P.E.R.C. NO. 82-58

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC COMMUNITY COLLEGE,

Petitioner,

-and-

Docket No. SN-82-5

EDUCATIONAL ASSOCIATION OF ATLANTIC COMMUNITY COLLEGE, INC.,

Respondent.

SYNOPSIS

In a scope of negotiations proceeding, the Commission denies the request of Atlantic Community College for a permanent restraint of arbitration of a grievance filed by the Educational Association of Atlantic Community College, Inc. The greivance concerned termination for budgetary reasons of a noninstructional professional employee who is not eligible for faculty rank. The Commission, in accordance with the decision of the Appellate Division in Plumbers & Steamfitters v. Woodbridge Bd. of Ed., 159 N.J. Super. 83 (App. Div. 1978), finds that the greivance concerns a mandatorily negotiable subject, since employees such as the one involved herein are not covered by any statutes concerning the order or priority of layoffs, and thus may negotiate concerning job security protections.

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Appearances:
For the Petitioner, Koury, Tighe & Lapres, Esqs.
(Peter P. Bisulca, of Counsel)

For the Respondent, Sterns, Herbert & Weinroth, P.A.
(Mark D. Schorr, of Counsel)

DECISION AND ORDER

A Petition for Scope of Negotiations Determination was filed with the Public Employment Relations Commission on August 14, 1981 by Atlantic Community College (the "College") seeking a determination as to whether a certain matter in dispute between the College and the Educational Association of Atlantic Community College (the "Association") is within the scope of collective negotiations.

The present dispute concerns the negotiability and arbitrability of a grievance alleging a breach of the job security provisions in the event of a reduction in force. Article IV(G) of the current contract between the parties provides, *inter alia*,

> Reduction of educators who are represented by the bargaining unit shall be made according to the following:
>
> 1. Seniority, for the purpose of this Article, shall be defined as beginning with the last date of continuous employment.

2. A seniority list shall be prepared by the Board and presented to the Association which includes all educators. Any errors on such list shall be corrected, and the list which is in effect by the first Monday of November shall be acknowledged by both parties as being correct.

3. In the event tenured educators are affected by a general reduction in force, such lay off will be on the basis of seniority and qualifications, except as necessary to staff the teaching positions remaining.

4. In the case of educators with identical college-wide seniority and who are affected by a general reduction in force, the accepted date for breaking any tie in seniority shall be the date of signing of the initial contract by the individual.

The above provisions have come into question as a result of a decision by the College in May 1981 to reduce the number of counselor positions at the College from three to two. It order to implement that decision, it decided to lay off Mr. Joseph Volczkai, a counselor at the College. The Association has sought to contest Mr. Volczkai's lay off pursuant to the above contractual provisions and the contractual grievance procedure. The College contends that its decision to lay off Volcskai and the impact of that decision are non-negotiable, non-arbitrable subjects.[1/]

1/ We recognize that the above provisions, as they affect unit members who are professional staff with faculty rank, may be illegal subjects of collective negotiations preempted by specific statutes (i.e., N.J.S.A. 18A:60-1 and 3). However, since the employee in question herein is a professional staff member without faculty rank (see footnote 3, infra), we consider only the applicability of these provisions to that employee and do not reach the question of the applicability of the provisions to other unit members. East Brunswick Bd. of Ed. and East Brunswick Ed. Assn, P.E.R.C. No. 81-123, 7 NJPER 242 (¶12109 1981). Whether the above provisions are enforceable as to the employee in ques-
(continued)

It should be noted at the outset that a reduction in force is a managerial prerogative and not subject to negotiations. Maywood Ed. Ass'n v. Maywood Bd. of Ed., 168 N.J. Super. 45, (App. Div. 1979), pet for certif. den. 81 N.J. 292 (1979). Clearly, the College's decision to eliminate a counselor position based on reasons of economy is a reduction in force, and as such, is not negotiable. N.J.S.A. 18A:60-3. However, the Association is not challenging the decision to eliminate the counselor position. Instead, the Association argues that the above contractual provisions are negotiable and that the underlying question in the grievance is whether under these provisions Mr. Volczkai should have been the employee terminated. The College maintains that the entire area of reduction in force, including the criteria and selection of the particular employees to be laid off, is non-negotiable and non-arbitrable.

In considering the instant petition, we are guided by substantial case law. In State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978), the Supreme Court stated that "the parties must negotiate upon and are free to agree to proposals governing any terms and conditions of public employment which have not been set, and thus preempted, by specific statutes or regulations." Specifically, with regard to seniority as it relates to lay offs, bumping and re-employment rights, the Court stated:

1/ (continued) question pursuant to the savings clause in the contract between the parties (Article XIV(E)) is an issue for the arbitrator to determine.

