

P.E.R.C. NO. 2018-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(KEAN UNIVERSITY),

Petitioner,

Docket No. SN-2017-052

-and-

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

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies Kean University's request for a restraint of binding arbitration of a grievance contesting the University's denial of an associate professor's request for sabbatical leave. The University argued that the denial was a managerial prerogative implicating its academic judgment. Initially, the Commission declines to find that the denial implicated academic judgment given that the certification filed by the University does not explain how granting or denying the leave application related to the University's freedom to decide who may teach, what may be taught, how it shall be taught, and who may be admitted to study, which are the four bases of academic judgment recognized by the Court. In addition, the Commission declines to find that the denial of the application was an exercise of a managerial prerogative given that the certification likewise does not explain how granting or denying the grievant's application would significantly interfere with the determination of governmental or educational policy.

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, Gurbir S. Grewal, Attorney General
(Andy Jong, Deputy Attorney General, on the brief)

For the Respondent, Bennett Muraskin, Staff
Representative, on the brief

DECISION

On June 22, 2017, the State of New Jersey, Kean 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 ("Union"). The grievance alleges that the University violated Article XXVII of the parties' collective negotiations agreement (CNA) when it denied an associate professor's application for a sabbatical leave for the 2017-2018 academic year.

The University has filed briefs, exhibits, and the certification of Dr. Dawood Farahi, President of Kean University.

The union filed a brief, an exhibit, and the certification of the associate professor (grievant). These facts appear.

The Union represents all nine State Colleges/Universities within the State of New Jersey in various titles including but not limited to teaching and/or research faculty, department chairpersons, administrative staff (non-managerial), librarians, student personnel staff, demonstration teachers, among other titles as listed in Article I of the parties' CNA. The University and Union are parties to a CNA effective from July 1, 2011 through June 30, 2015. The grievance procedure ends in binding arbitration with respect to grievances alleging a "breach, misinterpretation or improper application of the terms" of the CNA.^{1/}

Article XXVII of the CNA, entitled "Sabbatical Leaves," provides in pertinent part:

Each State College/University shall have a sabbatical leave program for its full-time, tenured faculty members . . . and librarians who, as of June 30 prior to the year for which the leave is requested, have completed a period of six (6) or more years of service. Sabbatical leaves shall be in half year leaves granted to those applicants with meritorious applications as evaluated pursuant to the procedures at each

1/ Conversely, an arbitrator's decision is "advisory and non-binding" as to grievances alleging that there has been an "arbitrary or discriminatory application of, or failure to act pursuant to, the applicable policies or rules of [the] Board of Trustees, or applicable regulations or statutes which establish terms and conditions of employment."

College/University and no more than once every seven years. At each College/University two (2) half year leaves may be combined into (1) full year leave.

Application may be made for the purpose of pursuing a substantial project designed to yield publishable results and/or enhance competency as a scholar or teacher. Sabbatical leaves may also be granted for the pursuit of an accredited terminal degree program in an appropriate field of study and/or such other criteria that may be established by the College/University.

Locally negotiated or accepted procedures shall be followed in the implementation of the Sabbatical Leave program. To the extent that a College/University has a locally negotiated or accepted procedure, those procedures shall remain in full force and effect until such time as a change is negotiated. If no locally negotiated agreement is reached then changes, if any, shall be made in accordance with the New Jersey Employer-Employee Relations Act and its governing regulations. If no locally negotiated or accepted procedure exists, the local Union and the College/University shall negotiate a procedure for the Sabbatical Leave program in accordance with the New Jersey Employer-Employee Relations Act and its governing regulations.

The grievant certifies that he is a tenured Associate Professor in the political science program within the College of Humanities and Social Sciences at Kean University; that a committee of his peers recommended his application to the University President; and that the University President notified the grievant by letter that he would not recommend the grievant's sabbatical leave application to the Board of Trustees. The

grievant further certifies that the University President did not provide him a basis for his decision.

University President Farahi certifies that he is responsible for evaluating applications for sabbatical; that the locally accepted procedure entails a faculty committee making a recommendation to him and he making the final determination; and that consistent with that procedure, he evaluated the grievant's application to determine whether it was meritorious insofar as being "a substantial project designed to yield publishable results and/or enhance competency as a scholar or teacher." Dr. Farahi further certifies that "after careful evaluation and application of [his] academic judgment, [he] determined that the sabbatical application [of the grievant] was not meritorious."

By letter dated April 6, 2017, the Union, through its staff representative, filed a grievance challenging Dr. Farahi's decision. Among other things, the representative asserted that the University President had denied the grievant's applications for the past seven years without informing him of the basis of the denials; that the current application was clearly meritorious; and that "since there does not appear to be any academic basis for the President's decision, the Union contends that it constitutes arbitrary and capricious conduct." Following a hearing, a University Hearing Officer denied the grievance, finding that it did not involve a breach, misinterpretation or

misapplication of the CNA, but rather an academic judgment as to the merit of the application, and alternatively, that Article XXVII of the CNA makes the University President's decision on an application final.

On May 19, 2017, the Union filed a request for binding arbitration. This petition ensued.

The Commission's inquiry on a scope of negotiations petition is quite narrow. We are addressing a single issue in the abstract: whether the subject matter in dispute is within the scope of collective negotiations. The merits of the union's claimed violation of the agreement, as well as the employer's contractual defenses, are not in issue because those are matters for the arbitrator to decide if the Commission determines that the question is one that may be arbitrated. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

The Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982):

[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).

