

P.E.R.C. NO. 84-84

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BROOKDALE COMMUNITY COLLEGE,

Petitioner,

-and-

Docket No. SN-84-1

BROOKDALE COMMUNITY COLLEGE
FACULTY ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission holds mandatorily negotiable proposals of the Brookdale Community College Faculty Association concerning evaluation procedures. The Commission holds not mandatorily negotiable proposals concerning criteria for hiring, promotion, evaluation, and reductions in force.

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Appearances:

For the Petitioner, Murray & Granello, Esqs.
(Robert E. Murray, of Counsel, Robert T. Clarke,
on the Brief)

For the Respondent, Sterns, Herbert & Weinroth, P.A.
(Michael J. Herbert, of Counsel and on the Brief,
and Jane F. Kelly, on the Brief).

DECISION AND ORDER

On July 7 and October 4, 1983, Brookdale Community College ("College") filed, respectively, a Petition for Scope of Negotiations Determination and an amended petition with the Public Employment Relations Commission. The College seeks a determination whether certain provisions in its collective negotiations agreement with the Brookdale Faculty Association ("Association") are mandatorily negotiable. These provisions, which the Association now seeks to carry over into a successor contract, concern various aspects of initial academic appointments, promotion decisions and procedures, faculty evaluations and evaluation schedules, and reductions in force.

The parties have submitted briefs and documents. The following facts appear.

The Association is the majority representative of the College's full-time faculty members. The Board and the Association entered a collective negotiations agreement effective from July 1, 1980 until June 30, 1983; this agreement contains the provisions in question. The parties are now in negotiations over a successor contract and the instant negotiability dispute has arisen.

In Local 195, IFPTE v. State, 88 N.J. 393 (1982) ("Local 195"), the Supreme Court set forth the tests for determining whether a matter is mandatorily negotiable. The Court stated:

To summarize, 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 pp. 404-405.

Article 7, entitled Initial Appointment to Academic Rank, is attached as part of the Appendix. The College argues that N.J.A.C. 9:2-2.7 preempts negotiation over this article and that this article significantly interferes with its managerial prerogative to establish hiring criteria. The Association responds that N.J.A.C. 9:2-2.7 only applies to New Jersey state colleges, not County Colleges, and thus does not preempt negotiation over this article. It further argues that

article 7 does not significantly interfere with the College's prerogative to determine hiring criteria because it does not dictate the choice of a particular applicant for a particular position.

We agree with the College that, on balance, Article 7 significantly interferes with its non-negotiable managerial prerogative to determine criteria for hiring. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983) ("Teaneck"); North Bergen Twp. Bd. of Ed. v. North Bergen Fed. of Teachers, 141 N.J. Super. 97 (App. Div. 1977) ("North Bergen"); In re Edison Twp. Bd. of Ed., P.E.R.C. No. 83-100, 9 NJPER 100 (¶14055 1983). Accordingly, Article 7 is not mandatorily negotiable.^{1/}

Article 8, entitled Promotion Procedure, is attached as part of the Appendix. The College contends that sections 8.2, 8.3, 8.4, 8.7, and 8.9 significantly interfere with its managerial prerogative to determine promotional criteria. The Association responds that these sections do not significantly interfere with the College's prerogative to determine hiring criteria because they do not dictate the choice of a particular applicant for a particular position.

We agree with the College that sections 8.2 and 8.3 directly and significantly interfere with its right to determine promotional criteria. Teaneck; North Bergen. Accordingly, these sections are not mandatorily negotiable.^{2/}

^{1/} Given this determination, we need not decide whether N.J.A.C. 9:2-2.7 preempts negotiation.

^{2/} Given a public employer's unilateral right to establish promotional criteria, it must negotiate, upon demand, over notifying its employees of what these criteria are.

Sections 8.4 and 8.7 concern the creation, composition, and functioning of an evaluation committee. These provisions would impermissibly require that promotional recommendations come from a certain body. See, e.g., In re NJIT, P.E.R.C. No. 83-79, 9 NJPER 51 (¶14025 1982); In re NJIT, P.E.R.C. No. 82-13, 7 NJPER 461 (¶12203 1981); In re Rutgers, The State University, P.E.R.C. No. 81-57, 6 NJPER 546 (¶11277 1980); In re Newark Bd. of Ed., P.E.R.C. No. 80-2, 5 NJPER 283 (¶10156 1979); In re Rutgers, The State University, P.E.R.C. No. 76-13 (1976).