> We have no doubt that these questions all relate to terms and conditions of employment. Nothing more directly and intimately affects a worker than the fact of whether or not he has a job. Since only those work ers whose work is judged satisfactory are included in this proposal, there is no danger of the merit system being injured.
> Id. at 84.

Similarly in this case the application of the contractual provisions presumes satisfactory job performance by the employees affected. The record herein admits of no interpretation other than that Mr. Volczkai performed his job in a satisfactory manner, and would not have been terminated but for the reduction in force.[2/]

Thus, where specific statutes regulate job security for certain employees, public employers and employee organizations may not negotiate contrary provisions. In re Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1980). Township of Weehawkin, P.E.R.C. No. 81-104, 7 NJPER 146 (¶12065 1981). State v. State Supervisory Employees Ass'n, supra. Accordingly, the Appellate Divison held in Union Cty Bd. of Ed. v. Union Cty Teachers Ass'n, 145 N.J. Super. 435 (App. Div. 1976) that a school board and a majority representative cannot negotiate job security or reemployment rights for non-tenured teachers, facing a reduction in force, as such rights have

2/ Paragraph 3 of the quoted contractual provision provides that layoffs will be based on "seniority and qualifications." Thus, if the College maintains that the reason Volczkai was chosen to be laid off was because his job performance, while adequate, was not equal to that of the employees retained, it would appear that it is free to put this before the arbitrator as a "qualification" other than seniority which was considered. The accuracy of the College's assessment of the employees' respective job performances is not reviewable by the arbitrator.

been precluded for them by N.J.S.A. 18A:28-5, 9, 10, 11 and 12. Once a teacher attains tenure under those statutes, he or she will be entitled to the rights contained therein.

However, where the Legislature does not provide tenure and/or reemployment rights for certain types of employees, those subjects may be negotiated by public employers and majority representatives. Thus, in Plumbers and Steamfitters v. Woodbridge Bd. of Ed., 159 N.J. Super. 83 (App. Div. 1978), the Appellate Division held that, in view of the absence of statutes regulating job security rights for the employees in question, job security provisions could be negotiated by the parties. Of course, such negotiations are limited by the employer's right to determine the extent of the work force required for a given governmental task. Sports Arena Employees Local 157 v. New Jersey Sports and Exposition Authority, App. Div. Docket No. A-90-80-T2 (November 12, 1981).

In the instant matter, the laid off employee is a non-instructional, professional counselor without faculty rank at a State educational institution.[3/] The Legislature has enacted job security legislation for instructional and certain other personnel at State educational institutions, providing tenure, layoff by seniority, and reemployment rights for those employees. N.J.S.A. 18A:60-1 and 3. As for professional staff without faculty rank

3/ In its brief, the Association asserts that Volczkai is a professional, noncontractual employee who is ineligible for faculty rank and the College has not rebutted this recitation of the facts. Our decision presumes the accuracy of this description of Volczkai's position.

at State educational institutions, such as the employee in question herein, the Legislature has provided a limited form of tenure rights. N.J.S.A. 18A:60-14. However, the Legislature has not enacted statutes concerning layoffs for professional staff without faculty rank.

Under the principles of State v. State Supervisory Employees Ass'n, supra, and Plumbers and Steamfitters v. Woodbridge Bd of Ed., supra, noted above, terms and conditions of employment, which include seniority as it affects lay offs, must be negotiated by public employers and majority representatives unless preempted by specific statutes or regulations. Since there is no such preemptive statute concerning seniority for lay off for the employee in question, we conclude that the relevant contractual provisions agreed to by the parties herein are negotiable as to the aggrieved employee, and that the Association may proceed to to arbitration based on those provisions and the facts herein.[4/]

ORDER

Based upon the above, IT IS HEREBY ORDERED that the instant grievance filed by the Educational Association of Atlantic Community College concerns a negotiable subject, is arbitrable

4/ In so ruling, we have not decided the merits of the grievance. As discussed, supra in footnote 2, the contract clause in question does not mandate seniority to be the sole factor in the College's determination as to the identification of the employee to be laid off. If the College relied on reasons other than relative seniority, these should be submitted to the arbitrator as other "qualifications" and may be a contract defense for the College's actions.

and may be submitted to binding arbitration if otherwise arbitrable under the parties' contract.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Parcells, Graves, Suskin and Newbaker voted for this decision. Commissioner Hipp abstained. None opposed.

DATED: Trenton, New Jersey
December 15, 1981
ISSUED: December 17, 1981