most recent CNA expired on August 31, 2012.

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].

Where a statute or regulation is alleged to preempt a negotiable term and condition of employment, it must do so expressly, specifically and comprehensively. See Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Assn, 91 N.J. 38, 44-45 (1982).

Article I is entitled Definitions. Section X. provides:

X. Seniority. For the purpose of assigning classes to full time members of the instructional staff, seniority shall be based upon the total number of years of full time teaching in a department. For the purpose of implementing Article XXX (Reduction in Force and Seniority), seniority shall be based upon the total number of years of full time teaching in a department, except where a faculty member has taught in more than one department in which case seniority shall be based upon the total number of years of full time teaching at the College, or in the case of full time members of the professional library staff, seniority shall be based upon the total number of years of full time professional work in the library.

The College argues that the underlined portion of this provision must be removed from the CNA because it infringes on

its managerial prerogative to assign classes to the most qualified and appropriate personnel. It asserts that the provision impermissibly makes seniority the sole determining factor for assigning classes. It cites Franklin Tp. Bd. of Ed., P.E.R.C. No. 2005-18, 30 NJPER 408 (¶133 2014) (contract language requiring seniority alone for the filling of vacancies not mandatorily negotiable as it does not provide for qualification to be taken into consideration).

The Association responds that the disputed language does not set forth any procedure for assignment of classes as it is contained in the definitions section. AAUP does not dispute the College has a prerogative to make the ultimate determination regarding faculty qualifications. Citing City of Elizabeth, P.E.R.C. No. 2007-11, 32 NJPER 309 (¶128 2006) and Rutgers, the State University of New Jersey, P.E.R.C. No. 91-74, 17 NJPER 156 (¶22064 1991)^{1/}, the AAUP asserts that seniority may be permissibly considered for class assignments where qualifications are equal.

The College replies that, as written, the provision does not recognize seniority as one factor to be considered with respect to determinations regarding assignments. Rather, the provision provides no discretion to the administration and is therefore not negotiable.

^{1/} Hereinafter cited as "Rutgers IV".

The Association sur-replies that by its inclusion in the Definitions section, the article only explains how seniority will be calculated if and when seniority needs to be considered as one factor in making assignments.

An employer has a non-negotiable prerogative to assign employees to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195, IFPTE v. State; Ridgefield Park. Cf. New Jersey Transit Corp., P.E.R.C. No. 96-78, 22 NJPER 199 (¶27106 1996). This prerogative trumps a claim that the assignment must be made on the basis of seniority. See New Jersey Transit, P.E.R.C. No. 2006-36, 31 NJPER 358 (¶143 2005). Seniority may be a negotiated tie-breaking factor only when the employer has determined that all qualifications are equal and when managerial prerogatives are not otherwise compromised. See Edison Tp., P.E.R.C. No. 98-14, 23 NJPER 487 (¶28235 1997).

The disputed portion of Article I.X is not mandatorily negotiable. As written, it does not provide for management's discretion to appoint the most qualified employee to a teaching assignment.

Article XI is entitled Faculty Appointments; section C is entitled Conditions and Terms of Faculty Appointments. The College disputes the negotiability of the following portion of subsection C.3.c.:

Non-tenure track faculty members, including non-tenure track replacement faculty, who are granted tenure-track appointments shall be given up to three years of College service credit for the length of their most recent continuous service under their non-tenure track faculty contracts.

The College argues that the above-cited portion of Article XI subsection C.3.c. infringes on its managerial prerogative with respect to making tenure determinations by requiring that employees be given "credit" towards tenure accrual. It asserts that this section is also preempted because tenure is governed by The State and County College Tenure Act, N.J.S.A. 18A:60-6 et. seq. Specifically N.J.S.A. 18A:60-8^{2/}, which provides:

Faculty members at a county college shall be under tenure in their academic rank, but not in any administrative position, during good behavior, efficiency and satisfactory professional performance, as evidenced by formal evaluation and shall not be dismissed or reduced in compensation except for inefficiency, unsatisfactory professional performance, incapacity or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of Title 18A of the New Jersey Statutes [N.J.S.18A:6-9 et seq.], after employment in such college or by such board of trustees for

^{2/} The law was amended by the Legislature after the parties briefs were filed. The cited law is the current version effective July 16, 2014.

- a. 5 consecutive calendar years; or
- b. 5 consecutive academic years, together with employment at the beginning of the next academic year; or
- c. the equivalent of more than 5 academic years within a period of any 6 consecutive academic years.

The Association responds that the issue of service credit is mandatorily negotiable as it intimately and directly affects the work and welfare of faculty and there is nothing in the provision that impedes the College's ability to determine whether a faculty member is classified as a tenure track or non-tenure track instructor. It further asserts the language is not preempted as the maximum allowable service credit is three years and New Jersey Law requires five years of service credit. The Association relies on Middlesex County Procetutor, P.E.R.C. No. 91-22, 16 NJPER 491 (¶21214 1990) aff'd 255 N.J. Super. 333 (app. Div. 1992) (employer's action to unilaterally rescind credit for prior government service is an unfair practice); Manalapan-Englishtown Reg. Bd. of Ed., P.E.R.C. No. 2007-42, 33 NJPER 3 (¶3 2007), aff'd 35 NJPER 230 (¶82 App. Div. 2009) (credit on salary guide for prior teaching experience is mandatorily negotiable); Tp. of Stafford, P.E.R.C. No. 2005-51, 31 NJPER 84 (¶40 2005) (proposal to change the eligibility date for prior service credit is mandatorily negotiable); Tp. of Winslow, P.E.R.C. No. 2004-40,

29 NJPER 548 (¶178 2003) (proposal concerning salary guide credit for prior service in other jurisdictions is mandatorily negotiable); and City of Orange, P.E.R.C. No. 2003-91, 29 NJPER 283 (¶85 2003) (proposal concerning credit for prior service is mandatorily negotiable).

The College replies that the cases cited by the Association concern service credit for salary guide placement and benefits - not tenure accrual. The language as written infringes on the College's prerogative to make tenure determinations by two years and is not mandatorily negotiable.

The Association is correct that service credit for salary guide placements and benefits is mandatorily negotiable. Middlesex County. However, as written, the disputed language is not limited to salary and benefits. N.J.S.A. 18A:60-6 specifically provides that a faculty member shall receive tenure after five years of employment. The statute does not prevent the College from agreeing to provide up to three years of prior service credit with the College when an employee is transferred to a tenure track position. The College is not being denied the ability to evaluate an employee for tenure as to be eligible under the contract, the employee has to be continuously employed. Thus, we find this provision mandatorily negotiable.

