P.E.R.C. NO. 2020-59

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY,

Petitioner,

-and- Docket No. SN-2020-031

UNION OF RUTGERS ADMINISTRATORS,
AMERICAN FEDERATION OF TEACHERS,
AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies Rutgers, the State University of New Jersey's request for a restraint of binding arbitration of the Union of Rutgers Administrators, American Federation of Teachers, AFL-CIO's two consolidated grievances alleging that the University violated the parties' CNA when it unilaterally refused to appoint unit members to multiple jobs and did not pay overtime to employees who worked multiple jobs. The Commission found that the University's assertion that URA-AFT does not have standing to bring the grievances under the CNA is an issue of contract interpretation for the arbitrator to determine. Additionally, the Commission found that the University could have agreed to consider URA-AFT members for the positions at issue, and thus, excluding URA-AFT members from those positions was not an exercise of the University's managerial prerogative to establish threshold eligibility criterion. Lastly, the Commission found that the parties could have reached an agreement regarding compensation for unit employees who performed duties in the positions at issue, as issues of employee compensations are generally negotiable and legally 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, Jackson Lewis, P.C., attorneys
(Jeffrey J. Corradino, of counsel and on the brief)

For the Respondent, Weissman & Mintz, LLC, attorneys
(Ira W. Mintz, of counsel and on the brief)

DECISION

On December 13, 2019, Rutgers, The State University of New Jersey ("University") filed a scope of negotiations petition seeking a restraint of binding arbitration of two grievances filed by the Union of Rutgers Administrators - American Federation of Teachers, Local 1766, AFL-CIO ("URA-AFT"). The grievances were consolidated for hearing and allege the University violated the parties' collective negotiations agreement when it unilaterally refused to appoint unit members to "multiple jobs" and did not pay overtime to employees who worked "multiple jobs". The University filed a brief, exhibits, and a

Certification of Harry M. Agnostak, Associate Vice President for Labor Relations and Director of the Office of Labor Relations. URA-AFT filed a brief, exhibits, and a Certification of Gregory Rusciano, Director of the URA-AFT.[1/] These facts appear.

URA-AFT represents all regularly employed administrative employees, all term contract employees who perform the unit work of the URA-AFT, and all casual employees who perform unit work of the URA-AFT for an average of at least four hours per week over a period of 90 calendar days. The University and URA-AFT are parties to a collective negotiations agreement effective from July 1, 2018 through June 30, 2022. The grievance procedure ends in binding arbitration.

The University and URA-AFT submit differing versions of the facts surrounding the grievances. The University states that it designates employees with a "Class" type depending on the position they hold. Regular salaried faculty and staff are "Class 1". Employees in casual "co-adjutant" positions are designated as "Class 8". According to the University, Class 8 appointments have existed prior to the formation of the URA-AFT in 2007. Class 8 positions are not recognized in any collective negotiations unit within the University. The URA-AFT consists of

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1/ Both parties filed general certifications averring to the statement of facts contained in their briefs without specific reference. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based on personal knowledge.

Class 1 employees performing non-academic, non-teaching administrative work.

University Policy 60.3.15 was first issued in 1986 and most recently updated in 2013. The University interprets the Policy to provide that only certain full-time staff members are permitted to hold a secondary appointment, including a Class 8 appointment, in addition to their primary, full-time appointment. According to the University, the Policy only permits employees who are exempt from the overtime requirements of the Fair Labor Standards Act (FLSA), identified by the University as "NL" positions, to receive additional compensation. Overtime exempt employees are only eligible to receive additional compensation via a Class 8 appointment if they fall within one of the limited circumstance specified in the policy. Thus, the University asserts that Class 1 non-exempt employees may not be appointed to Class 8 positions.

In November 2018, the University asserts that Human Resources became aware that some non-exempt Class 1 employees were receiving Class 8 appointments. The Human Capital Management office reminded departments that under the Policy, non-exempt employees could not hold an additional exempt appointment. The University asserts it then took unspecified action to prevent non-exempt employees from receiving Class 8

appointments including certain members of the URA-AFT negotiations unit.

