P.E.R.C. NO. 2018-38

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNION COUNTY COLLEGE,

Petitioner,

-and-

Docket Nos. SN-2017-053
SN-2017-054
SN-2017-055

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

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the College's request for a restraint of binding arbitration of grievances contesting the assignment of winter term and overload classes to non-unit part-time faculty members. Finding that the College did not show that its course assignments were made based on its determination of the respective qualifications of the faculty members seeking the same assignment, the Commission holds that arbitration of the grievances would not significantly interfere with the College's managerial prerogative to base course assignments on the qualifications of its faculty. The Commission also dismisses the College's petitions challenging the negotiability of language in the parties' collective negotiations agreement (CNA) because the parties finished negotiations on a successor CNA and did not mutually agree to have the Commission make a negotiability determination on the language. Thus there is no active negotiability dispute per N.J.A.C. 19:13-2.2(a)4 for the Commission to decide.

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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Respondent.

Appearances:

For the Petitioner, Cleary, Giaccobe, Alfieri & Jacobs, attorneys (Matthew J. Giacobbe and Gregory J. Franklin, of counsel and on the briefs; Andres Acebo, Shannon M. Boyne and Bradley D. Tishman, on the briefs)

For Levy Ratner, P.C. attorneys (Carl J. Levine, of counsel and on the brief)

DECISION

On June 22, 2017, Union County College (College) filed three petitions for scope of negotiations determinations. The petitions sought restraints of binding arbitration of grievances filed by the Union County College Chapter of the American Association of University Professors (AAUP). The petitions also alleged that language contained in an expired collective negotiations agreement (CNA) between the College and the AAUP was not mandatorily negotiable.

The parties have filed briefs, certifications and exhibits. These facts appear.

The AAUP represents the College's "full-time instructional and professional library staff."

The grievances filed by the AAUP involve requests by full-time faculty members to teach additional courses.[1/]

The November 19, 2016 grievance

Professor Jay Siegel had filed a request to teach two online courses during the 2017 Winter session. After he was assigned one such course he requested assignment to another course. The College responded that the course requested had been assigned to another professor. On November 19, 2016, the AAUP filed a formal grievance asserting that the College had violated its CNA with the AAUP by failing to assign Siegel to a second course and assigning it instead to a non-unit, part-time faculty member.[2/]

The College denied the grievance asserting that the article cited in the grievance applied to regular semesters and not to "sessions or terms (either Summer or Winter)."

1/ The AAUP did not seek arbitration of a related grievance it filed on April 25, 2016. It is not part of this dispute.

2/ The grievance asserts the College violated the contract "including but not limited to Art. IX.A.1.a," which reads:

> A non-unit member may not teach a course in a department where a faculty member in that department is qualified to teach that course, and is willing to teach that course. The assignment of courses for credit, developmental courses, and/or laboratories to a person other than full-time members of the instructional staff shall be considered tentative, pending the cancellation of courses, or the final assignment or reassignment of courses to full-time members.

On February 8, 2017, the AAUP filed a request with the Commission for the appointment of an arbitrator (Docket No. AR-2017-357).

The February 3, 2017 grievance

The grievance, as initially filed, asserted that the College, in denying the course assignment requests of three faculty members, Professors Siegel, Belmonte and Franklin, violated the agreement including Articles IX.A.1.a., XXIX.A.6.a and XXIX.A.4.c.(7).[3/] The grievance sought adherence to the agreement for future overload course assignments and a make whole remedy to faculty who suffered financially from denied assignments.

3/ Article IX.A.1.a. is quoted at n. 2, supra. The other articles provide:

> XXIX.A.4.c.(7)
>
> A faculty member may choose to teach a distance learning course as part of their base load or overload.
>
> Article XXIX.A.6.a
>
> A faculty member who requests it will be assigned up to two overload courses in one semester provided every faculty member in his or her department who has requested overload assignments and who is qualified to teach the course in question has been assigned at least three (3) overload hours.

In denying the grievance the College stated that it will continue to honor the requirements of the three cited contract articles, "so long as it does not infringe on the College's managerial prerogatives."

On April 24, 2017, the AAUP filed a request with the Commission for the appointment of an arbitrator (Docket No. AR-2017-488).