Article XII is entitled Faculty Reappointments and Procedures; section A. is entitled Procedures. Subsection A.1.c. and d. provides:

c. Between October 1 and the end of the first semester of each academic year, all faculty members including librarians who are eligible for promotion within the meaning of Article XIII(Professional Evaluation) of this Agreement, and who have requested consideration for promotion, shall be evaluated in order of academic rank, beginning with instructors (librarians-I), for the purpose of recommending promotion or no promotion. No later than October 1 of each academic year, the Academic Vice President shall inform each Department Chairperson, and in the case of the Library, the Director of Libraries, and the Chairperson of the Peer Evaluation committee of the names of those faculty members whose length of service in rank makes them eligible for promotion and who have requested consideration for promotion. It shall be the responsibility of every member to make certain that the Academic Vice President has correct information for purposes of the preceding sentence.

d. Except as otherwise provided in this Article or elsewhere in this Agreement, uniform rules and regulations for the conduct of department evaluations shall be established jointly by the Academic Vice President and the Faculty Executive Committee.

The College is not seeking removal of all of Article XXII subsection A.1.c, but only the underlined portions. It argues that the requirement to inform the Chairperson of the "Peer Evaluation Committee" of the names of faculty members eligible

for promotion infringes on the College's managerial prerogative to determine whether the Peer Evaluation Committee will be involved in the evaluative process. As for Article XXII subsection A.1.d., the College argues that the first sentence should be removed from the CNA because it infringes on its managerial prerogative to control the "conduct" of evaluations; namely, to determine what the evaluative criteria will be and who will perform evaluations.

The College relies on Rutgers, The State University and Rutgers Council of AAUP Chapters, P.E.R.C. No. 91-44, 16 NJPER 593 (¶21261 1990), aff'd in pt, rev'd in pt 256 N.J. Super. 104 (App. Div. 1992), aff'd 131 N.J. 118 (1993)^{3/} (a procedural proposal that affects the underlying managerial prerogative to evaluate staff is not mandatorily negotiable); Tenafly Bd. of Ed., P.E.R.C. No. 83-51, 8 NJPER 621 (¶13297 1982) (PERC Chairman holds proposal which would allow Board to designate representatives to evaluate teachers is not negotiable); Greater Egg Harbor Bd. of Ed., I.R. No. 87-8, 12 NJPER 793 (¶17302 1986); Burlington County College, P.E.R.C. No. 90-13, 15 NJPER 513 (¶20213 1989) (evaluator and criteria held not mandatorily negotiable); Bethlehem Tp. Bd. of Ed., P.E.R.C. No. 80-5, 5 NJPER 290 (¶10159 1979), aff'd 177 N.J. Super. 479 (App. Div. 1981), aff'd 91 N.J. 38 (1982) (notice provision for teacher evaluation

^{3/} Hereinafter cited as "Rutgers III".

was more substantive than procedural); and Teaneck Bd. of Ed and Teaneck Teachers Ass'n, P.E.R.C. No. 78-3, 3 NJPER 224 (1977), rev'd 161 N.J. Super. 75 (1978) (evaluation criteria is not mandatorily negotiable).

The Association responds that the disputed language concerns evaluation procedures which are mandatorily negotiable. It concedes that the Peer Evaluation Committee (PEC) may no longer exist as it historically had and therefore for any period the PEC is not in existence, the notice requirement in this article are moot. The Association relies on Rutgers III; Bethlehem Tp. Bd. of Ed.; In re: Rutgers, The State University, P.E.R.C. No. 82-47, 7 NJPER 671 (¶12303 1981)^{4/} (Rutgers required to negotiate prior to invoking a collegial system of evaluations); State-Operated School Dist. of the City of Paterson, P.E.R.C. No. 2005-9, 30 NJPER 339 (¶111 2004) (provisions requiring minimum observation time for formal teaching observation and allowing teacher to request another observer held mandatorily negotiable); Englewood Bd. of Ed., P.E.R.C. No. 98-75, 24 NJPER 21 (¶29014 1997) (promotional procedures are mandatorily negotiable); Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 95-16, 20 NJPER 378 (¶25190 1994) denying recon. of P.E.R.C. No. 95-15, 20 NJPER 334 (¶25175 1994) (an employer has the managerial prerogative to determine promotional qualifications and criteria, but must negotiate over

^{4/} Hereinafter cited as "Rutgers II".

promotional procedures); Delaware Tp. Bd. of Ed., P.E.R.C. No. 87-50, 12 NJPER 840 (¶17323 1986) (procedural aspects of evaluative observation are mandatorily negotiable including: observation be openly conducted; a conference be held with the teacher prior to preparing the report; requiring reports to identify strengths and weaknesses and make recommendations for improvement).

The College replies that the PEC cannot have a role in the evaluation process. Further, the "conduct" of evaluations refers not to procedural rules or to notice requirements, but to criteria for evaluations citing Brookdale Community College, P.E.R.C. No. 84-16, 9 NJPER 560 (¶14234 1983) (proposal designating individual having primary responsibility for evaluation held non negotiable) and Tenafly. The College maintains the provision infringes on its managerial prerogative by requiring faculty input and by mandating rules and regulations regarding evaluations be established jointly by the Academic Vice President and the Faculty Executive Committee.

The Association responds that it does not contest the College's prerogative to determine what role, if any, the PEC will have in the evaluation process. However, if the PEC continues to play a role in the process, the issue of whether its Chair receives notice is mandatorily negotiable.

We and the Courts have often held that even if a managerial decision is not mandatorily negotiable, the procedures relating to making or reviewing that decision generally are. Bethlehem Tp. Bd. of Ed; Rutgers II. However, the line between a substantive and procedural matter is sometimes indistinct and giving a particular label may not resolve the issue. Here, the language regarding jointly established rules and regulations for the conduct of evaluations is a case of indistinction. The "conduct" of evaluations may be procedural or substantive. On this record, it appears it would be substantive. Conversely, the requirement to notify the Chairperson of the PEC of the faculty who are eligible for promotion is procedural. We therefore hold the disputed language in section c is mandatorily negotiable and the disputed language in section d is not mandatorily negotiable.

Article XIII is entitled Professional Evaluation. Section C. is entitled Process for Post Tenure Review, and Section E. is entitled Notification and Deadlines. Subsections C.1.a. and E.8. provide:

C. Process for Post Tenure Review

1. Pursuant to College policy regarding evaluation of tenured faculty members, and for the purpose of providing advice and guidance pertaining to the criteria stated in section c. below a regular review of the academic performance of tenured faculty members will be conducted.

a. Such evaluations of tenured faculty members shall take place once every five

years. Evaluations done for purposes of determining promotions shall not be substituted for post-tenure evaluations.