URA-AFT asserts that University employees who perform adjunct teaching duties can be designated as Class 1, 7 or 8 depending on whether they are already members of certain negotiations units. It illustrates three scenarios for Class 8 appointments. First, an individual who is hired to teach a three-credit course for one semester can be a Class 7 employee and member of the Part-Time Lecturer Faculty Chapter (PTL) of the AAUP-AFT negotiations unit. Second, a person may be excluded from the PTL unit because they are a member of another negotiations unit, are an exempt employee under the FLSA, and are therefore treated as Class 8 coadjuncts who are paid a fixed stipend for teaching the three-credit course. Third, a person may be excluded from the PTL Unit because they are a member of another University negotiations unit and are non-exempt under the FLSA thus requiring they be paid overtime for their teaching duties. The grievances at issue involve the third category of employee. While the URA-AFT acknowledges that the University has never negotiated with any of its units over the terms and conditions of employment of Class 8 employees, it asserts the University has negotiated over the terms and conditions of employment of PTLs and URA-AFT unit members who perform adjunct teaching duties on a course-by-course basis.

URA-AFT takes issue with the University's characterization of Policy 60.3.15. It highlights that the Policy neither mentions Class 8 appointments nor prohibits non-exempt employees from being assigned to Class 8 appointments for additional compensation. URA-AFT submits Policy 60.3.14 entitled "Overtime/Comp Time for Regularly Appointed Staff that provides "[e]xcept in narrowly defined circumstances, all time worked for the university by employees in non-exempt positions including work in two or more departments and at special events as well as the employee's own department, must be considered in determining whether overtime compensation is due." URA-AFT is seeking payment to its members under Policy 60.3.14.

URA-AFT further asserts that this issue is not unique to the University as the realization that non-exempt employees assigned adjunct faculty duties are entitled to overtime compensation was shared by institutions of higher education across the country. URA-AFT submitted as an exhibit a FAQ from the University of Alaska (UA) entitled "Non-Exempt University Employees & Adjunct Appointments." UA pays non-exempt employees an hourly rate and overtime when required for their adjunct assignments. According to URA-AFT, instead of paying overtime when required, the University announced that it would no longer permit non-exempt employees be assigned to teaching duties.

According to the URA-AFT, prior to the realization that overtime was required to compensate non-exempt employees, URA-AFT members were paid a flat stipend to teach courses or perform additional duties. Some members were permitted by departments to continue adjunct duties, but through overtime compensation. In September 2019, University Payroll Supervision issued an email to departments advising that if a Class 1 employee is non-exempt, the employee cannot hold an additional exempt appointment. The University then ceased permitting URA-AFT members to work as coadjutants. Both parties acknowledge that grievances were filed, but neither party has provided the grievance documentation.

On February 15, 2019, URA-AFT filed a Request for Submission for a Panel of Arbitrators. The URA-AFT identifies the grievance as follows:

> Did the employer violate the collective agreement (including but not limited to article 19-just cause), its own policies, binding past practices and/or relevant laws when it: (a) unilaterally changed the pay of and/or (b) refused "multiple jobs" to [Grievant] and all others similarly situated? If so, what shall be the remedy?

On June 19, 2019,URA-AFT filed a second Request for Submission for a Panel of Arbitrators. The URA-AFT identifies this grievance as follows:

> Did the employer violate the collective agreement, its own policies, binding past practices and relevant laws when it failed to

> properly pay overtime to unit employees who worked "multiple jobs" (including but not limited to co-adjutant appointments) for hours worked between May 14, 2016 and May 14, 2019? If so, what shall be the remedy?

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.

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 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.

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have. We specifically do not comment on whether any provision of the agreement or University policy has been violated.

The University argues that the URA-AFT does not have standing to arbitrate any aspect of Class 8 appointments as they are not covered by the parties' agreement; it has a managerial prerogative to set eligibility criteria for appointment to Class 8 positions; and compensation for Class 8 positions is not negotiable with the URA-AFT.

URA-AFT responds that it does not seek to arbitrate the amount of the coadjutant stipend or the number of its members who could be appointed to work in these positions. URA-AFT is seeking that its members retain the right to apply for and receive coadjutant teaching assignments. To the extent members were improperly compensated for appointments, it seeks to arbitrate the compensation issue.

The University replies that since URA-AFT concedes it has not negotiated Class 8 appointments, the subject is not arbitrable. And, the University has a managerial prerogative to determine qualifications for its positions.

We determine abstract issues of negotiability and do not determine whether the parties' agreement addresses the subject of the grievance. Rutgers, The State University of New Jersey and Union of Rutgers Administrators, AFL-CIO, P.E.R.C. No. 2011-89, 38 NJPER 70 (¶14 2011). Thus, we must answer the question as to whether the University could have negotiated with URA-AFT over appointment to and compensation for Class 8 positions on behalf of its members.

