

P.E.R.C. NO. 2018-51

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(KEAN UNIVERSITY),

Petitioner,

-and-

Docket No. SN-2018-034

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 State of New Jersey, Kean University's request for a restraint of binding arbitration of a grievance filed by the Council of New Jersey State College Locals, AFT/AFL-CIO contesting the removal of professors from the classroom and assigning them to non-teaching duties. The Commission restrains arbitration to the extent the grievances challenge the University's managerial prerogative to assign non-teaching duties. The Commission declines to restrain arbitration over the severable, mandatorily negotiable impacts of non-teaching duties and whether the non-teaching duties fall outside of the grievants' primary duties. The Commission also finds that the arbitrator may determine if an educational policy rationale was the basis for the assignment of non-teaching duties to the grievants specifically, and if not, then the arbitrator may assess the negotiable issues of the frequency/rotation/allocation of the duties among employees.

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
(Elizabeth A. Davies, Deputy Attorney General on the
brief)

For the Respondent, Council of New Jersey State College
Locals AFT, AFL-CIO (Bennett Muraskin, Staff
Representative)

DECISION

On February 22, 2018, the State of New Jersey (State), Kean University (Kean or University), filed a scope of negotiations petition seeking a restraint of binding arbitration of grievances filed by the Council of New Jersey State College Locals, AFT, AFL-CIO (Council). The grievances allege that the University violated the parties' collective negotiations agreement (CNA) by removing the grievants from the classroom and assigning them to non-teaching duties.

The University filed a brief, exhibits, the certification of its Provost and Vice President for Academic Affairs (Provost),

and the certification of its Associate Provost. The Council filed a brief, exhibits, the certification of grievant LK, and the certification of grievant MM. These facts appear.

The Council represents nine State colleges including Kean University and negotiates a global collective agreement, or master agreement, with the State on behalf of its members. The Kean Federation of Teachers (KFT) is a local within the Council that negotiates local agreements with the University. The State and the Council are parties to a CNA in effect from July 1, 2015 through June 30, 2019. The grievance procedure ends in binding arbitration.

Article XII of the parties' CNA, entitled "Faculty Responsibilities," provides in pertinent part:

A. 1. Institutional responsibilities of the faculty shall include teaching responsibilities and other responsibilities as defined below. The basic academic year teaching load shall be assigned over thirty-two (32) weeks of instruction and shall occur during the period of payment which commences September 1 and ends on June 30, and may not exceed such thirty-two (32) week period unless otherwise agreed to by the concerned faculty member.

* * *

B. Teaching Responsibilities

* * *

7. Assignment of non-teaching duties within load for any faculty member, for any purpose, is a matter of academic/managerial judgment of the College/University. The President, or his or her designee, prior to the commencement of each semester, and prior to the allocation of non-teaching

assignments to various purposes and individual faculty members, will consult with the UNION as to such allocations and the contemplated manner of selecting individual faculty members who will receive them. In the event that any faculty member feels that he or she is being treated in a[n] inequitable manner in regard to alternate assignments within load, he or she may bring the matter to the attention of the President, who either in person or through a designee will conduct a prompt administrative review of the matter.

* * *

C. Other Responsibilities

* * *

2. Faculty responsibilities which have been traditionally performed by the faculty and are reasonable and consistent with sound academic practice shall be continued consistent with previous practice. Disagreements concerning their specific nature shall be resolved by the Local UNION and the College/University. These responsibilities shall be performed within the academic year, provided that assignments outside the thirty-two (32) weeks of instruction referred to above shall not be made individually or collectively on an inequitable basis.

Article XXI of the parties' CNA, entitled "Salary and Fringe Benefit Agreement," provides in pertinent part:

G. 5. There shall be a Range Adjustment Program at each College/University where full-time faculty are employed. Full-time faculty members who meet or exceed the merit-based criteria established for range adjustments are eligible to be considered for and may apply for a range adjustment within rank. The merit-based criteria will be established by the College/University and published for the understanding of affected employees.

The procedures for consideration will be negotiated between the College/University and the Local UNION. The procedures for consideration utilized in the College/University, if universally applicable, or in a division, department or similar unit in which the faculty member is employed, shall be fairly and equitably applied to all applicants and nominees.