Section 8.9 concerns the creation of a joint committee under an alleged side-bar agreement. The parties have not provided us with a copy of this agreement so we do not know what functions the committee will perform and therefore cannot properly apply Local 195's balancing test in order to make a formal scope determination. If, however, the joint committee's task is merely to insure compliance with the sections of Article 8 not challenged in this proceeding, it appears that section 8.9 would be mandatorily negotiable. If the joint committee's task includes determining promotional criteria, then it appears that section 8.9 would not be mandatorily negotiable.

Article 9, entitled Evaluation, is attached as part of the Appendix. Sections 9.1B (1&4), 9.2B, 9.3A and B, 9.4A (1&2) and 9.4B are in dispute. The College asserts that these provisions significantly interfere with its managerial prerogative to determine evaluation criteria and are partially preempted by

N.J.A.C. 6:3-1.19 and 6:3-1.21. The Association responds that these provisions are procedural in nature and do not interfere with the College's ability to evaluate the merits of its employees' job performance.

In Bethlehem Twp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982) ("Bethlehem"), the New Jersey Supreme Court upheld the general test for determining the negotiability of contractual provisions concerning evaluations which we have long applied; evaluation procedures are mandatorily negotiable, so long as not preempted by a specific statute or regulation, but evaluation criteria are not. State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978); State v. State Troopers NCO Ass'n, 179 N.J. Super. 80 (App. Div. 1981); Fair Lawn Bd. of Ed. v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554 (1980); In re Byram Twp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977); In re Willingboro Twp. Bd. of Ed., P.E.R.C. No. 82-67, 8 NJPER (¶13042 1982); In re Rutgers, The State University, P.E.R.C. No. 82-47, 7 NJPER 671 (¶12303 1981); In re Township of Edison Bd. of Ed., P.E.R.C. No. 83-40, 8 NJPER 599 (¶13281 1982); In re Brookdale Community College, P.E.R.C. No. 84-16, 9 NJPER 560 (¶14234 1983) ("Brookdale").

In the instant case, we believe the following provisions predominantly concern evaluation criteria and are not mandatorily negotiable: sections 9.1B1 and 9.3A and B. Further, sections 9.4A1 and 2 and 9.4B are not mandatorily negotiable because they impermissibly impinge upon the College's non-negotiable managerial prerogative to determine the identity of

its primary evaluators. Brookdale; In re Tenafly Bd. of Ed., P.E.R.C. No. 83-51, 8 NJPER 62 (¶13297 1982).

We believe, however, that sections 9.1B4 and 9.2B are mandatorily negotiable. The former section protects the vital interest of faculty members in knowing of any perceived weaknesses which may affect their employment status or compensation, having an opportunity to correct any weaknesses, and having an opportunity to respond to any criticisms which they believe unfounded; it does not interfere with any managerial prerogative and instead promotes the common interest of employees and employer in identifying any problems and working towards their elimination. In re Fair Lawn Bd. of Ed., P.E.R.C. No. 83-39, 9 NJPER 648 (¶14281 1983). The latter section protects the interest of faculty members in having current and relevant evaluation material considered and does not in any way restrict the College's ability to determine or weigh evaluation criteria.^{3/} On balance, then, both provisions are mandatorily negotiable.

Article 10, entitled Evaluation Schedule, is attached as part of the Appendix. The College asserts that N.J.S.A. 18A:27-3.1 and N.J.A.C. 6:3-1.19 preempt this article and that the identity of the evaluators is not mandatorily negotiable. The Association responds that this article predominantly involves mandatorily negotiable matters of evaluation procedures.

^{3/} We see nothing in N.J.A.C. 6:3-1.19 and 6:3-1.21 to indicate that these regulations, adopted by the State Board of Education, apply to County colleges. The State Board of Education does not supervise and control institutions of higher education. N.J.S.A. 18A:4-10; forward to N.J.A.C. 6:3-1.1 et seq.

We believe that the number and scheduling of evaluations and prior notice of the identity of the evaluators are mandatorily negotiable. Article 10 is not mandatorily negotiable, however, to the extent it would restrict the College's managerial prerogative to unilaterally determine or change, upon proper notice, the identity of its evaluators. Once the College exercises its unilateral right to identify who will conduct employee evaluations, however, it must negotiate over notifying the employees of the identity of the evaluators, and the frequency and schedule of examinations.^{4/} Bethlehem.

