P.E.R.C. NO. 2010-98

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERSITY OF MEDICINE AND DENTISTRY
OF NEW JERSEY,

Respondent,

-and- Docket Nos. CO-2005-220
CO-2007-271

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY
COUNCIL OF AMERICAN ASSOCIATION
OF UNIVERSITY PROFESSORS CHAPTERS,

Charging Party.

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY
COUNCIL OF AMERICAN ASSOCIATION
OF UNIVERSITY PROFESSORS CHAPTERS,

Respondent,

-and- Docket No. CE-2006-003

UNIVERSITY OF MEDICINE AND DENTISTRY
OF NEW JERSEY,

Charging Party.

Appearances:

For the Respondent/Charging Party, University of Medicine and Dentistry of New Jersey, Paula T. Dow, Attorney General of New Jersey (Michael J. Gonnella, Deputy Attorney General, of counsel)

For the Charging Party/Respondent, University of Medicine and Dentistry of New Jersey Council of American Association of University Professors Chapters, Crow and Associates (Mark D. Schorr, of counsel)

DECISION

This case asks us to answer a question that has arisen about the implementation of P.E.R.C. No. 2010-12, 35 NJPER 330 (¶113 2009). In that decision, we found that the University of Medicine and Dentistry (UMDNJ) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), when it unilaterally reduced the faculty practice or clinical components of the salary of certain faculty represented by the University of Medicine and Dentistry of New Jersey Council of American Association of University Professors (AAUP). We held that UMDNJ had to cease refusing to negotiate over reductions in supplemental salaries and to negotiate upon request over the disputed reductions in this case. We also ordered UMDNJ to notify AAUP of any proposed reductions in supplemental salaries and to negotiate in good faith upon demand over those proposed reductions.

On October 15, 2009, UMDNJ notified us that it had instructed its Deans and Department Chairs that AAUP must be notified of all proposed reductions in supplemental salaries and that UMDNJ must negotiate in good faith to impasse over those proposed reductions before any reduction can be implemented. UMDNJ also informed us that it had notified AAUP that, at AAUP's request, UMDNJ was ready to begin negotiations over the

reductions at issue in this case. UMDNJ informed us that as we had not ordered it to negotiate over back pay or over past reductions other than the ones at issue in this case, it would limit negotiations to the negotiations unit members who (1) remained in the employ of UMDNJ as of September 24, 2009, the date of our Order, and (2) had not already had their salary reductions restored prior to September 24, 2009. UMDNJ also informed us that it understood that AAUP disagreed with its interpretation and might be seeking clarification.

On October 19, 2009, AAUP wrote us about this dispute over the implementation of P.E.R.C. No. 2010-12. It asserts that UMDNJ is not in compliance with our Order and asks that we take appropriate steps pursuant to N.J.A.C. 19:14-10.2(a) to ensure compliance. It identified four areas in dispute:

1. UMDNJ is refusing to negotiate over the compensation of unit members who were the subject of the case but whose clinical components were restored at a later date;

2. UMDNJ is refusing to negotiate over the clinical components of salary of unit members who left UMDNJ, in some cases because of the reduction in compensation;

3. UMDNJ is refusing to negotiate over reductions in clinical components affecting unit members that occurred during the period between the litigation and our September 24, 2009 Decision and refusing to provide information about those reductions (these issues are the subject of another unfair practice charge (CO-2008-368).

> 4. UMDNJ has asked for a time frame within which to complete negotiations and has advised AAUP that it will not comply with the Commission's impasse procedures. AAUP asserts that the School Employees Contract Resolution and Equity Act, N.J.S.A. 34:13A-33 (School Act), bars UMDNJ from implementing changes in terms and conditions of employment without AAUP's agreement.

On October 30, 2009, UMDNJ filed a response. It quotes the portion of our decision that requires it to "negotiate upon request over the disputed reductions in this case and any future reductions that AAUP seeks negotiations over." UMDNJ asserts that it rejected AAUP's request to negotiate with regard to individuals whose clinical supplements were disputed but who were no longer UMDNJ employees on the date of the decision. UMDNJ further asserts that as in the case of employees who already had their clinical components restored, the only thing at issue in those instances is back pay, which we refused to award. UMDNJ contends that we carefully considered the past practice between the parties and determined that it would be unfair to disturb the status quo by ordering clinical supplements restored retroactively. As for negotiations, UMDNJ states that it has expressed its disagreement with AAUP's position that it may not implement a proposed reduction in clinical supplements until post-impasse procedures have been exhausted. As for the AAUP's reliance on the School Act, UMDNJ contends that the statute does

not apply and cannot be construed to require AAUP's agreement before a reduction can be implemented. Finally, UMDNJ denies that it is refusing to provide information to AAUP.

On November 4, 2009, AAUP responded. It states that there is no suggestion in our Decision that UMDNJ's obligation to negotiate is limited to future impacts. AAUP asserts that while we did not restore the individual unit members to the status quo, we explicitly required that UMDNJ negotiate over the reductions in salary that were the subject of the litigation. AAUP further asserts that UMDNJ may have restored the compensation for certain unit members, but it did not do so retroactively, so AAUP has a right to negotiate over those cuts. AAUP also contends that it has a right to negotiate for unit members who have left UMDNJ's employ, for the time during which they were employed. As for the School Act, AAUP asserts that the statute prohibits unilateral implementation whether or not the terms and conditions of employment are expressly set forth in an expired or expiring collective negotiations agreement. Finally, AAUP discusses its reason for raising the pending unfair practice charge.