* * *

E

8. At each level of evaluation, the faculty member shall be given timely notice of the results of the evaluation, so that he/she may respond if he/she so wishes to the recommendation, prior to the PTRF^{5/} and recommendation being passed on to the next level.

The College argues that Article XIII subsection C.1.a. infringes on its managerial prerogative to determine educational policy because it states that promotional evaluations "shall not be" substituted for post-tenure evaluations, which places significant limitations on how the College may use evaluations.

The College argues that the underlined portion of Article XIII subsection E.8 precludes the post-tenure review file from advancing to the next level until the faculty member has responded to the recommendation. It asserts that this provision does not merely set procedural notice requirements, but gives the faculty member control over the progress of the evaluative process, thus infringing on the College's managerial prerogative to conduct evaluations and set educational policy. The College cites Boonton Bd. of Ed., P.E.R.C. No. 80-78, 6 NJPER 12 (¶1006

^{5/} "Post Tenure Review File".

1979) (contract provision that teachers receive advance notice prior to classroom observations is not mandatorily negotiable).

The Association responds that contract provisions regarding the frequency and scheduling of evaluations are mandatorily negotiable. It asserts nothing in the disputed article precludes the College from conducting informal observations or reviews more frequently. The portion that requires a list of those employees scheduled to undergo formal post-tenure reviews to be forwarded to certain individuals by a specific date is procedural. The Association relies on Rumson-Fair Haven Reg. HS Bd. of Ed, P.E.R.C. No. 99-55, 25 NJPER 41 (¶30017 1998) (contract provision setting a maximum number of evaluations is mandatorily negotiable as it did not preclude informal observations) and Brookdale Community College, P.E.R.C. No. 84-84, 10 NJPER 111 (¶15058 1984) (schedule and frequency of evaluations are mandatorily negotiable).

The College replies that C(1)(a) does not simply concern the frequency of formal evaluations nor just provide notice since the provision states that evaluations done for the purpose of determining promotions shall not be substituted for post-tenure evaluations. This, the College argues, interferes with the educational policy goals concerning substituting post-tenure evaluations. The College cites Rutgers III. (matters of education policy are not negotiable).

In Brookdale Community College, P.E.R.C. No. 84-84, we held that contract language concerning the number, frequency, and scheduling of evaluations was procedural and therefore mandatorily negotiable. The provision in C(1)(a) that post-tenure evaluations take place once every five years is mandatorily negotiable. It sets a minimum, but does not prevent the College from conducting more frequent evaluations or informal observations and discussion of teaching performance. See Matawan-Aberdeen Reg. School Dist., P.E.R.C. No. 90-98, 16 NJPER 300 (¶21123 1990), recon. den. P.E.R.C. No. 91-4, 16 NJPER 434 (¶21185 1990), aff'd NJPER Supp. 2d 257 (¶213 App. Div. 1991) (holding mandatorily negotiable clause permitting only one observation of a tenured employee, except that either party could request an additional observation in the event one was unfavorable).

The second sentence of section C(1)(a) is not mandatorily negotiable as it places a restriction on the College's managerial prerogative regarding the use of employee evaluations. The faculty member has an interest in receiving a post-tenure evaluation, but the College has a stronger interest in utilizing the information it receives from the promotional evaluation. To limit the College to only the information from a post-tenure evaluation would significantly interfere with policy determinations.

Section C(E) (8) is procedural and mandatorily negotiable. It provides the faculty member an opportunity to respond to the evaluation prior to it being passed to the next level. The Article does not require a faculty response nor does it prevent the College from proceeding if no response is received.

Article XIV is entitled Faculty Record File; Subsection D.1. is entitled Student Evaluations. Subsection D.1.a. provides:

D. The following procedures are to be used in accordance with the provisions of Article XIII (Professional Evaluation), Part B. Section 3.

1. Student evaluations

a. Student evaluation forms shall be distributed to students in a class by a person, other than the faculty member to be evaluated, chosen by the Department Chairperson and approved by the Academic Vice President [approved by the Department Chairperson or Coordinator]. When the evaluations are completed, that person shall collect them and bring them to the Department Chairperson's office. The forms will be forwarded by the Department Chairperson to the Computer Center for tabulation. Once the evaluations are tabulated, the forms and the summary of the tabulations shall be forwarded to the Department Chairperson. The Department Chairperson shall then sign, date, and give the forms and summary to the evaluated faculty member for placement in his/her record file, together with whatever comments the faculty member wishes to make about any aspect of the student evaluation summaries.

The College argues that the bracketed portion of Article XIV subsection D.1.a. should be removed from the CNA because it has the managerial right to determine how information will be

conveyed and how student evaluations are distributed. The College requests that this Commission replace the language in brackets with its proposed underlined language. The College cites Burlington County College, P.E.R.C. No. 90-13 (a provision regarding promotional procedures is negotiable, but the employer has a prerogative to determine who will convey information regarding those procedures) and Brookdale Community College, P.E.R.C. No. 84-84 (College has the right to "unilaterally determine or change" the identity of its evaluators).

The Association opposes the College's request that the Commission amend the disputed provision to include "chosen by the Department Chairperson and approved by the Academic Vice President." It further asserts that the College's challenge is limited to the designation of who will distribute the forms to students which is procedural. It distinguishes Burlington County College because that case concerned a provision that designated chairpersons to discuss eligibility and qualifications for promotion in academic rank with faculty who shall become eligible for promotion. The Association maintains the disputed provision involves the mere distribution of a pre-written student evaluation which has been approved by the College.

The College replies that the physical distribution of forms may be procedural, but the College has a managerial right, pursuant to Burlington County College, to determine how the

information will be conveyed. The College further responds that the effectiveness of student evaluations as a tool in the evaluation process could easily be compromised if they are distributed improperly.

We find that the disputed language in Article XIV(D) (1) (a) is mandatorily negotiable. The language does not identify who will distribute the evaluation forms, just that it will be a person approved by the Department Chairperson or Coordinator still leaving the discretion to identify the individual to management. This is a procedural task. We decline to add the language sought by the College as it is outside our scope of negotiations jurisdiction. Ridgefield Park. As the employer, the College Academic Vice-President retains his/her prerogative to direct Department Chairpersons and Coordinators in the evaluation process.

Section D.2 of Article XIV is entitled Peer Evaluations and provides, in part, in section a:

Peer evaluations shall be conducted
by a faculty member from the
candidate's department, chosen by the
Department Chairperson and approved
by the Academic Vice President.