Article 23, entitled Reduction in Force, is attached as part of the Appendix. The College asserts that N.J.A.C. 9:2-3.1 et seq preempt negotiation over this provision and that this provision significantly interferes with the College's prerogative to set the substantive criteria for determining which faculty members are laid off and recalled. The Association responds that N.J.A.C. 9:2-3.1 et seq. only apply to New Jersey State Colleges, not County colleges, and thus do not preempt negotiation over this provision. The Association, however, commendably brings to our attention a regulation, N.J.A.C. 9:4-5, governing reductions in force at County colleges which the State Board of Higher Education adopted on April 15, 1983. The Association notes that this regulation is on appeal before the Appellate Division of the

^{4/} For the reasons stated in the previous footnote, we see nothing in the cited statute or regulations which preempts negotiation over Article 10. We also note that the parties have not raised the issue of under what circumstances the College may have a managerial prerogative to make additional observations or evaluations over and above those already scheduled.

Superior Court (Docket No. A-4736-82T2) and argues that it exceeds the powers of the State Board of Higher Education to govern County colleges. The Association further argues that section 23.2 merely establishes a procedure for determining which faculty members will be laid off or recalled.

We agree with the College that, on balance, section 23.2 significantly interferes with its non-negotiable managerial prerogative to determine the criteria for faculty layoffs and recall. In In re Rutgers, The State University, P.E.R.C. No. 83-136, 9 NJPER 276 (¶14127 1983), we specifically held that contractual provisions basing faculty reductions in force and reemployment rights on seniority were not mandatorily negotiable because they unduly restricted the employer's ability to match the qualifications of particular instructors with particular courses. Thus, section 23.2 is not mandatorily negotiable.^{5/}

ORDER

The following provisions of the 1980-83 contract between Brookdale Community College and the Brookdale Community College Faculty Association are mandatorily negotiable: Articles


^{5/} We need not decide whether a seniority provision would be mandatorily negotiable if its application was limited to situations in which the appointed and rejected teaching candidates were otherwise equally qualified. In re Willingboro Bd. of Ed., P.E.R.C. No. 82-67, 8 NJPER 104, 106, n. 4 (¶13042 1982). We also need not decide whether any of the cited regulations preempt negotiation.

9.1B4, 9.2B, and 10 to the extent it involves negotiation over notice of the identity of the evaluators and the number and scheduling of evaluations rather than over the identity of evaluators.

The following provisions of the 1980-83 contract between the College and the Association are not mandatorily negotiable: Articles 7, 8.2, 8.3, 8.4, 8.7, 9.1B1, 9.3A and B, 9.4A1 and 2, 9.4B, and 10 to the extent it involves negotiation over the identity of evaluators rather than notice of the identity of the evaluators and frequency and scheduling of evaluations, and 23.2.

We decline to issue a formal scope of negotiations determination regarding Article 8.9.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Newbaker, Butch and Suskin voted for this decision. None Opposed. Commissioner Hipp abstained. Commissioners Hartnett and Graves were not present.

DATED: Trenton, New Jersey
January 18, 1984
ISSUED: January 20, 1984

APPENDIX

ARTICLE 7

INITIAL APPOINTMENT TO ACADEMIC RANK

7.1 The guidelines for initial appointment to academic rank currently in effect will continue in effect. These are:

a.) Instructor: Master's Degree in subject field; or Bachelor's Degree plus at least three (3) years' experience in related career education field.

b.) Assistant Professor: Master's Degree in subject field, plus five (5) years of professional experience; or Bachelor's Degree, plus at least three (3) years' experience in related career education field and five (5) years' teaching experience; or Bachelor's Degree, plus at least ten (10) years' experience in related career education field.

c.) Associate Professor: Master's Degree in subject field plus nine (9) years of professional experience; or Master's Degree in subject field and thirty (30) semester hours of relevant graduate work beyond the Master's Degree and six (6) years' professional experience; or Bachelor's Degree, plus three (3) years' experience in related career education field and ten (10) years' teaching experience; or Bachelor's Degree, plus twelve (12) years' experience in related career education field and four (4) years' teaching experience.

d.) Professor: Appointment shall be based on exceptional qualifications and demonstrated instructional leadership.