LK and MM are full-time faculty members that have been employed by Kean University since 1990.

LK holds an M.A. and a Ph.D. in Art History from Columbia University and is a tenured, full professor in Art History at Kean. He certifies that he has typically taught a full load of twelve credits per semester, and twenty-four credits per academic year, within the field of Art History. According to LK, he received "annual reappointment evaluations in which [his] teaching effectiveness was a major criterion" before he received tenure; he has also "undergone post-tenure assessments every five years in which [he] continue[s] to be evaluated based [up]on [his] teaching effectiveness."

MM holds a D.M.A. (Doctor of Musical Arts) from the University of Miami and is a tenured, full professor in Music at Kean. She certifies that she has typically taught a full load of twelve credits per semester, and twenty-four credits per academic year, within the field of Music. According to MM, she received "annual reappointment evaluations in which [her] teaching effectiveness was a major criterion" before she received tenure;

she has also "undergone post-tenure assessments every five years in which [she] continue[s] to be evaluated based [up]on [her] teaching effectiveness."

The Associate Provost - who served as the Dean of the College of Humanities and Social Sciences as well as the Acting Dean of the College of Visual and Performing Arts during the fall semester of 2016 - certifies that on December 3, 2016, the University's Board of Trustees accepted her recommendation and "authorized the creation of the College of Liberal Arts to encompass and replace the existing Colleges of Humanities and Social Sciences and the College of Visual and Performing Arts." The Associate Provost was "tasked with facilitating the merger of two schools within the College of Liberal Arts into the School of Fine and Performance Arts and reorganizing the departments."

According to the Associate Provost, although "[t]he College of Visual and Performing Arts was created approximately ten-years earlier as a stand-alone college with the expectation of high student enrollment," she "found that Art History, Music and Theater [were] struggling with very low student enrollment." The Associate Provost certifies that at the time of the transition, "the Art History Program had fifteen students enrolled . . . with three full-time faculty members and the Music Program had . . . twenty-six students enrolled . . . with six full-time faculty members."

The Associate Provost certifies that "[b]ased [up]on low 2016 fall enrollment, [she] consulted with [the Provost] and [they] decided to assign recruitment duties . . . to two faculty members who would also review the curriculum." According to the Associate Provost, after efforts to "[solicit] a volunteer from each department . . . were unsuccessful," University management "decided to assign two faculty members, one from the Music program and one from the Art History program[,] to fulfill these duties." The Associate Provost certifies that selection of the two faculty members "was based [up]on the number of students each faculty member taught, the number of advisees each faculty member had, and the faculty member's SIR2^{1/} scores" because University management "[was] looking for . . . faculty members whose absence from the classroom would have the lowest impact on the students and programs." The Associate Provost certifies that "[b]ased [up]on th[is] criteria[,] [LK] . . . and [MM] . . . were selected."

On July 31, 2017, the Provost sent LK and MM identical letters that provide in pertinent part:

This letter serves as follow-up to the formal notification that was provided to you by letter sent electronically on March 21, 2017. Consistent with that communication and the reorganization of the College of Liberal Arts as approved by the Kean University Board of

^{1/} According to the University's brief, "[a]n SIR2 score is the result of student surveys on teacher performance."

Trustees at its December 2016 Board meeting, please be advised that your non-teaching assignment for the 2017 Fall Semester will consist of assignment to the Nancy Thompson Library to provide student learning support in the areas of writing, tutoring, and career development. Your experience in academic advisement will add to the array of services that we can provide our students.

After no volunteers requested the reassignment, your selection for non-teaching assignment is based upon an objective review of several measures including the number of students taught each semester, the number of students who are assigned to you as advisor, and SIR II scores.

The Associate Provost certifies that "[LK] taught one class in the fall of 2017 and two classes in the spring of 2018 . . . [and] [h]is non-teaching duties were adjusted accordingly." The Associate Provost also certifies that "[MM] was not assigned teaching classes in the fall of 2017 but was offered a class assignment in the spring [of] 2018 . . . which was declined due to pre-scheduled leave."