The College and Association while in negotiations came to an agreement to remove language that initially was in the contract providing that the faculty member would approve their evaluator. The College now seeks that this Commission add the underlined

language to the article. We decline to add the employer's proposed language as the request is outside our scope of negotiations jurisdiction. Ridgefield Park.

Article XIX is entitled Powers and Organization of the Faculty and provides:

A. Powers and Organization of the Faculty

1. The establishment of requirements for degrees in course, the determination that such requirements have been met in any individual case, are responsibilities vested in the Board. The recommendations regarding the above and recommendations that degrees in course be conferred are responsibilities vested in the faculty.

2.

a. Through appropriate faculty committees, the faculty shall actively participate in the making of recommendations to the President in the areas of:

(1) long range planning;

(2) the use of existing physical resources and the acquisition of additional physical resources; and

(3) priorities in the deployment of financial resources.

b. The President or his or her designee shall comply with reasonable requests from the appropriate faculty committee for information pertinent to the faculty committee's functions as specified in Part A, Section 3.a. of this Article.

3. The advice of the faculty will be solicited with respect to decisions in the areas of curriculum of courses and/or laboratories not described in Part A, Section 1.a. of this Article.

B. Organization

1. All members of the faculty as defined in Article I, Section K of this Agreement are members of the faculty organization and shall have all rights and responsibilities deriving from such membership.

2. The faculty shall have the right to adopt bylaws and other rules and regulations necessary for the carrying out of its duties and responsibilities. These bylaws, rules and regulations shall include but are not limited to:

a. Manner, time, and frequency of its meetings.

b. Voting procedures in meetings and qualifications for voting.

c. Officers of the faculty, the qualifications for, procedures for election of, and duties of such officers.

d. The delegation of powers to and establishment of committees of the faculty as well as qualifications and the manner of election or appointment of members to such committees.

e. Duties, responsibilities, and procedures of committees.

3. The faculty shall have the right to determine the manner in which it shall exercise its powers according to its own rules and regulations provided that it is consistent with

or not otherwise provided for by the terms of this Agreement.

4. Those faculty committees which are required by the provisions of this Agreement shall be established by the faculty. The Faculty Executive Committee shall notify the Academic Vice President of the committees of the faculty and of their membership, as soon as the committees are established.

The College seeks the removal of Article XIX. It asserts Article XIX(A) infringes on its managerial prerogative to determine curriculum as it not only acknowledges the faculty's interest in making decisions, it requires the President to seek the faculty's advice. The College relies on Middlesex County College, P.E.R.C. No. 78-13. 4 NJPER 47 (¶4023 1977) and Rockaway Tp. Bd. of Ed. and Rockaway Education Ass'n, 120 N.J. Super. 564, 569 (App. Div. 1972).

The College argues that Article XIX2(a)(3) is not mandatorily negotiable because matters regarding physical accommodations are not negotiable if they significantly interfere with governmental policy. The College asserts recommendations regarding physical accommodations interferes with its essential duty to spend government funds wisely. The College cites Rutgers III at 116 and 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, 77 (App. Div. 2011).

The College further asserts that the article is preempted as N.J.S.A. 18A:3B-2(d)^{6/} imposes a duty on institutions of higher education to be affordable and accessible. Therefore, Article XIX interferes with governmental policies by giving the faculty authority to control public funds which implicates educational policy. Byram Tp. Bd. of Ed. v. Byram Tp. Ed. Ass'n, 152 N.J. Super. 12 (App. Div. 1977) (teacher facilities are mandatorily negotiable provided a negotiated agreement does not "constitute a capital improvement involving a major budgetary expense," or "significantly interfere with management's educational responsibilities"). The College also asserts N.J.S.A. 18A:3B-6^{7/}

6/ § 18A:3B-2(d) provides:

the institutions of higher education in the State shall be responsible for achieving the Statewide goals of affordability and accessibility for all students, institutional excellence, and effectiveness in addressing the societal and economic needs of the State; and

7/ N.J.S.A. 18A:3B-6 provides:

Powers, duties of governing boards of institutions of higher education

The governing board of each public institution of higher education shall have the following general powers and duties to fulfill its mission and the Statewide goals in cooperation with other institutions and the State coordinating structures:

a. To develop an institutional plan and to determine the programs and degree levels to be offered by the institution consistent with this plan and the institution's programmatic mission;

(continued...)

7/ (...continued)

- b. To have authority over all matters concerning the supervision and operations of the institution including fiscal affairs, the employment and compensation of staff not classified under Title 11A of the New Jersey Statutes, and capital improvements in accordance with law;
- c. To set tuition and fees; however, prior to the date of the adoption of a tuition or fee schedule or an overall institutional budget, and with reasonable notice thereof, the governing board shall conduct a public hearing at such times and places as will provide those members of the college community who wish to testify with an opportunity to be heard;
- d. To establish admission standards and requirements and standards for granting diplomas, certificates and degrees;
- e. To recommend for appointment by the Governor, members to the institution's governing board. The recommendation shall be made with regard to the mission of the institution and the diversity of the community to be served;
- f. To have final authority to determine controversies and disputes concerning tenure, personnel matters of employees not classified under Title 11A of the New Jersey Statutes, and other issues arising under Title 18A of the New Jersey Statutes involving higher education except as otherwise provided herein. Any matter arising under this subsection may be assigned to an administrative law judge, an independent hearing officer or to a subcommittee of the governing board for hearing and initial decision by the board, except for tenure hearings under *N.J.S.18A:6-18*. Any hearings conducted pursuant to this section shall conform to the requirements of the "Administrative Procedure Act," P.L.1968, c.410 (*C.52:14B-1 et seq.*). The final administrative decision of a governing board of a public institution of higher education is appealable to the Superior Court, Appellate Division;
- g. To invest and reinvest the funds of the institution; however, institutions which invest the funds of the institution through the Director of the Division of
- (continued...)

7/ (...continued)

Investment in the Department of the Treasury on or before the effective date of this act shall continue to do so, unless this requirement is waived by the State Treasurer on an annual basis, which waiver shall not be unreasonably withheld;

h. To retain legal counsel of the institution's choosing. State entities may choose representation by the Attorney General; however, as to claims of a tortious nature, the institution shall elect within 75 days of the effective date of this act whether it, and its employees, shall be represented in all such matters by the Attorney General. If the institution elects not to be represented by the Attorney General, it shall be considered and its employees considered employees of a sue and be sued entity for the purposes of the "New Jersey Tort Claims Act" only. The institution shall be required in that circumstance to provide its employees with defense and indemnification consistent with the terms and conditions of the Tort Claims Act in lieu of the defense and indemnification that such employees would otherwise seek and be entitled to from the Attorney General pursuant to *N.J.S.59:10-1 et seq.* and *P.L.1972, c.48 (C.59:10A-1 et seq.)*;

i. To be accountable to the public for fulfillment of the institution's mission and Statewide goals and for effective management of the institution;

j. To submit a request for State support to the Division of Budget and Accounting in the Department of the Treasury and to the commission in accordance with the provisions of this act;

k. To have prepared and made available to the public an annual financial statement, and a statement setting forth generally the moneys expended for government relations, public relations and legal costs;

l. To have prepared an annual independent financial audit, which audit and any management letters regarding that audit shall be deemed public documents.