7.2 For Student Development Specialists and Media Specialists, relevant experience is equated to teaching. Master's Degree is normally required for Student Development Specialists, Media Specialists, and faculty teaching in college and university parallel programs. Less than a Master's Degree may be allowed for teaching in career education programs.

ARTICLE 8

PROMOTION PROCEDURE

8.1 Applications for promotion may be submitted by a member of the unit on or before November 15 each year.

8.2 The requirements for academic rank (Experience and Length of Service, Educational Preparation) contained in ARTICLE 7 shall be minimal requirements for promotion.

8.3 In addition to these minimal conditions in the paragraph above, consideration will be given to performance as a member of the faculty, work or services performed for the Institution beyond assigned duties, professional status, growth and development, and in community service.

8.4 The Institute Evaluation Committee shall review credentials and make recommendations for promotion.

8.5 The full list of those being recommended for promotion shall be passed by the Committee to the Institute Dean on or before March 15. The Institute Dean may append comments concerning the individuals on the list, and he/she then shall pass the list to the President on or before March 31.

8.6 The President will review the recommendations and submit a list to the Board. Any faculty member applying for promotion who is not on the list which is submitted to the Board must be notified of that fact.

8.7 The Institute Evaluation Committee shall consist of one tenured teaching faculty member from each team within the Institute and include the faculty member's team leader. The Committee shall be appointed by the Institute Dean on or before November 1.

8.8 Faculty members receiving promotions in rank shall receive an additional five percent (5%) in their annual base salary.

8.9 Pursuant to side-bar letter of understanding, a joint committee will be established and shall function in accordance with the provisions of said side-bar Agreement.

ARTICLE 9 EVALUATION

9.1 Purposes of Evaluation

A.) The primary purpose of evaluation is to improve the quality of the learning environment at Brookdale, as well as to make an assessment of an employee's contribution to the improvement of this environment so that the employee may grow and develop as a manager of the learning process.

B.) To this end, the evaluation process will identify an employee's strengths and weaknesses as a learning manager throughout the year, and on a continuing basis, and assist the employee in correcting any weakness. To facilitate a continuing effort toward the improvement of instruction, the evaluation process will:

- 1.) Be based on criteria consistent with the philosophy of the College and mutually understood.
- 2.) Include written evaluations at specified times during each year and also will include a personal interview on each written evaluation.
- 3.) Include data which are submitted to the appropriate supervisor for inclusion in each written evaluation.
- 4.) Identify weakness in writing and make recommendations for improvement.
- 5.) Include no written evaluations that have not been submitted to the employee in writing in a personal conference.

C.) Evaluations provide the primary basis upon which recommendations as to retention, promotions, annual salary adjustments, and/or merit awards are made.

9.2 Frequency of Evaluation

A.) Each member of the staff will be evaluated in writing according to the Evaluation Schedule hereinafter contained. Each faculty member will receive a copy of all evaluations given. The evaluations will be placed in the individual's personnel file. Provision shall be made for the attachment of comments by the faculty member to each evaluation.

B.) Nothing in this article will preclude full-time instructional personnel from requesting and receiving additional evaluations throughout an academic year, including peer and student evaluation(s).

9.3 Basis for Evaluation

A.) Evaluations will be based on observable behavior of the individual being evaluated.

B.) The observable behavior and productivity to be measured will be directly related to assigned performance objectives. Performance objectives will be prepared by the faculty member in concert with the team and are subject to the approval of the Dean or Learning Center Chairperson. The Dean may assign performance objectives to the team. Any modifications of the objectives assigned after the beginning of a College term will be made in concert with the team before they become effective. In addition, these modifications must relate to the staff member's academic training and/or competencies.

C.) Evaluations will be recorded on forms designed for such purpose (PE 14, PE 47, and PE 48) and will be filed as part of the personnel records of the individual being evaluated.

9.4 Responsibility for Evaluations

A.) Teaching Faculty

1.) Learning Center Chairpersons will be responsible for conducting and writing evaluations. Following review of the evaluation by the Institute Dean, Learning Center Chairpersons will conduct individual interviews with members of their learning center.

2.) Institute Deans have final authority and responsibility for the recommendations that are made on the evaluation of all personnel in their respective Institutes. Accordingly, Institute Deans may conduct additional evaluations as they deem them appropriate.

B.) Non-Teaching Faculty

The appropriate Officer of the College or Dean is responsible for written evaluations and for the individual evaluation interviews of all personnel responsible to him/her.