LK certifies that "[b]eginning with the fall 2017 semester, [he] has been indefinitely reassigned to non-teaching duties" consisting of "student advisement, updating courses, the development and supervision of student internships at local art institutions and historic properties, and recruitment."

According to LK, "[i]t does not appear that [he] will be assigned to teach more than one class per semester going forward" because he only taught one course in fall 2017, one course in spring

2018, and another course "on an emergency basis" in spring 2018 despite the fact that "[a]ll the [other] courses [he] no longer teach[es] are still being offered and have been taught by adjuncts." LK certifies that the University "has not provided [him] with any date when [he] will resume [his] teaching duties" and "[t]herefore [he] assume[s] that [his] reassignment [will] continue[] indefinitely." According to LK, "ongoing non-teaching duties have harmed [his] career as a faculty member at Kean" in the following ways:

- "[he] cannot apply for range adjustment";

- "[he] [is] limited in [his] right to apply for Release[] Time for Research";

- "[he] [is] limited in eligibility to apply for other research opportunities offered to faculty that involve collaborating with students";

- "[n]ot teaching diminishes [his] interface with students, colleagues, and the department"; and

- "[he] [is] one of only two faculty members who is required to phone in [his] arrival and departure from campus."

MM certifies that "[b]eginning with the fall 2017 semester, [she] has been indefinitely reassigned to non-teaching duties" that "[she] previously performed on a smaller scale" consisting of "recruiting new students, researching the existence of high school music programs and contacting high school music directors about attracting their students to Kean University", and

"visit[ing] high schools to conduct recruitment and to give master classes to selected students with the goal of encouraging them to apply to Kean University to study music." MM also certifies that she is "working with . . . a non-faculty professional who runs the office of Career Development and Advancement . . . [to] produc[e] a brochure to advertise the music program." According to MM, "[she] does not have any reason to believe that [she] will be assigned to teach any courses going forward" because she "[has] not taught any courses since [her] reassignment in fall 2017"^{2/} despite the fact that "[a]ll the courses [she] no longer teach[es] are still being offered and have been taught by adjunct faculty." MM certifies that the University "has not provided [her] with any date when [she] will resume [her] teaching duties" and "[t]herefore [she] assume[s] that [her reassignment] will continue indefinitely." According to MM, "ongoing non-teaching duties have harmed [her] career as a faculty member at Kean" in the following ways:

- "[she] [is] denied [her] status as a 'teacher'";

- "[she] [is] no longer eligible for Release Time for Research";

2/ MM certifies that she did not accept the Associate Provost's offer to teach one course in spring 2018 "because [she] knew [that she] would be on medical leave." According to MM, the Associate Provost "informed [MM] that she was offering . . . this class for one semester only to fulfill the requirement that [MM] undergo [her] five year post-tenure assessment."

-“other programs at Kean offering research opportunities to faculty that involve collaboration with students . . . are unavailable to [her]”; and

-“unlike other faculty, [she] must call the Provost’s office when [she] arrive[s] and leave[s] campus.”

On September 14, 2017, the Council filed two identical grievances on behalf of LK and MM that provide in pertinent part:

Pursuant to Article VII., Section B.1 of the State-Union Agreement (“Agreement”), the Union hereby alleges that Kean University violated the terms of the Agreement including but not limited to Article XII, Section B.7 and C.2 with respect to the University’s July 31, 2017 notice to [the grievants regarding their] removal from the classroom and assignment to non-teaching duties.

* * *

[The grievants have] been indefinitely assigned non-teaching duties in excess of the basic academic year teaching load. [They have] also been assigned non-teaching duties not traditionally performed by faculty and [have] received assignment outside the thirty-two (32) weeks of instruction on an inequitable basis.

The appropriate remedy is to withdraw the notice of reassignment.

The University denied or did not respond to the grievances at each step of the process. On December 4, the Council demanded binding arbitration. 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. 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.

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the employer may have.