These powers and duties are in addition to and not a limitation of the specific powers and duties provided for the governing board of each public institution under chapter 64, 64A, 64G, 64E, or 64M of Title 18A of

(continued...)

preempts the Article as it grants the governing body authority over matters concerning the supervision and operations of the College including fiscal affairs.

Finally, the College seeks removal of Article XIX.B asserting that the regulations are not appropriate for inclusion in the CNA as they govern internal rules of the Association.

The Association responds that the provisions of Article XIX cited by the College provide for consultation with employees. Citing State-Operated School Dist. of the City of Paterson, P.E.R.C. No. 2005-9 (finding consultation and notice clause regarding school calendar mandatorily negotiable) and other cases^{8/}, the Association argues that matters of consultation with

7/ (...continued)
the New Jersey Statutes. If the provisions of this section are inconsistent with these specific powers and duties, the specific powers and duties shall govern.

8/ The Association also cites Middletown Tp. Bd. of Ed., P.E.R.C. No. 98-74, 24 NJPER 19 (¶29013 1997) (provision concerning student grading policy not mandatorily negotiable except to the extent it requires consultation with a teacher prior to changing a grade); Burlington County College, P.E.R.C. No. 90-13, 15 NJPER 513 (¶20213 1989) (provision requiring consultation with faculty members regarding teaching assignments is mandatorily negotiable); Plainfield Bd. of Ed., P.E.R.C. No. 88-46, 13 NJPER 842 (¶18324 1987) (teacher consultation on textbook and instructional equipment purchases held mandatorily negotiable); Delaware Tp. Bd. of Ed., P.E.R.C. No. 87-50, 12 NJPER 840 (¶17323 1986) (clause permitting non-binding advice from teachers regarding class size is mandatorily negotiable); Matawan Reg. Bd. of Ed., P.E.R.C. No. 80-153, 6 NJPER 325 (¶11161 1980) (Chairman finds mandatorily negotiable the

(continued...)

employees are mandatorily negotiable, particularly when such consultation is in areas of their professional expertise.

In response to the College's challenge to Article XIXB, the Association asserts the College "misapprehends" the reference to "faculty organization" as set forth in the Article. Referring to the certification of Carl Cuttita, the Association states that the reference is not to the union chapter, but refers to the organization of all members of the full-time instructional and professional library staff created by the Faculty Handbook and Bylaws. The Association asserts the Article is mandatorily negotiable as it does not grant any substantive powers to members of the unit, but describes procedures that will be used in exercising powers which the faculty may otherwise be granted.

The College replies that Articles XIX(A) (2), (3) and (4) must be removed because even though the AAUP asserts they only require advice, the underlying subjects: course degree requirements; long-range planning; the use and acquisition of physical resources; deployment of financial resources; curriculum, subject

8/ (...continued)
establishment of a Faculty Advisory Board that would provide for an advisory forum for the expression of teachers' views regarding classroom discipline); State-Operated School Dist. of the City of Newark and City Ass'n of Supervisors and Administrators, AFSA/AFL-CIO, Local 20, P.E.R.C. No. 2000-51, 26 NJPER 66 (¶31024 1999) and P.E.R.C. No. 2001-10, 26 NJPER 368 (¶31149 2000), aff'd in pt., rev'd in pt. 28 NJPER 154 (¶33054 App. Div. 2001) (provision allowing unit members to recommend an employee to fill a position that has been vacant for a month is mandatorily negotiable).

matter, and methods of instruction are matters of educational policy and are not mandatorily negotiable. As to Article XIX(B), the College asserts the AAUP has recognized that the Faculty Handbook and By-Laws are internal AAUP documents. The College cites to the Preamble of the Faculty Handbook and Bylaws which it alleges recognizes that its provisions are enacted by the faculty of the College "in accordance with Article XIX 'Powers and Organization of the Faculty' in the collective negotiations agreement." The College argues that Article XIX(B) should not be in the agreement as the Handbook and Bylaws are a means for the AAUP to assert control over managerial prerogatives without including them in the agreement and since the article incorporates these documents, they should be stricken from the agreement.

The Association responds that the Article XIX(A) is advisory in nature and clearly vests the Board with the authority to make determinations. The Article also does not grant the faculty authority to control aspects of the overall educational policies. It provides a process for non-binding input. As to Article XIX(B), the Association stresses that it has filed a certification that the Handbook and By-Laws are documents approved by the College. The substantive rights embodied in the Faculty Handbook and By-Laws were granted to the faculty voluntarily by the College in its exercise of its managerial

prerogative as incorporated into Article XIX(B). The Association notes the Commission has long recognized that, in the context of higher education, there is a unique juxtaposition system of two concepts, collegiality and collective negotiations. Relying on Rutgers, the State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976)^{9/}, the Association states that the present College administration may not have the same commitment to collegiality and shared governance as that of previous administrations, but it does not equate that the faculty acted unilaterally when the shared governance structure was established and subsequently modified.

Article XIX(A)1-2B is mandatorily negotiable as it only provides for faculty committees to make recommendations to the President and for the President to comply with reasonable requests for information from faculty committees. It does not restrict the College's statutory powers or managerial prerogatives. Article XIX(A)3 is not mandatorily negotiable as it requires the College to solicit the advice of the faculty prior to decisions being made in the areas of curriculum of courses and/or laboratories which infringe on the College's managerial prerogatives.

Article XIXB is not mandatorily negotiable. We have recognized that in the higher education setting, a system of

^{9/} Hereinafter "Rutgers I".

collegiality has developed. Collegiality shares or delegates certain functions of management to faculty members. Rutgers I and II. However, the concept of collegiality does not make mandatorily negotiable those matters which are otherwise not mandatorily negotiable. The College has not presented facts to establish that the faculty organization infringes on its managerial prerogative. The Association has submitted a certification establishing that the faculty organization is not a union organization. We accept that the faculty organization is not an arm of the Association. However, we still find that the College is not required to negotiate with the Association regarding its existence or organization as it does not concern grievances or terms and conditions of employment. Middlesex County College.^{10/}

Article XX is entitled Departments. Subsection A. provides:

No new department shall be created,
nor any existing department
abolished, merged with any other
department or divided into two (2) or
more departments, without prior
notice and discussion with the
Departmental Coordinating Committee.