We have previously held that an arbitrator may interpret a contractual recognition clause and determine whether an employee is covered by the agreement. In City of Hoboken, P.E.R.C. No. 96-16, 21 NJPER 348 (¶26214 1995), aff'd, 23 NJPER 140 (¶28068 App Div. 1996), the employer asserted that when performing certain duties, an employee was not a member of the negotiations unit as defined by the recognition clause and his claim for overtime was not arbitrable. The employer's assertion depended on an interpretation of the recognition clause, and a factual determination as to whether the grievant was performing duties covered by the agreement. We held that those questions were properly before an arbitrator. See also, City of Hoboken and Hoboken Muncipal Supervisors Ass'n, P.E.R.C. No. 2010-40, 35 NJPER 445 (¶146 2009) (Arbitrator may determine if City CFO is in the negotiations unit and whether overtime was required for his attendance at Council meetings). Similarly here, the

University's assertion that URA-AFT does not have standing because Class 8 titles are not included in the unit is an issue of contract interpretation for the arbitrator to determine. Ridgefield Park.

Next, we must determine whether the URA-AFT may arbitrate its claim that unit members should be afforded the right to apply for and receive Class 8 teaching assignments. The University argues that limiting Class 8 appointments to certain exempt employees is an exercise of its managerial prerogative to establish a threshold eligibility criterion. It primarily relies on Borough of Madison and Int'l Brotherhood of Teamsters Local 469, P.E.R.C. No. 2016-68, 42 NJPER 497 (¶138 2016).

In Madison, we restrained arbitration of a grievance contesting the Borough's decision to decline to hire/promote the grievant to a position because he did not possess the requisite license or experience. URA-AFT asserts that Madison is distinguishable because the University has not asserted a policy reason, educational or otherwise, for denying its members the ability to perform these additional duties and be paid for that work.

We reiterate that our jurisdiction is narrow. Ridgefield Park. We view the issue not as whether the parties agreed to appoint URA-AFT members, but whether they could have agreed to. In Ocean County College and Ocean County College Faculty Ass'n,

P.E.R.C. No. 2019-49, 45 NJPER 53 (¶112 2019) recon. denied, P.E.R.C. No. 2020-6, 46 NJPER 108 (¶22 2019), we found that a contractual provision giving preference to certain qualified faculty members to teach courses involving extra pay to be mandatorily negotiable. Similarly, we find here that the University could have agreed to consider URA-AFT members for Class 8 positions. An arbitrator may determine whether the parties made an agreement over Class 8 positions and whether the University violated that agreement. We decline to speculate about contractual rulings the arbitrator may make and what remedies the arbitrator may order if a violation is found. Whether employees are qualified for a position depends upon particular facts. The University has not submitted a certification setting forth the specific qualifications for a Class 8 appointment or to establish the basis for its managerial prerogative argument. If, as the University suggests, the parties contract does not provide for the appointment of URA-AFT members to Class 8 appointments, the dispute will end with the arbitrator's decision. If the arbitrator rejects the University's contractual defenses and issues an award that the University believes significantly interferes with its governmental policymaking powers, the employer may then assert that the award is illegal in post-arbitration proceedings.

Last, we consider whether the URA-AFT may arbitrate its claim that unit members who previously held Class 8 appointments were erroneously compensated. As a rule, employees have a right to negotiate over compensation they receive for the duties they perform. See, e.g., Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322 (1989); Woodstown-Pilesgrove Reg. Bd. of Ed. and Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980); State of New Jersey (Dept. of Human Services), P.E.R.C. No. 97-106, 23 NJPER 194, 197 (¶28090 1997). The University relies on Madison Bd. of Ed. and Madison Teachers' Ass'n, P.E.R.C. No. 80-116, 6 NJPER 182 (¶11088 1980). In Madison, we dismissed an unfair practice charge alleging the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally increased the workload of guidance counselors as a result of a new guidance program. The record before the Hearing Examiner developed that the counselors, on their own, scheduled evening meetings with parents. We relied on the Supreme Court's decision in Woodstown-Pilesgrove Reg. Bd. of Ed., issued after the Hearing Examiner's decision, to find that the dominant issue in the case was the Board's goal of providing a better guidance program, thereby rendering the workload changes that resulted nonnegotiable.

Here, we are applying a scope of negotiations analysis, not an unfair practice review of a factual record. The University

alleges it did not mandate any modification or increase in URA-AFT members' primary Class 1 workload. The unit members who previously held Class 8 appointments did so voluntarily and outside their Class 1 unit positions. These assertions are factual and contractual defenses for the arbitrator to determine. Thus, on this record, we find that the parties could have reached an agreement regarding compensation for unit employees who performed Class 8 duties.

ORDER

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

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Jones and Papero voted in favor of this decision. None opposed. Commissioner Voos recused herself.

ISSUED: May 28, 2020

Trenton, New Jersey