

P.E.R.C. NO. 2016-72

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
WILLIAM PATERSON UNIVERSITY,

Petitioner,

-and-

Docket No. SN-2016-021

COUNCIL OF NEW JERSEY STATE
COLLEGE LOCALS, AFT, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, the request of the University to restrain binding arbitration of a grievance filed by the Council. Finding that the University has non-negotiable managerial prerogatives to determine how and the methods by which to train employees, the Commission restrains arbitration of the University's decision to require online training on preventing harassment and discrimination. However, finding that negotiating over compensation for the training would not impair the managerial prerogatives implicated, the Commission declines to restrain arbitration over the compensation issue.

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, Robert Lougy, Acting Attorney
General of New Jersey, attorneys (Steven Hahn, of
counsel and on the brief)

For the Respondent, Bennett Muraskin, Staff
Representative

DECISION

On September 29, 2015, the State of New Jersey, William Paterson University (University) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Council of New Jersey State College Locals, AFT, AFL-CIO (Council). The grievance alleges that the University violated the parties' collective negotiations agreement (CNA) by failing to negotiate over compensation for adjunct faculty participation in two online training courses.

The parties have filed briefs and exhibits. The University submitted the certifications of Chief Diversity Officer Michelle

Johnson, Associate Vice President for Human Resources John Polding, and Associate Provost for Academic Affairs Stephen Hahn. The Council filed the certifications of Susanna Tardi, President of Local 1796 and a University professor, and of Vincent Vicari, an adjunct faculty member. These facts appear.

The Council represents adjunct faculty who teach credit courses at the University during the regular academic year. The Council and the University are parties to a CNA in effect from July 1, 2011 through June 30, 2015. The grievance procedure ends in binding arbitration.

The provision of the CNA that the Council alleges was violated, Article XXIII(A), states:

This Agreement incorporates the entire understanding of the parties on all matters which were the subject of negotiations. During the term of this Agreement neither party shall be required to negotiate with respect to any such matter except that proposed new rules or modification of existing rules including local rules governing working conditions shall be presented to the UNION and negotiated upon the request of the UNION as may be required pursuant to the New Jersey Employer-Employee Relations Act, as amended.

On November 14, 2014, Chief Diversity Officer Johnson notified University employees that the University had partnered with a company to provide two online training courses on preventing harassment and discrimination and that employees had to complete both courses within forty-five days of receipt of a

registration email from the company. By email sent on December 5, 2014, Johnson reminded employees that they were required to complete the online training.

Between December 5, 2014 and January 9, 2015, 215 adjuncts had completed both courses. Time spent online taking the discrimination course averaged 45 minutes; 39 minutes for the harassment course. Employees could pause and resume the courses at their convenience.

By email sent to John Polding on January 8, 2015, Donna Fengya, Council Vice President of Negotiations, asked to be provided dates and times when administration would be available to negotiate with the Council over compensation for adjuncts to complete the online courses. Polding responded the next day, advising Fengya that he would notify adjunct faculty that completion of the online program would not be currently required and, therefore, there would be no need to explore dates for negotiations. On the same day, Polding sent an email to adjunct faculty members advising that they would not be required to complete the two online courses and that administration would evaluate other methods by which to transmit important information to them.

Johnson certifies that employees had been required to take the courses on account of the University's obligation to educate its employees on prohibited conduct in the workplace and academic

environment under state and federal law. Similarly, Polding certifies that the training was intended to satisfy the University's obligations under Title IX, 20 U.S.C. §1681 et seq. and N.J.A.C. 4A:7-3.1.

Polding also certifies that adjuncts are provided extra compensation for training mandated by the University, but not for training that is legally required, such as annual ethic briefings. Hahn certifies that adjunct faculty are not provided additional compensation for performing non-teaching tasks that are integral to teaching, and that these tasks include grading student work, posting grades, holding office hours, and responding to student inquiries.^{1/}

On March 19, 2015, the Council filed a grievance alleging that the University violated Article XXIII(A) by failing to negotiate over compensation for adjunct faculty participation in the online training. On May 15, the University denied the grievance. This petition ensued.^{2/}

The Commission's inquiry in a scope proceeding is quite narrow. We are addressing the abstract issue of whether the subject matter in dispute is within the scope of collective

1/ Professor Tardi and Adjunct Vicari deny that adjuncts have assigned office hours. Whether or not they do is not material to our inquiry.

2/ On November 4, 2015, the University filed an application for interim relief, which the Commission Designee denied on November 20, 2015 after oral argument.

negotiations. We do not consider the merits of the grievance or whether the contract provides a defense to the employer.

Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 154 (1978).

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].

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).

The University argues that compensation for the training courses is non-negotiable because it is preempted by N.J.A.C. 4A:7-3.1(1) and because the dominant issue is a compelling

government goal that only has a de minimis effect on the adjunct faculty's employment.

The Council replies that the underlying issue in this case is whether compensation for adjunct faculty required to take two online training courses is negotiable. It maintains that the issue is mandatorily negotiable.

N.J.A.C. 4A:7-3.1 sets forth the State policy prohibiting harassment and discrimination in the workforce. Subsection "1" of the regulation provides:

All State agencies shall provide all new employees with training on the policy and procedures set forth in this section within a reasonable period of time after each new employee's appointment date. Refresher training shall be provided to all employees, including supervisors, within a reasonable period of time. All State agencies shall also provide supervisors with training on a regular basis regarding their obligations and duties under the policy and regarding procedures set forth in this section.

For a statute or regulation to preempt negotiation, it must expressly and comprehensively set particular terms and conditions of employment such that nothing is left to the discretion of the public employer. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978). While N.J.A.C. 4A:7-3.1 clearly obligates the University to train new employees on the anti-discrimination policy, it is completely silent with regard to compensation. Since the regulation neither expressly nor comprehensively sets

the issue of compensation, it does not preempt negotiation over that issue.

We have consistently held that a public employer has a non-negotiable prerogative to require employee training. See, e.g., Orange Tp., P.E.R.C. No. 90-119, 16 NJPER 392 (¶21162 1990); Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987); Millburn Tp., P.E.R.C. No. 84-110, 10 NJPER 224 (¶15113 1984). That prerogative extends to the determination of how to train employees. See, e.g., Borough of Dunellen, P.E.R.C. No. 95-113, 21 NJPER 249 (¶26159 1995); Monroe Tp. Bd. of Ed., P.E.R.C. No. 93-9, 18 NJPER 428 (¶23194 1992); City of Long Branch, P.E.R.C. No. 92-102, 18 NJPER 175 (¶23086 1996); Middlesex Cty Bd. of Social Services, P.E.R.C. No. 92-93, 18 NJPER 137 (¶23065 1992).

The University's failure to train employees on sexual harassment and other forms of discrimination could expose it to liability for discrimination. Gaines v. Bellino, 173 N.J. 301, 320 (2002) (admission by employees that they had not received sexual harassment training among the evidence that prevented grant of summary judgment to employer on its affirmative defense to vicarious liability). Thus, as to the training requirement, the University's obligation to ensure a workplace and academic environment free of discrimination is the dominate concern. It therefore has a non-negotiable managerial prerogative to require

adjuncts to complete online courses in preventing harassment and discrimination.

However, we have also consistently held that employees may negotiate over whether they will be compensated during training, how much compensation they will receive, and whether their compensation will be effectively reduced by having training costs imposed on them. See, e.g., Mine Hill Tp.; Middlesex Cty Bd. of Social Services, Franklin Tp., P.E.R.C. No. 86-83, 12 NJPER 98 (¶17037 1985); City of Newark, P.E.R.C. No. 86-52, 11 NJPER 703 (¶16242 1985); Hackettstown, P.E.R.C. No. 82-102, 8 NJPER 308 (¶13136 1982).

Negotiating over compensation for training on preventing harassment and discrimination, to the extent adjuncts are not already compensated for such non-teaching duties, would not impair the managerial prerogatives implicated here.

As for the University's argument that the training time was so de minimis that any resultant workload increase is not arbitrable, we have not used the de minimis nature of an alleged contract deviation as a basis for restraining arbitration over a severable compensation issue. For instance, in Hoboken Bd. of Ed., P.E.R.C. No. 93-14, 18 NJPER 444 (¶23199 1992), a decision cited by the University in its brief, we restrained arbitration over the board's unilateral change in starting and ending hours of certain teaching staff members, but we noted that the change

did not increase the length of their workday and that employees have the right to negotiate over how much they are paid. We did not resolve the parties' respective arguments on whether the change in hours was de minimis or not.

We do not determine whether adjunct faculty had any workload increase as a result of taking the two online training courses or whether their existing compensation rates are intended to include time spent on legally mandated training. These are issues for an arbitrator to decide.

ORDER

The request of the University for a restraint of binding arbitration is granted to the extent that the grievance contests the University's requirement that adjunct faculty complete online courses in preventing harassment and discrimination, but denied to the extent that the grievance seeks additional compensation for adjuncts who completed the courses.

BY ORDER OF THE COMMISSION

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

ISSUED: April 28, 2016

Trenton, New Jersey