The College argues that Article XX(A)(1) requires it to notify and discuss any decisions to reorganize educational departments with the Departmental Coordinating Committee prior to

^{10/} We will not speculate on how our decision impacts other portions of the Agreement.

executing a reorganization. Citing Dunnellen Bd. of Ed. v. Dunellen Ed. Ass'n, 64 N.J. 17 (1973), the College asserts that the requirements of the Article interferes with its prerogative to create, abolish, merge or alter departments.

The Association responds that members of the faculty work through existing departments, serve as chairs of departments, and serve on departmental committees. It asserts that the article does not interfere with the College's prerogatives as it only requires "prior notice and discussion" before departments are created, abolished, merged, or split." While conceding that the College retains the ultimate authority to organize the departmental system, it argues the elimination or reorganization of departments has the potential to affect job security, teaching assignments, and other terms and conditions of employment. The Association notes the discussion requirement is not onerous and the College has not alleged that this provision has interfered with the exercise of its prerogatives.

The College replies that it recognizes that reorganizations may have an impact on the faculty and will endeavor to provide notice, if possible, for these decisions. However, making it a requirement infringes on its managerial authority to determine educational policy.

Article XX(A) (1) is not mandatorily negotiable as written. The decision to create, abolish, or reorganize a department is a

managerial prerogative of the College. Jersey City v. Jersey City POBA, 154 N.J. 55 (1998). As written, Article XX(A) (1) implies the College may not exercise its prerogative without prior notice and discussion which infringes on its policymaking power. Further, any negotiable impact issue flowing from the College's decision would require discussion with the majority representative of the faculty affected and not the Departmental Coordinating Committee.^{11/}

Article XX, subsection B. provides:

A faculty member may be reassigned by the Academic Vice President, from one department to another in the event that his or her scholarly preparation, teaching assignments, preference and interests would be better served through such a reassignment. Such reassignments shall be made in consultation with the faculty member and the department affected. In the event that a department or the faculty member objects to such reassignment, they may submit their objection to the Department Coordinating Committee which, in turn, shall make a written recommendation, with as much specificity as possible, to the President for decision.

The College challenges the negotiability of the underlined portion of Article XX(B). It asserts the provision infringes on its prerogative to assign staff to certain courses. Citing Dunellen Bd. of Ed., the College asserts that permitting faculty

^{11/} If the language was limited to prior notice, it might be mandatorily negotiable.

to reject certain assignments prevents it from assigning the faculty member it deems most qualified.

The Association responds that the prerogative to assign the most qualified candidates to specific positions is not in dispute. The provision only allows a faculty member who is being involuntarily reassigned to a new department to have that decision reconsidered. Relying on Ridgefield Park, the Association asserts that a reassignment affects an employee's work and welfare and that permitting the employee to ask for reconsideration is a minimal burden since the College's ultimate decision-making authority is not limited.

The College replies that it is not seeking to deny a faculty member the right to formalize their objection to an assignment, but the procedure to be used is not appropriate for negotiations as it infringes on its ability to make assignments.

Article XX(B) is mandatorily negotiable. Transferring or reassigning a public employee based on an assessment of relative qualifications is preeminently a policy determination. However, a public employee has an interest in their assignment. On balance, we discern no significant interference to the College's ability to assign qualified employees if they are permitted to procedurally object to the assignment. Article XX(B) protects the employer's right to be the decision maker and only provides the employee an opportunity to be heard.

Article XX, subsection D provides:

D. Those decisions which by the terms of this Agreement are required to be made by a department shall be by a majority vote of faculty members in the department.

The College seeks the removal of Article XX(D) asserting that it has no objection to the applicability of this provision to decisions rightfully belonging to the faculty, but to the extent this Article can be applied to decisions reserved solely to management, the provision is not mandatorily negotiable.

The Association responds that, as written, the Article only provides for the decisions agreed to in the contract and therefore will not infringe on management decisions.

The College replies that this provision is an internal procedure that is not appropriate for collective negotiations and should be removed similar to the 30 provisions the parties have agreed to remove in negotiations.

Article XX(D) is mandatorily negotiable. Absent a showing that this Article has implicated a prerogative or been exercised for a procedure outside the CNA, the Article limits itself to the parties' procedures in the CNA which concern mandatorily negotiable subjects.

Article XX, subsection M provides:

1. A joint committee called the Academic Coordinatorship Compensation Review Committee, consisting of three (3) faculty members appointed by the Executive Committee of the Union County College Chapter of the

American Association of Professors and three (3) administrators appointed by the College shall be formed. After the first academic year (1994-1995), the number of committee members shall be reduced to two (2) faculty members and two (2) administrators.

2. The Academic Coordinatorship Compensation Review Committee will be chaired in alternate academic years by a faculty member appointed by the AAUP Executive Committee and an administrator appointed by the College President. Every member of the committee will have voting privileges.

3. The charge of the Committee is to annually review any requests from academic coordinators or an appropriate academic officer of the College for changes in the amount of overload or release time assigned to their coordinatorships. Beginning in 1994, the committee will also be charged with annually reviewing and stating the criteria used in making their recommendations concerning the amount of compensation for coordinatorships. All requests shall be accompanied by a written job description for the coordinatorship.

4. The Committee shall set a schedule for receipt of requests for changes and shall determine the documentation required to decide questions concerning academic coordinatorships. This information shall be communicated in a timely fashion annually to appropriate administrators, department chairs, and academic program coordinators.

5. Final approval of the Committee's recommendations shall reside with the Vice President for Academic Affairs.

The College argues that these provisions must be removed from the CNA because they require it to assign administrators to "pre-negotiate" potential terms and conditions of employment with

the Academic Coordinatorship Compensation Review Committee that will have "voting privileges." It asserts that this provision infringes upon the College's managerial prerogative to make its own determination whether to add duties and/or make assignments even if the assignment will result in tasks that require more time. The College relies on Monroe Tp. Bd. of Ed., P.E.R.C. No. 93-9, 18 NJPER 428 (¶23194 1992); Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982); and Burlington Cty. College.

The Association responds that provisions addressing workload and compensation intimately and directly affect the work and welfare of employees. It asserts this provision provides for a committee consisting of chapter members and members appointed by the College who make non-binding recommendations related to issues of compensation which is a mandatorily negotiable subject. It opposes the College's characterization of this provision as providing for release time in furtherance of teaching duties because coordinators are given release time (lower class loads) to account for their administrative duties assigned by the College administration. Cuttita certifies that the release time is provided pursuant to Article XXIX.A.1.c(4)^{12/} of the agreement; the agreement does not specify the amount of release time a

^{12/} The AAUP also points out the Chairs have the same provision in the same CNA, but the College has not challenged it.

coordinator receives; in actuality, a coordinator and administration reach agreement as to release time; and no employee is forced to be a coordinator.