On November 19, 2009, AAUP supplemented its November 3 submission with additional argument about the application of the School Act. It asserts that the statutory bar against employer implementation of a change in terms and conditions of employment

under the Act is not limited to the time during which the parties are conducting collective negotiations, but applies at all times. It argues that the bill that became the School Act was amended during passage to specifically protect against unilaterally imposed changes in terms and conditions of employment not set forth in the expired or expiring agreement. AAUP contends that if it seeks negotiations, a salary reduction can be made only with its specific agreement.

On December 2, 2009, UMDNJ filed a response. It argues that the School Act's prohibition against any change "without specific agreement of the majority representative," if applied to UMDNJ, conflicts with our ruling that "AAUP does not obtain from this proceeding any contractual protection against unilateral reductions in supplemental compensation." It further argues that the School Act does not apply to UMDNJ.

On December 7, 2009, AAUP filed a response explaining why it believes the School Act applies to UMDNJ.

UMDNJ's obligations under P.E.R.C. No. 2010-12 fall somewhere in between the parties' positions. Under our Decision and Order, UMDNJ must negotiate upon request over the disputed reductions in this case and any future reductions that AAUP seeks negotiations over. Because of the more than two-decade history of UMDNJ's unilaterally setting and changing supplemental

salaries, we did not order restoration of the status quo and back pay. Instead, we ordered UMDNJ to negotiate over the disputed reductions. Although we did not order back pay, the obligation to negotiate over past reductions implicitly includes the obligation to negotiate over the possibility of back pay. Because UMDNJ is required to negotiate over the possibility of back pay, it must also negotiate over the supplemental salary reductions for employees whose supplemental salaries have been restored or who left UMDNJ's employ.

But as we stated explicitly in our decision, the obligation to negotiate does not entail an obligation to agree. And we reject AAUP's contention that either the Act requires UMDNJ to participate in mid-contract impasse procedures or that the School Act prohibits UMDNJ from unilaterally implementing mid-contract changes over non-contractual terms and conditions of employment.

N.J.S.A. 34:13A-5.4e requires us to adopt rules to regulate the time of commencement of negotiations and to institute impasse procedures so that there will be a full opportunity for negotiations and the resolution of impasses prior to required budget submission dates. The focus of that statutory obligation is the establishment of impasse procedures for successor contract

negotiations. Further, N.J.S.A. 34:13A-6(b) provides that whenever negotiations between a public employer and exclusive representative concerning terms and conditions of employment shall reach an impasse, we are empowered upon the request of either party to provide mediation to effect a voluntary resolution of the impasse, and, if necessary, to invoke fact-finding.

Our impasse rules, N.J.A.C. 19:12 et seq., were adopted pursuant to those statutory commands. They provide for mediation and fact-finding during successor contract negotiations or agreed-upon reopener negotiations. N.J.A.C. 19:12-2.1. Those rules do not impose and never have imposed an obligation on a public employer to exhaust impasse procedures when negotiating over a mid-contract change in a non-contractual term and condition of employment.

In addition, the School Act does not require agreement from an exclusive representative before a school employer can implement a mid-contract change in a non-contractual term and condition of employment. This statute was enacted in 2003. L. 2003, c. 126. The original bill, A3419, was introduced on March 6, 2003 and was referred to the Assembly Labor Committee. That Committee issued a Statement that provides, in relevant part:

> This bill prohibits any school employer from unilaterally imposing, modifying, amending, deleting or altering any terms and conditions of employment of its employees without specific agreement of their majority representative. The bill also provides for a series of procedures if collective bargaining between an employer and majority representative reaches an impasse.
>
> If collective bargaining fails to result in the parties reaching agreement on the terms of a negotiated agreement and mediation procedures of the New Jersey Public Employment Relations Commission have been exhausted with no final agreement reached, the parties are required by the bill to participate in mandatory fact-finding conducted under the jurisdiction of the commission, with the fact finder appointed no more than 30 days after the last meeting between the parties and the mediator. The bill requires the fact finder's report to be made available to the parties upon issuance, and to the public 10 days later. If the employer and majority representative do not reach a voluntary negotiated agreement within 20 days of the issuance of the fact finder's report, the commission is directed to appoint a super conciliator to assist the parties.

On June 12, 2003, the bill was amended on the Assembly floor. The Floor Amendment Statement clarifies:

> that the bill's prohibition against an employer unilaterally imposing, modifying, amending, deleting or altering terms and conditions of employment, without specific agreement of the majority representative, applies whether or not the existing terms and conditions are expressly set forth in the expired or expiring collective negotiations agreement, so long as they are negotiable terms and conditions of employment.

The bill was passed and enacted with those amendments. Thus, the focus of the statute, as adopted, is the preservation of terms and conditions of employment after the expiration of a collective negotiations agreement, whether or not those terms and conditions of employment are set by the expired or expiring contract. That focus is consistent with the obligation of all public employers to preserve the status quo concerning both contractual and non-contractual terms and conditions of employment after the expiration of a collective negotiations agreement. The change made by the School Act is that for school employers, changes in the status quo after the expiration of a collective negotiations agreement cannot be implemented without the agreement of the majority representative. Nothing in the statute suggests that it was intended to prevent mid-contract changes to mandatorily negotiable terms and conditions of employment without the agreement of the majority representative. Such an interpretation of that statute would effectively convert past practices into binding contractual terms that could not be changed without the consent of the majority representative. We decline to read such a significant change into a statute that on its face focuses on successor contract negotiations, not mid-contract changes.[1/]

1/ Because of this ruling, we need not consider UMDNJ's alternate argument that the School Act does not apply to it.

We expect that with this clarification of the parties' rights and obligations, no further Commission Order will be required.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Fuller, Krengel and Watkins voted in favor of this decision. None opposed. Commissioners Eaton and Voos recused themselves.

ISSUED: June 24, 2010

Trenton, New Jersey