The Scope of Negotiations Petitions

On June 22, 2017, the College filed three petitions for scope of negotiations determinations that were consecutively docketed as SN-2017-053, 054 and 055. The petitions were consolidated for processing. SN-2017-053 references both AR-2017-357 and AR-2017-488. SN-2017-054 refers to AR-2017-488, and SN-2017-055 references AR-2017-357. Section Four of all three petitions state that the negotiability dispute arose in the context of grievances that the AAUP sought to submit to binding arbitration. However, all three petitions also refer to provisions of the 2012-2015 expired College-AAUP agreement and assert that those articles should be excised as they infringe on the College's managerial prerogatives to determine which faculty members are qualified to teach particular courses.

For the reasons set forth below, we will focus only on whether the subjects of the grievances are negotiable and arbitrable rather than issue a determination as to whether the pertinent contract articles may be retained in a successor agreement.

A scope of negotiations petition may be filed during the course of collective negotiations to prevent the inclusion in a successor CNA of language alleged to be non-negotiable because it significantly interferes with the exercise of managerial prerogatives or because the language conflicts with and is accordingly preempted by a pre-existing state statute or regulation. See N.J.A.C. 19:13-2.2(a)4.i.

In order to resolve the parties' collective negotiations impasse, the Commission appointed a mediator, and then a fact-finder to assist the parties in agreeing upon the terms of a successor CNA.[4/]

Where negotiations are concluded before a scope of negotiations petition is decided, the negotiability dispute normally becomes moot, unless the parties have expressly agreed to preserve it for a ruling by the Commission. In Bergen County Community College, P.E.R.C. No. 99-12, 24 NJPER 428 (¶29196 1998), the College filed a scope of negotiations petition

4/ The fact-finder reported that he resolved the impasse after meeting with the parties on October 7, 2016.

asserting that contract language the Association sought to retain in a successor agreement was non-negotiable. The parties reached agreement on a successor CNA. The memorandum of agreement reflected a modification in the language of one of the contract terms that was raised in the scope of negotiations petition, but lacked any reference to the other challenged issue, including whether the parties had mutually agreed to have the Commission issue a negotiability ruling. We declined to issue a scope of negotiations determination, explaining (24 NJPER at 429):

> Once the parties have reached agreement on a successor contract, there is normally no longer a scope of negotiations dispute under N.J.A.C. 19:13-2.2(a)(4), unless the parties have agreed to reserve the issue raised by the petition.

In contrast, in a prior scope of negotiations dispute between these same parties which arose during the course of collective negotiations after the parties had resolved their impasse, we issued a ruling on active and unresolved negotiability disputes because the parties had concurred in a writing to the Commission that the negotiations dispute on the unresolved issues required resolution through a Commission decision. Union County College, P.E.R.C. No. 2015-024, 41 NJPER 205, 206 (¶70 2014)

Here, the parties finished negotiations on a successor CNA before the scope of negotiations petitions, which indicated the disputes had arisen with respect to demands to submit AAUP

grievances to binding arbitration, were filed.[5/] In addition, no writing reflects a mutual agreement to have the Commission rule on the negotiability of the contract language.[6/] As in Bergen, we decline to do so here.

However, the College's petitions also assert that two grievances that the Association seeks to submit to binding arbitration are not negotiable. Those are active negotiability disputes which we will decide. See N.J.A.C. 19:13-2.2(a)4.ii.

While we will not determine whether the contract language challenged by the College is, in isolation, negotiable or non-

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5/ The certification of AAUP Chapter President Derek McConnell recites, with respect to negotiations for a new agreement:

- The parties agreed that, except for compensation proposals, no new proposals would be submitted after the fourth negotiations meeting;
- The contract articles listed in the scope of negotiations petitions were not discussed during collective negotiations either during the first four sessions or thereafter;
- The articles were not referenced in the parties' joint declaration of a negotiations impasse.

6/ The College has not submitted a certification disputing the negotiations history as set forth by McConnell. The certification of attorney Andres Acebo recites that the petitions were filed to restrain arbitration and obtain a ruling that the disputed language was not negotiable.

negotiable, we will consider the contract's terms as they may relate to the grievances the AAUP is pursuing.[7/]

Our scope of negotiations 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. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (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

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7/ We will consider the negotiability/arbitrability of the grievances under Docket No. SN-2017-053, which refers to both grievance arbitration demands (Docket Nos. AR-2017-357 and AR-2017-488). We will dismiss the remainder of SN-2017-053 to the extent it seeks to excise contract language not challenged by or connected with the AAUP's grievances. We will dismiss SN-2017-054 and SN-2017-055 in their entirety.

> 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.