The Association cites Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 95-15, 20 NJPER 334 (¶25175 1994) recon. den. P.E.R.C. No. 95-16, 20 NJPER 378 (¶25190 1994). The Association distinguishes Monroe Tp. Bd. of Ed. asserting the Commission found that release time was mandatorily negotiable in that case, but the specific provision in issue specified the nature of training and professional development programs that the release time would be used for. Here, the Association maintains that the College has the right to assign specific duties to be performed by coordinators. The recommendations of the committee are non-binding and concern changes in the amount of release time.

The College replies that the provision must be removed as there is no limitation permitting the College to decline to assign administrators to the Committee if the College determines it is unnecessary; the AAUP may internally form its own committee to make recommendations; and the AAUP has conceded that the portion of XX(M) (4) which grants the Committee voting rights with respect to the criteria for evaluating teaching staff that is used to make decisions regarding coordinators is not mandatorily negotiable. The College responds that Old Bridge Tp. Bd. of Ed. concerns the actual procedures utilized in reviewing release time

requests and not the creation of a discussion group to make recommendations.

The AAUP responds that the provision does not infringe on the College's prerogative to make determinations about whether to add additional duties because the plain language of the provision shows that it does not limit the College's right to make assignments, but rather allows a committee to make recommendations concerning whether duties that the College has chosen to assign warrant an increase in compensation. The AAUP further responds that it has not conceded any portion of the article is non-negotiable.

Article XX(M) is not mandatorily negotiable. The College cannot be required to assign administrators to the Committee unless it chooses to do so. Rutgers I. If the College agrees to continue the Committee, the matters of compensation and leave time for coordinators are mandatorily negotiable. Byram Tp. Bd. of Ed. v. Byram Tp. Ed. Ass'n, 152 N.J. Super. 12 (App. Div. 1977) (work hours and work load are mandatorily negotiable); Monroe Tp. Bd. of Ed. (Release time is mandatorily negotiable, but nature of the duties performed during the release time is a managerial prerogative). The final paragraph (5) is not mandatorily negotiable as it identifies what member of management will approve the requests which significantly interferes with the College's policymaking power.

Article XXIX is entitled Faculty Workload; section A. is entitled Full-time Members of the Instructional Staff.

Subsections A.4.c.(7) and (9) provide:

(7) A faculty member shall not be required to utilize more than one sending site for a particular course, unless s/he chooses to do so. A faculty member shall not be required to travel to any receiving site to which the course is being transmitted.

(9) A faculty member may choose to teach a distance learning course as part of their base load or as an overload.

The College argues that these provisions must be removed from the CNA because public employers have the managerial prerogative to add duties and time to the current duties of staff members. It asserts that the College is not required to negotiate over scheduling of classes and that it has the managerial authority to develop a schedule that meets its educational policy objectives.

Citing Burlington County College, P.E.R.C. No. 2010-38, 35 NJPER 439 (¶144 2009), the Association responds that while the assignment of on-line courses is not negotiable, severable terms and conditions of employment are mandatorily negotiable. In regard to Article XXIX.A.4.c(7), the Association asserts it seeks to reasonably limit the travel time required of faculty members who teach on-line courses. This equates to workload which is mandatorily negotiable. The Association relies on Middletown Tp. Bd. of Ed., P.E.R.C. No. 98-74; State of New Jersey (Dept. of

Transportation), P.E.R.C. No. 98-52, 23 NJPER 608 (¶28299 1997); and Belleville Bd. of Ed., P.E.R.C. No. 97-11, 22 NJPER 320 (¶27162 1996).

The Association further argues that Article XXIX.A.4.c(9) is specifically limited to the manner in which faculty are compensated for teaching on-line courses. Citing Article XXIX.A.1 of the parties' CNA that defines a full-time teaching load as 15 credit hours or the equivalent, the Association asserts that faculty who teach in excess of 15 credit hours are compensated with "overload compensation" which is similar to overtime. Thus, citing Woodstown-Pilesgrove Reg. School Dist. Bd. of Ed v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582, 589 (1980) and Burlington Cty. College, P.E.R.C. No. 90-13, the Association asserts the clause refers to the relationship of compensation to workload which is mandatorily negotiable. The Association denies the provision interferes with the College's determination as to who will teach on-line classes.

The College replies that it has a managerial prerogative to add duties and time to the current duties of staff members. And, it is not required to negotiate over the scheduling of classes as it has a managerial prerogative to develop a schedule that meets its educational policy objectives. The College cites Millville Tp. Bd. of Ed., P.E.R.C. No. 2005-13, 30 NJPER 354 (¶115 2004); Elizabeth Bd. of Ed., P.E.R.C. No. 2004-9, 29 NJPER 389 (¶123

2003); and Morris Hills Reg. Bd. of Ed., P.E.R.C. No. 2012-12, 38 NJPER 153 (¶43 2012). The College further cites Burlington County College, arguing that Article XXIX.A.4.c(7) gives the faculty member the power to choose where class sites will be held leaving no flexibility to the College to determine sending sites and assigning faculty. It alleges this provision does not permit a deviation for special qualifications; does not contemplate or restrict negotiations with respect to compensation; and is a barrier to making assignments. As to Article XXIX.A.4.c(9), the College argues it impermissibly restricts its authority to assign the most qualified faculty members. The College disputes the Association's characterization of a compensation-only provisions as the article does not address compensation.

Article XXIX.A.4.c(7) is not mandatorily negotiable. A faculty member does have an interest in not traveling excessively between work sites. However, that interest is outweighed by the College's interest in assigning faculty to the work site it deems most effective to teach the class. As written, the article leaves the decision to the faculty member and therefore significantly interferes with the educational policymaking powers of the College. Middlesex Cty. College, P.E.R.C. No. 78-13; Burlington Cty. College, P.E.R.C. No. 2010-38.

Article XXIX.A.4.c(9) is mandatorily negotiable. We accept the Association's explanation that this provision clarifies that

a distance learning course can count towards a faculty member's base load or overload for compensation purposes. The article is an overtime provision which is mandatorily negotiable as long as it is not preempted by statute or regulation. State of New Jersey (Dept. of Corrections), P.E.R.C. No. 89-111, 15 NJPER 275 (¶20120 1988), aff'd 240 N.J. Super. 26 (App. Div. 1990); State of New Jersey (State Troopers), P.E.R.C. No. 86-139, 12 NJPER 484 (¶17185 1986). The College retains the prerogative to assign the faculty member of its choosing to teach the courses.