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 its "decision to assign [LK] and [MM] non-teaching duties based on an educational policy decision was within its academic judgment and managerial prerogative" and is therefore non-negotiable. The University asserts that "[t]he dominant concern in [its] decision to assign faculty non-teaching duties was to enhance recruitment and retention efforts for the new college programs." The University maintains that "requiring binding arbitration [in this matter] . . . would prevent Kean from responding to changing circumstances and making managerial determinations in the best interest of the students, the university, and the public."

The Council argues that "[t]he contract articles grieved do not interfere with government policy." Specifically, the Council maintains that "the University has misapplied [Art. XII B.7] by eliminating all or most of [LK] and [MM]'s teaching load and placing no limits on the duration of these assignments"; and that although "the University is free to argue that the assignment is . . . an academic/managerial judgment", "[i]t is fully within the authority of an arbitrator to determine whether an indefinite assignment of all or substantially all non-teaching duties violates this article." The Council also maintains that "the

University has misapplied [Art. XII C.2] by assigning faculty to exclusively non-faculty responsibilities"; and that although "the University is free to argue that full time non-teaching assignments are a faculty responsibility consistent with what it considers previous practice", "[i]t is fully within the authority of an arbitrator to decide this contractual dispute as well." Moreover, the Council contends that its "claim that a faculty member without a teaching load or with a substantially reduced teacher load is no longer a faculty member under the terms of the [a]greement can and should be decided by an arbitrator." The Council also argues that "[t]he assignment of non-teaching duties to [LK] and [MM] directly and intimately affects their work and welfare." Specifically, the Council maintains that "the University is requiring faculty members to perform new jobs, unrelated to their core teaching function, apparently forever, while also denying them opportunities for research." Lastly, the Council argues that "[t]he University's alleged educational policy decision violates N.J.S.A. 18A:60-7 and 18A:60-10."^{3/4/}

3/ N.J.S.A. 18A:60-7b defines "faculty member" as "any full-time member of the teaching staff appointed with academic rank."

4/ N.J.S.A. 18A:60-10, entitled "Establishment of procedure for career development," provides:

It shall be the responsibility of the board
of trustees and the president of each State
and county college, in conjunction with their

(continued...)

The Council maintains that "the centrality of teaching [as] an integral component of faculty duties is clear, unequivocal and unmistakable" as demonstrated by Appendix II of the parties' CNA, entitled "Career Development Program," and the University's "Career Development Program for Tenured Faculty Members" handbook - both specify that "teaching effectiveness" and "classroom observation" are essential components of faculty assessment, development, and evaluation including "mandated five year post-tenure review." The Council also references the University's "Range Adjustment Program" to demonstrate that "instructional effectiveness," "scholarship," "student evaluation," and "teaching observations" are essential components to determine whether faculty "are eligible to be considered for and may apply for a range adjustment within rank."

In reply, the University insists that "[w]hile the assignment of non-teaching duties has some effect on [LK] and [MM]'s work and welfare, the predominant issue is the educational goal and purpose of the University." The University argues that "[LK] and [MM] do not need specific academic training on how to

4/ (...continued)

faculty to establish a formal procedure for the career development of all members of the professional staff including, but not limited to, a systematic and regular evaluation for the purpose of identifying any deficiencies, extending assistance for their correction and improving instruction.

review curriculum or how to encourage students to enroll in classes in their specific field of expertise." The University maintains that "[LK] and [MM] are both currently performing duties that involve their areas of expertise and the University," that "[MM] is still performing the same non-teaching duties she performed previously when she was teaching full time," and that "[n]either professor is delivering packages between offices or operating a switchboard." Moreover, the University asserts that "there is nothing preventing [LK] or [MM] from performing research."

The Commission has consistently held that "the right to assign teachers non-teaching duties is a non-negotiable management prerogative." Mahwah Bd. of Ed., P.E.R.C. No. 83-96, 9 NJPER 94 (¶14051 1983). "Employers may unilaterally assign new duties if they are incidental to or comprehended within an employee's job description and normal duties" and "may make assignments necessary to respond to emergencies." New Jersey Highway Auth. and IFPTE Local 193 (Toll Supervisors of America), AFL-CIO, P.E.R.C. 2002-76, 28 NJPER 261 (¶33100 2002), aff'd 29 NJPER 276 (¶82 App. Div. 2003); see also Plainfield Bd. of Ed., P.E.R.C. No. 88-46, 13 NJPER 842 (¶18324 1987) (holding that employees may be required to perform minor tasks incidental to their primary duties).