C.) Evaluations will be reviewed by the supervisor of the individual who has performed the evaluation, as well as the Vice President, Educational Services. Such review will be primarily concerned with determining whether the articles governing evaluation have been followed.

ARTICLE 10
EVALUATION SCHEDULE

10.1 In all instances where a specified date stated in the evaluation time schedule below falls on a Saturday, Sunday, or holiday, the next immediate working day will prevail. The following time schedule for evaluation will apply:

A.) TENURE CANDIDATES: DATES DUE:

1.) Individuals Initially Appointed Prior to Beginning of the Fall Term

- a.) Evaluation #1 by institute Dean, Dean, and/or other appropriate supervisor Prior to 12/1
- b.) Unsatisfactory evaluation from evaluation #1 to the Vice President, Educational Services, by Institute Dean, Dean, and/or other appropriate supervisor 12/1
- c.) If evaluation is unsatisfactory, an additional evaluation will be made by the Vice President of Educational Services 12/1 to 12/15
- d.) Evaluation #2 by Institute Dean and/or other appropriate supervisor 12/1 to 6/15

2.) Individuals Initially Appointed After the Beginning of the Fall Term

- a.) Evaluation #1 by Institute Dean and/or other appropriate supervisor Prior to 2/1
- b.) Unsatisfactory evaluation from evaluation #1 to the Vice President, Educational Services by Institute Dean, Dean, and/or other appropriate supervisor 2/15
- c.) If evaluation is unsatisfactory, an additional evaluation will be made by the Vice President of Educational Services 2/15 to 3/1
- d.) Performance evaluation #2 by Institute Dean, Dean, and/or other appropriate supervisor 3/1 to 6/15

B.) OTHER NON-TENURED FACULTY: DATES DUE:

1.) Individuals Initially Appointed Prior to the Beginning of the Fall Term

- a.) Evaluation #1 by Institute Dean and/or other appropriate supervisor Prior to 2/1
- b.) Unsatisfactory evaluation from evaluation #1 to the Vice President, Educational Services, by Institute Dean, and/or other appropriate supervisor 2/15
- c.) If evaluation is unsatisfactory, an additional evaluation will be made by the Vice President of Educational Services 2/15 to 3/1
- d.) Evaluation #2 by Institute Dean, Dean, and/or other appropriate supervisor 2/1 to 6/15

2.) Individuals Initially Appointed After the Beginning of the Fall Term

- a.) If initial contract begins during Fall Term, the employee will be evaluated twice. First evaluation

will be done by Institute Dean, Dean, and/or other appropriate supervisor by 2/1 and other schedule dates for evaluation will conform to B.1 above.

- b.) If initial contract begins after close of Fall Term, the employee will be evaluated once that first year and any unsatisfactory evaluation will be submitted to the Vice President, Educational Services, by the Institute Dean, Dean, and/or other appropriate supervisor Prior to 3/1

C. TENURED FACULTY: DATES DUE:

- 1.) Evaluation by Institute Dean and/or other appropriate supervisor Prior to 2/21
- 2.) Unsatisfactory evaluation to the Vice President, Educational Services, by Institute Dean, Dean, and/or other appropriate supervisor 2/21
- 3.) If evaluation is unsatisfactory, an additional evaluation will be made by the Vice President, Educational Services. 2/21 to 3/1

ARTICLE 23
REDUCTION IN FORCE

23.1 Whenever it is necessary, in the judgment of the Board, to decrease the number of faculty members because of financial exigency or because of discontinuance of a program or a substantial decrease of student population within the College, the Board, upon recommendation of the President, may cause the necessary number of staff to be placed on leave of absence without pay. Layoff shall be implemented by identifying the subject area or specialty where the reduction in force shall take place.

23.2 Non-tenured faculty members shall be laid off first, and should further reduction be necessary, tenured faculty members shall then be laid off in inverse order of their seniority. The released faculty member's place shall not be filled by a replacement for a period of three (3) years, unless the faculty member has first been offered reappointment to his/her original position. When circumstances shall be appropriate to increase the instructional staff, in the judgment of the Board, each tenured faculty member laid off shall be reinstated in the inverse order of his/her layoff followed by non-tenured who shall be preferred in recall over new hires. A tenured faculty member who is laid off shall retain but not accumulate seniority for a period of three (3) years.