

P.E.R.C. NO. 2016-14

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Petitioner,

-and-

Docket No. SN-2015-031

COUNCIL OF NEW JERSEY STATE
COLLEGE LOCALS, AFT,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the State of New Jersey's request for a restraint of binding arbitration of a grievance filed by the Council of New Jersey State College Locals, AFT. The grievance challenges the State's refusal to negotiate over procedures relating to tenure-upon-hire. Finding that N.J.S.A. 18A:60-16(b) requires discussions and, where appropriate, negotiations on the subject of procedures for granting tenure-upon-hire, the Commission holds that the issue is not preempted and is therefore arbitrable.

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, John J. Hoffman, Acting Attorney
General (Nicole M. DeMuro, of counsel)

For the Respondent, Mets Schiro & McGovern, LLP,
attorneys (Kevin P. McGovern, of counsel and on the
brief)

DECISION

On October 20, 2014, the State of New Jersey (State) filed a scope of negotiations petition seeking restraint of binding arbitration of a grievance filed by the Council of New Jersey State College Locals, AFT (Council). The grievance asserts that the State violated the parties' collective negotiations agreement (CNA) when it refused to negotiate over procedures relating to tenure-upon-hire.

The State filed briefs, exhibits, and the certification of the Chief Executive Officer of the New Jersey Association of State Colleges & Universities. The Council filed a brief,

exhibits, and the certification of the President of the Council. These facts appear.

The Council represents faculty unions - including faculty, professional staff, and librarians - at nine State colleges and universities. The State and the Council are parties to a CNA in effect from July 1, 2011 through June 30, 2015. The grievance procedure ends in binding arbitration.

On January 17, 2014, the State Legislature approved P.L.2013, c.235, (N.J.S.A. 18A:60-16), an amendment to the education law. N.J.S.A. 18A:60-16(b) provides, in pertinent part:

The board of trustees may, upon the hiring of a new faculty member, grant tenure to the member if he was previously under tenure at an accredited four-year institution of higher education. **A State college shall develop procedures regarding the granting of tenure upon hiring to a new faculty member who was previously under tenure at an accredited four-year institution that are consistent with decisions for tenure at the State college, and shall include faculty members in the development of the procedures.**

[emphasis added]^{1/}

According to the Council President, unions representing faculty at several State colleges and universities sought to enter into negotiations over the development of procedures for

^{1/} N.J.S.A. 18A:60-16 became effective July 16, 2014.

tenure-upon-hire after N.J.S.A. 18A:60-16 was enacted. They contend that those requests were either ignored or rejected. On March 31, 2014, the Council filed a grievance. The Council's grievance was denied at the departmental level. This petition ensued.

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 contract language in question, only its 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, 404-405 (1982) states:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

Where a statute or regulation is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically and comprehensively in order to foreclose otherwise required employer-employee negotiations on the subject matter. Council of N.J. State College Locals, NJSFT-AFT/AFL-CIO v. State Bd. of Higher Ed., 91 N.J. 18, 30 (1982); Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

The question before us is whether N.J.S.A. 18A:60-16(b) preempts negotiations over procedures relating to tenure-upon-hire. We find that it does not.

We have repeatedly held that an educational employer has a non-negotiable managerial prerogative to review the academic qualifications of tenure candidates and to decide whether to grant tenure. New Jersey Institute of Technology, P.E.R.C. No. 83-125, 9 NJPER 215 (¶14101 1983). Although evaluation and promotion criteria - including those related to tenure - are not mandatorily negotiable, related procedures are mandatory subjects

for collective negotiation. Bethlehem Tp. Bd. of Ed., 91 N.J. at 46-47; see also 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); Bd. of Ed. v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554, 558 (App. Div. 1980). Even if a proposal may be labeled procedural, however, it is still non-negotiable if it significantly interferes with a managerial prerogative. State of New Jersey (Dep't of Human Svcs., Greystone Park Psychiatric Hospital), P.E.R.C. No. 89-85, 15 NJPER 153 (¶20062 1989).

We have also held that bargaining units have the right to engage in collective negotiations for terms and conditions of employment related to new hires. See Somerset Cty., P.E.R.C. No. 98-24, 23 NJPER 505 (¶28245 1997); see also Belleville Ed. Ass'n v. Belleville Bd. of Ed., 209 N.J. Super. 93 (App. Div. 1986); County of Union and PBA Local No. 108, P.E.R.C. No. 2013-4, 39 NJPER 83 (¶32 2012), aff'd 40 NJPER 453 (¶158 2014).

The State argues that the plain language of N.J.S.A. 18A:60-16(b) and its legislative history clearly preempt all issues involving the development of tenure-upon-hire procedures from negotiations. The State also argues that it has a non-negotiable managerial prerogative to make all hiring decisions and further, because all issues involving tenure-upon-hire procedures are pre-employment, they are not terms and conditions of employment.

The Council responds that negotiating over procedures will have no effect on the colleges' or universities' right to grant or deny tenure as they see fit. The Council argues that N.J.S.A. 18A:60-16(b) acknowledges that procedures relating to tenure are mandatorily negotiable, and that the legislative history^{2/} indicates that negotiations were intended. The Council further maintains that unions have the right to bargain for terms and conditions of employment relating to new hires.

The State replies that the express limitations on the procedures that may be developed under N.J.S.A. 18A:60-16(b) restrict institutional discretion and therefore preempt negotiations over procedures relating to tenure-upon-hire. The State also maintains that because the development of tenure-upon-hire procedures only relate to potential employees, any and all

^{2/} The legislative history related to P.L.2013, c.235 indicates that the Legislature sought to require faculty involvement and/or consultation regarding the development of procedures for tenure-upon hire. As originally introduced, both A-1165 and S-1160 simply provided that individual boards of trustees at State colleges and universities could grant tenure-upon-hire if a candidate was previously under tenure at another accredited institution of higher learning. A-1165 and S-1160 were subsequently amended to require, with respect to decisions to grant tenure-upon-hire, "appropriate faculty consideration consistent with decisions for tenure at the State college." A-1165 and S-1160 were amended again to remove the "appropriate faculty consideration" provision set forth above and replace it with the language ultimately adopted in N.J.S.A. 18A:60-16(b).

procedures relating to tenure-upon-hire are pre-employment and not subject to negotiations.

We find the reasoning in Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 47-48 (1982) to be applicable in this matter. As we read the subject provision, it is clear that the "shall include faculty members in the development of the procedures" language was intended to encourage discussion. Therefore, rather than restricting the channels of communication, this provision actually requires discussion and, where appropriate, negotiations on the subject of procedures for granting tenure-upon-hire. Id.

The statute's language establishes no specifics with respect to tenure-upon-hire other than to require a dialogue between administrators and faculty members. Whereas a preempting statute must be complete and say all that there is to be said, N.J.S.A. 18A:60-16(b), in contrast, does not.

Accordingly, the State's request to restrain arbitration is denied.

ORDER

The request of the State of New Jersey for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: September 24, 2015

Trenton, New Jersey