The University argues that President Farahi's decision to grant or deny sabbatical leave implicates its academic judgment and, as such, should be deemed a non-negotiable managerial prerogative. It maintains that it would be inappropriate for an arbitrator to second-guess the President's academic judgment regarding the merit of an application or the lack thereof. It cites and relies upon decisions in which certain matters were deemed to predominately involve educational policy decisions and, therefore, non-negotiable managerial prerogatives. These include Bethlehem Twp. Bd. of Educ. v. Bethlehem Twp. Educ. Ass'n, 91 N.J. 38, 46 (1982) (substantive aspects of teacher evaluation); Association of N.J. State College Fac. v. Dungan, 64 N.J. 338 (1974) (promulgation of rules on faculty tenure policies for State colleges); Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17 (1973) (consolidation of department chairmanships into a newly created chairmanship); Burlington Cty. College Fac. Ass'n v. Board of Trustees, 64 N.J. 10 (1973) (establishment of college calendar). The University also relies upon In re Univ. of Med. &

Dentistry, 144 N.J. 511, 533 (1996) (recognizing that rights guaranteed by our Act "will be preempted when they infringe on important educational policies") and In re State of New Jersey, Rowan University (Rowan), No. A-1286-15T3, 43 NJPER 23 (¶7 2016), 2016 N.J. Super. Unpub. LEXIS 1743 (App. Div. July 26, 2016), aff'g, P.E.R.C. No. 2016-6, 42 NJPER 108 (¶30 2015), recon. den., P.E.R.C. No. 2016-38, 42 NJPER 273 (¶79 2015), holding that Rowan University's decision to discontinue the training of a medical resident was beyond the scope of negotiations and not arbitrable because the decision implicated the University's academic freedom and medical judgment.

The Union argues that the denial of sabbatical leave is arbitrable, citing Willingboro Bd. of Ed., P.E.R.C. No. 80-75, 5 NJPER 553 (¶10287 1979) aff'd, No. A-1756-79, NJPER Supp.2d 88 (¶70 1980), 1980 N.J. Super. Unpub. LEXIS 17 (App. Div. Dec. 8, 1980), certif. den., 87 N.J. 320 (1981) (granting or denying sabbatical leave for teachers is a required subject for collective negotiations)^{2/} and Hudson County Area Voc-Tech. Sch. Bd. of Ed., P.E.R.C. No. 85-7, 10 NJPER 497(¶15225 1984) (applying Willingboro and declining to restrain arbitration of

^{2/} As the Appellate Division noted in Willingboro, while the appeal in that case was pending, the arbitrator upheld the board's position in two of the three grievances and gave the third teacher the opportunity to reapply for sabbatical leave. The court denied the Commission's motion to dismiss the appeal as moot.

grievance contesting denial of fashion design teacher's application for sabbatical leave).

In reply, the University maintains that Willingboro is irreconcilable with decisions involving a university's academic judgment, most recently Rowan. It also argues that the Union cannot establish a contract violation based upon the absence of a statement of reasons for denying the grievant's application inasmuch as the Union failed to negotiate such a requirement into the sabbatical leave article of the CNA.^{3/}

Reiterating what our courts have said previously, the concept of and constitutional concern for a university's academic freedom was charted by Justice Frankfurter in his concurring opinion in Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957), "when he spoke of four essential freedoms of universities, namely, the freedom to determine for themselves on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study." Rowan, supra, 43 NJPER at 25, 2016 N.J. Super. Unpub. LEXIS 1743, quoting Dixon v. Rutgers, 110 N.J. 432, 448-449 (1988) (internal quotes omitted). Here, the

^{3/} We do not address that argument or the University's arguments based upon the provision of the CNA's grievance procedure stating, "The arbitrator shall not substitute his or her judgment for academic judgments rendered by the persons charged with making such judgments." Nor do we decide whether the locally accepted procedure or practice makes the University President's decision to grant or deny a sabbatical leave final, as the University argues. See discussion of Ridgefield Park Ass'n, supra.

University has not articulated how granting or denying the grievant's sabbatical leave application implicates or relates to any of those four essential freedoms or the University's interest in academic freedom. In the absence of such a showing, we decline to restrain arbitration based on the concept of academic freedom.

Turning to its managerial prerogative argument, the University has likewise not articulated how granting or denying the grievant's application would significantly interfere with the determination of governmental or educational policy. Neither party has provided us with any specific information about the grievant's application, and the University has not disclosed the reasons why it was deemed not meritorious. While the University President certifies that the application was not meritorious in his academic judgment, such conclusory assertions do not enable us to apply the requisite balancing test to the specific facts of this dispute, as we are charged to do. Jersey City, supra. Nor has the University shown how sabbatical leaves pertain to its educational policies or educational programs. Likewise, it has not provided us any basis for distinguishing sabbaticals in higher education from those at the elementary and secondary levels, which were the subject of Willingboro and Hudson County Area Voc-Tech. Sch. Bd. of Ed. On this particular record, we are unable to conclude that the University's interests in determining

which of its professors are granted sabbatical leave or which of their research and scholarship activities are underwritten by the University predominate over employee interests. Nor can we conclude that the denial of the grievant's leave application represented the exercise of a managerial prerogative. Therefore, as in Willingboro, the dispute between the parties may proceed to binding arbitration if otherwise subject to that procedure under their negotiated agreement.

ORDER

Kean University's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: April 26, 2018

Trenton, New Jersey