Analysis of the November 19, 2016 (Siegel) grievance

As summarized at p.2 infra., the Siegel grievance asserts that the College violated the parties' CNA, specifically Article IX.A.1.a. when it denied Siegel's request to teach a second course during the Winter 2017 term and instead assigned it to a non-unit, part-time faculty member. The contract language reads:

> A non-unit member may not teach a course in a department where a faculty member in that department is qualified to teach that course, and is willing to teach that course. The assignment of courses for credit, development courses and/or laboratories to persons other than full time members of the instructional staff shall be considered tentative, pending the cancellation of courses, or the final assignment or reassignment of courses to full time members.

A December 23, 2017 e-mail from the College's Human Resources Director to the AAUP denied the grievance stating: "Article IX.A.1.a. applies to semesters, not sessions or terms, (either Summer or Winter)."

The College's brief asserts that Article IX.A.1.a. infringes upon its prerogative to make course assignments and unduly restricts its right to determine the qualifications of faculty

members to teach certain courses. It cites cases holding that public employers have the prerogative to base assignments on which employees are best qualified to perform particular jobs.[8/]

The AAUP responds that the College's denial of the grievance did not claim that Professor Siegel was not qualified to teach the course he sought nor did the College assert that the part-time faculty member assigned to it was better qualified. It asserts that, in the context of this dispute, Article IX.A.1.a. protects the faculty represented by the AAUP against having work its members traditionally perform being given to other employees of the same public employer.[9/]

Rather than focusing on the context in which the grievance arose, including the specific reasons given by the HR department for denying it, the College's reply brief reiterates the general proposition that public employers have the prerogative to evaluate and compare the qualifications of its employees prior to making an assignment. However, it does not assert that its

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8/ Warren County College, P.E.R.C. No. 2016-48, 42 NJPER 344 (¶98 2016)(where contract allows faculty to select particular courses to teach, it infringes on the College's prerogative to assign the most qualified teachers and is not mandatorily negotiable); Union Cty. Coll., P.E.R.C. No. 2015-24, 41 NJPER 205, 206 (¶70 2014) (language basing faculty class assignments on seniority interfered with assessment of qualifications).

9/ The AAUP cites, among other decisions, Rutgers, The State University and AFSCME, P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd 1983 N.J. Super. Unpub. LEXIS 15, NJPER Supp.2d 132 (¶113 App. Div. 1983)

decision was based upon the respective qualifications of Professor Siegel and the assigned part-time faculty member.

We decline to restrain arbitration of this grievance as the College has not shown, or even stated, that it denied the AAUP's claim for reasons related to qualifications or skills needed to teach the course. Our ruling does not prevent the College from arguing to an arbitrator that Article IX.A.1.a. applies only to semester course assignments and not Winter Term instruction. However, the College has not argued that arbitration of such a claim is outside the scope of negotiations.[10/] Nor does our ruling prevent the College, in a future dispute, from asserting that the AAUP cannot rely on Article IX.A.1.a. in pursuing a grievance arbitration that, in contrast to the present dispute, actually raises an issue concerning the College's determination of the respective qualifications of faculty members seeking the same assignment.

Analysis of the February 3, 2017 grievance

The AAUP filed a grievance labeled "Failure to Follow Procedures for the Assignment of Overload Courses," on behalf of Professors Siegel, Belmonte and Kennedy alleging that overload courses sought by the faculty members were given to non-unit

10/ See Flemington-Raritan Bd. of Ed., P.E.R.C. No. 2011-28, 36 NJPER 363 (¶141 2011), aff'd 2011 N.J. Super. Unpub. LEXIS 1671, 38 NJPER 32 (¶4 2011), certif. den. 209 N.J. 100, 2012 N.J. LEXIS 136 (2012) (decision to eliminate summer work may not be challenged, but removal of that work from employees who traditionally performed it and assigning it instead to non-unit employees is negotiable and arbitrable).

part-time faculty.[11/] The College was alleged to have violated articles IX.A.1.a., XXIX.A.4.c.(7), and XXIX.A.6.a.[12/]

11/ The grievance contains this recitation:

> Case 1: Prof. Siegel, SSBH Division, requests his Spring 2017 schedule and overload courses in September of 2016, when assignments were due . . . On December 22, 2016, the courses he requested as overloads were assigned to Prof. Siegel, as he had requested. However, on December 23, 2016, the next day, the courses were re-assigned to non-unit faculty. Prof. Siegel subsequently told Dr. Rapalo that he would accept any online sections of BUS 105 or BUS 201. As of Jan. 3, 2017, these courses had still not been assigned. On Jan. 17th, they were assigned to non-unit faculty. While Prof. Siegel was ultimately assigned to overload courses, he declined to teach them because they were not any of the courses he requested to teach.
>
> Case 2: For Spring 2017, Prof. Belmonte, SSBH Division, had requested BUS 11-300, an online course that she had developed and taught both in-person and online. This course was assigned to a non-unit member.
>
> Case 3: Prof. Kennedy in the STEM Division had made numerous requests to Dean Jones for an overload course. . . She listed four courses she was willing to teach. Dr. Jones asked that she not request any courses to which an adjunct had already been assigned, rather, asking faculty to select from the remaining courses, although full-time faculty assignments should have been completed before adjuncts were given their assignments. . . In this case, there were faculty with two overload assignments while Prof. Kennedy still had not even one overload assignment. Finally, on January 23, 2017, she was assigned an overload course.
>
> Remedy: The College will abide by the provisions of the Agreement in making overload assignments in the future. Any faculty members improperly denied their requests, who suffered financial losses as a result, will be made whole.

12/ The College discusses the negotiability of Article XXVIII.A.1, but neither of the two grievances that the AAUP seeks to arbitrate asserts a violation of that language. A (continued...)

> XXIX.A.4.c.(7),
>
> A faculty member may choose to teach a distance learning course as part of their base load or overload.
>
> XXIX.A.6.a.
>
> A faculty member who requests it will be assigned up to two overload courses in one semester provided every faculty member in his or her department who has requested overload assignments and who is qualified to teach the course in question has been assigned at least three (3) overload hours.

In denying the grievance, the College responded:

> Pertaining to Professor Siegel and Professor Belmonte, both requests for overload courses were granted, however the faculty members declined the courses that were offered to them. All requests are seriously considered and must support the mission of the College of student success. As such the College maintains its managerial right to assign courses as it deems appropriate. In fact, the Public Employment Relations Commission reviewed XXIX.A.c.(7) in [Union Cty. Coll., P.E.R.C. No. 2015-24, 41 NJPER 205 (¶70 2014)] and declared that "the College retains the prerogative to assign the faculty member of its choosing to teach the courses."[13/]

12/ (...continued)
grievance that was filed alleging a violation of that article has not been pursued to arbitration. Hence no present dispute exists regarding Article XXVIII.A.1.

13/ P.E.R.C. No. 2015-24 does hold XXIX.A.c.(7), as it appears in the 2012 to 2015 CNA, to be not mandatorily negotiable. The dispute there concerned contract language in a CNA that expired in 2012. XXIX.A.c.(7) then read:

> (7) A faculty member shall not be required to utilize more than one sending site for a

(continued...)

> Regarding Professor Kennedy, Dr. Jones asked faculty requesting overloads to consider courses not yet assigned, but did not preclude members from requesting courses assigned to non-members. Ultimately, Professor Kennedy was assigned an overload course.
>
> Please be advised that the college will continue to honor the requirements of Articles IX.A.1.a., IX.A.4.c.(7), and XXIX.A.6.a. as long as it does not infringe on the College's managerial prerogatives.

As with its argument regarding Article IX.A.1.a., the College asserts that the language of Articles XXIX.A.4.c.(7) and XXIX.A.6.a. would significantly interfere with its prerogative to assign overload courses based upon an assessment of faculty qualifications. Its brief does not acknowledge that the written denial of the grievance made no claim that course assignments were based on a comparison of the qualifications of the faculty members who sought or were assigned to teach them. The letter denying the grievance asserted that "All requests are seriously considered and must support the mission of the College of student

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13/ (...continued)

> 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.

Article XXIX.A.c.(7) as set forth in the CNA that expired in 2015, appeared in the expired 2012 agreement as XXIX.A.c.(9) with the identical language. The Commission held that language to be mandatorily negotiable. See 41 NJPER at 213-214.

success. The College maintains its managerial right to assign courses as it deems appropriate." Also, the letter ends with a pledge "[T]o honor the requirements of Articles IX.A.1.a., IX.A.4.c.(7), and XXIX.A.6.a. as long as it does not infringe on the College's managerial prerogatives."

The record in this case fails to show that if the grievances were sustained, such a ruling would significantly interfere with the College's managerial prerogatives to base course assignments on the qualifications of its faculty, either full-time or part-time.

ORDER

The College's request in Docket No. SN-2017-053 to restrain arbitration of the grievances referenced in Commission Docket Nos. AR-2017-357 and AR-2017-488 is hereby denied. The remainder of Docket No. SN-2017-053 is dismissed. Docket Nos. SN-2017-054 and SN-2017-055 are dismissed.

BY ORDER OF THE COMMISSION

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

ISSUED: April 26, 2018

Trenton, New Jersey