Article XXIX is entitled Faculty Workload; section A is entitled Full-Time Members of the Instructional Staff.

Subsection A.5.b.(3) provides:

No courses shall be canceled without direct consultation with the Department Chairperson.

The College argues that Article XXIX subsection A.5.b.(3) must be removed because it infringe on its managerial prerogative to set curriculum and educational policy by requiring approval from the Department Chairperson. The College cites Elizabeth Bd. of Ed., P.E.R.C. No. 2004-9 and Morris Hills Reg. Bd. of Ed., P.E.R.C. No. 2012-12, asserting it is not required to negotiate over class scheduling and retains the managerial authority to develop a schedule that meets educational policy objectives.

The Association responds that the provision is clear that approval is not required - only consultation. The Association

concedes that the timing and nature of the consultation are matters of managerial discretion. It further asserts the consultation is important for the chair to do his/her job as he/she may have relevant information about curriculum needs, course sequencing, and other matters.

Article XXIX(A) (5) (b) (3) is not mandatorily negotiable. The College has an indisputable right to cancel courses. Gloucester County College, P.E.R.C. No. 2006-7, 31 NJPER 247 (¶95 2005). As written, Article XXIX(A) (5) (b) (3) implies that the College may not exercise its prerogative to cancel without prior consultation with the department chair which substantially limits its policymaking power.

Article XXX is entitled Reduction in Force and Seniority. Subsection C.1.a. provides:

a. If a faculty member desires to obtain qualification to teach in areas other than his/her own discipline, the faculty member will submit a plan for undertaking such retraining to the Academic Vice President for his or her review and approval. The Academic Vice President will consult with the Department Chairperson and credentials committee of the department to which the faculty member seeks admittance. If the Vice President for Academic Affairs judges the plan to be satisfactory and the area in which the faculty member(s) wish to be retrained is appropriate to the needs of the College, the College will agree to fund the retraining effort of the faculty member(s) while following said plan.

The College argues that the underlined provision's requirement that the Academic Vice President consult with the Department Chairperson and the credentials committee infringes on the College's managerial prerogative to assign employees as it deems appropriate. The College cites Ridgefield Park asserting it cannot be required to consult with the Department Chairperson or Credentials Committee prior to determining whether an employee's proposal/application for retraining should be approved.

The Association distinguishes Ridgefield Park asserting that case acknowledged the interest employees have in transfers, but the provision in that case was only found non-negotiable because it set specific criteria that management was required to consider in making transfer decisions. It argues that consultation with faculty members of a department before the College decides whether or not to fund a retraining program does not impinge on the College's ultimate authority to determine whether the employee is qualified. The Association cites City of Jersey City, P.E.R.C. No. 85-78, 11 NJPER 84 (¶16037 1985) arguing that in this layoff provision, the Commission and courts have recognized that nothing more directly and intimately affects a worker than whether they have a job.

The College replies that requiring the Academic Vice President to consult with the Chairperson and committee infringes

on its prerogative to assign employees. The College argues that the Association has not explained how requiring consultation would provide any benefit to the employee facing layoff or possible re-employment. It asserts the article infringes on a hiring decision that is not subject to negotiations under Dunellen.

Article XXIX.C.1.a is not mandatorily negotiable. First, the College is not required to have the Academic Vice President consult with anyone prior to the College making a determination to fund retraining. Second, the only logical reason to have the Department Chairperson and the credentials committee consult with the Academic Vice-President is to make a recommendation on the application. As the Court found in Rutgers III, a committee that makes promotion recommendations - or in this case a hiring/training recommendation- engages in advocacy and "[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.

Article XXXIII is entitled General Working Conditions.

Section N. provides:

N. The appropriate Academic Officer will consult with departmental chairpersons involved regarding scheduling of large lecture sections prior to the construction of the master schedule.

The College argues that this provision infringes on its managerial prerogative to develop curriculum and schedule classes because it requires the College to consult with the appropriate departmental chairperson about scheduling large lecture classes. The College cites Elizabeth Bd. of Ed. and Morris Hillg Reg. Bd. of Ed., alleging that it has a managerial prerogative to schedule classes as it deems appropriate and cannot be required to consult with departmental chairpersons. The College further asserts that this article infringes on its prerogative to set class size which is an issue of educational policy. The College cites Winslow Tp. Bd. of Ed., P.E.R.C. No. 2000-95, 26 NJPER 280 (¶31111 2000) and Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 95-15, 20 NJPER 334 (¶25175 1994) (class size is not mandatorily negotiable). The College compares this provision to the one requiring mutual agreement for a remedial class to be taught in mass lecture format in Essex Cty. College, which we found not mandatorily negotiable. P.E.R.C. No. 2007-46, 33 NJPER 19 (¶8 2001).

The Association responds that it is not challenging the College's prerogative to schedule large lecture classes, it is merely requiring the College to consult first with the chairpersons responsible for the departments in which the courses are being considered. Cuttita certifies that the chairs likely have knowledge regarding course conflicts and pedagogical advantages and disadvantages for the format. The Association

cites Burlington Cty. College, P.E.R.C. No. 90-13 and Plainfield Bd. of Ed, P.E.R.C. No. 88-46, asserting that provisions requiring mere consultation that do not meaningfully impinge on management's ability to exercise its prerogatives, especially in areas where those to be consulted have relevant expertise, are mandatorily negotiable. The Association distinguishes the cases cited by the College asserting that they involved provisions that placed limits on the exercise of prerogatives. The Association asserts nothing in this article limits the College's prerogative to schedule courses.

Article XXXIII.N is not mandatorily negotiable. As written, it requires consultation prior to the College exercising its prerogative to schedule a large lecture session. This article significantly interferes with the College's prerogatives to determine class size, how curriculum will be delivered, and who will make that determination. Essex Cty. College.

ORDER

The following provisions are mandatorily negotiable:

Articles: XIC.3.c; XIIA.1.c;
XIIIC.1.a -first sentence;
XIIIC(E) (8); XIV(D) (1) (a); XIX(A)1-
2B; XX(B); XX(D); XXIX.A.4.c(9)

The following provisions are not mandatorily negotiable:

Articles: I.X; XII(d); XIII(C) (1) (a) -
second sentence; XIX(A) (3); XIX(B);
XX(A) (1); XX(M); XXIX(A) (4) (c) (7);
XXIX(A) (5) (b) (3); XXIX(C) (1) (a);
XXXIII(N).

BY ORDER OF THE COMMISSION

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

ISSUED: October 30, 2014

Trenton, New Jersey