However, the Commission has "place[d] no limitation on . . . faculty grievance[s] challenging . . . non-teaching reassignment[s] on grounds that same [are] beyond [the grievant's] primary duties." Warren Cty. Comm. Coll., P.E.R.C. 2016-48, 42 NJPER 344 (¶98 2016); accord Bayonne Bd. of Ed., P.E.R.C. No. 87-109, 13 NJPER 268 (¶18110 1987). "Employees may seek to negotiate for contractual protections against being required to assume duties outside their job titles and beyond their normal duties" because "[o]btaining contractual protection against the imposition of unrelated and out-of-title duties protects the integrity of the equation between . . . negotiated salaries and . . . required work." New Jersey Highway Auth. and IFPTE Local 193 (Toll Supervisors of America), AFL-CIO; see also Byram Tp. Bd. of Ed. v. Byram Tp. Ed. Ass'n, 152 N.J. Super. 12, 25-26 (App. Div. 1977) (holding that in general, the assignment of duties unrelated to an employee's job description or classification is mandatorily negotiable).

The Commission has also held that "[w]here such assignments primarily affect the working hours, workload, or compensation of employees, the issue is mandatorily negotiable." Mahwah Bd. of Ed. Similarly, "frequency and rotation of [non-teaching] assignments . . . may be submitted to arbitration." Atlantic Highlands Bd. of Ed., P.E.R.C. No. 87-28, 12 NJPER 758 (¶17286 1986); see also Princeton Reg. Bd. of Ed., P.E.R.C. No. 2003-15,

28 NJPER 399 (¶33143 2002) (holding that “[the] rotation of [non-teaching] duties among teachers [is] severable and mandatorily negotiable”); 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) (holding that “[t]he allocation of [non-teaching] duty assignments is mandatorily negotiable”); Burlington Cty. Coll., P.E.R.C. No. 90-13, 15 NJPER 513 (¶20213 1989) (holding that “registration duty assignments are to be allocated among faculty” and “are mandatorily negotiable”).

Although the University recently consolidated and reorganized certain colleges based in part upon low student enrollment in the Art History and Music programs, the grievants have certified that all of the courses that they no longer teach are still being offered and have been taught by adjuncts. The University has asserted that it assigned non-teaching duties to only the grievants based upon an educational policy determination centered on reducing student and program impact; however, it is undisputed that the University originally solicited volunteers from each department. Given these apparent inconsistencies, we find the University’s articulation of an educational policy rationale for the selection of only the grievants to be inconclusive.

Accordingly, we restrain arbitration only to the extent that the instant grievances challenge the University’s managerial

prerogative to assign non-teaching duties. The impact of performing non-teaching duties (e.g., compensation, workload, working hours) and whether the non-teaching duties assigned to the grievants fall outside their primary duties (e.g., is recruiting within the job description of a full-time, tenured professor) are severable, mandatorily negotiable issues.

Moreover, whether the University can sufficiently demonstrate that an educational policy rationale was in fact the basis for assigning non-teaching duties to only the grievants may be determined by the arbitrator. If the University is unable to sustain its burden, the arbitrator may proceed to assess the frequency/rotation/allocation of non-teaching duties among employees.

ORDER

The request of the State of New Jersey, Kean University for a restraint of binding arbitration is granted only to the extent the grievances challenge the University's managerial prerogative to assign non-teaching duties. The request is denied to the extent the grievances contest the severable impact of assigned non-teaching duties as well as to the extent the grievances assert that the non-teaching duties fall outside the grievants' primary duties. If the University cannot sufficiently demonstrate that an educational policy rationale was in fact the basis for assigning non-teaching duties to only the grievants,

the arbitrator may proceed to assess the frequency/rotation/
allocation of non-teaching duties among employees.

BY ORDER OF THE COMMISSION

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

ISSUED: May 31, 2018

Trenton, New Jersey