**BEFORE ARBITRATOR MICHAEL WHELAN**
**IN THE MATTER OF ARBITRATION BETWEEN**

United Faculty of Florida, Florida
Gulf Coast University Chapter,

UNION,

Issue: Arbitrability

v.

FMCS Case No.: 190826-10334

Florida Gulf Coast University
Board of Trustees,

UNIVERSITY.
_____/

# EMPLOYER'S POST-HEARING BRIEF

Respectfully submitted,

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Pursuant to the Parties' October 3rd 2019 case management call with the Arbitrator, the University hereby files its *Post-Hearing Brief*. The University set forth its arguments with respect to the arbitrability issue in its *Pre-Hearing Brief*. It will therefore focus in this Brief on discussing and responding to the union's *Pre-Hearing Brief*, the testimony at the hearing, and focusing final arguments on the University's position.

***Refutation of the Union's Arguments***

**THE "NO REMEDY" ARGUMENT**:

The union leads with the argument that:

> There is no provision that precludes this dispute from being resolved through the CBA's grievance and arbitration machinery. *** Under the University's reasoning, it could release any employee…at any time and deprive the employee…of any recourse through the CBA simply by calling it a "non-reappointment."

**Union Pre-Hearing Brief, pg. 7**. Respectfully, the University disagrees. As the University more exhaustively set forth in its *Pre-Hearing Brief*, there are numerous provisions which have a preclusive effect. Among them is the specificity requirement. The union's drafting of its grievance form makes it exceedingly difficult to determine what "this dispute" is since the text thereof fails to cite specific contractual language:

> By issuing letters of non-reappointment on May 21, 2019 to Sugden Resort & Hospitality Management faculty, FGCU violated the…CBA…Articles 1, 8, 12, 13, 15, 16, 29, 31, and others may be applicable. With this action, FGCU is effectively terminating employment of these faculty effective May 21, 2020 and dismissing the 3-year continuing multi-year appointment which automatically renews after receipt of an overall satisfactory annual evaluation.

Section 20.3(A) defines "*Grievance*" as a "dispute…concerning the interpretation or application of a *specific term or provision* of the CBA." The form filed by the union president simply called out a series of CBA article numbers, with a thrown-in "and others that may also apply." This form of grievance pleading is inconsistent with the CBA's mandate that a grievance invoke *specific terms or provisions* over which a dispute exists. Collective bargaining agreements routinely require such specificity since, after all, the nature of dispute resolution is to identify and narrow the issues at hand so that the parties can start from a common understanding of the contractual items at issue. It is fundamentally unfair to ask the employer to comb through a host of CBA chapters to attempt to divine which exact provisions a grievant is really wanting to focus on.

Under the union's argument, a grievance only needs to say "you did XYZ and that violated one or more articles of the CBA" in order to satisfy the specificity requirement. The Arbitrator cannot impose such a loose rule upon the Parties since it is wholly inconsistent with the wording of the CBA, and indeed would not only completely undermine the specificity requirement of the CBA,

but would be contrary to a meaningful presentation of a given dispute, and simply create for the grievant the quickest path to get to the arbitrator.[1]

Next, § 20.6(F)(1)(d) of the CBA requires that all arbitration requests "***shall*** be signed by the grievant[s]." Emphasis added. The arbitration form submitted to the University which is of record in this matter clearly shows that it was not signed by any of the non-renewed faculty members. The violation of this provision clearly "precludes this dispute from being resolved."

Further, if an employee fails to submit an informal resolution request within 30 days of the disputed act, the complained-of action cannot thereafter be formally grieved. Sec. 20.2(C) and Sec. 20.14(B). Since none of the employees (individually or as a group[2]) requested informal resolution concerning the non-renewal letters of May 21st 2019 by June 21st 2019, the failure to have followed this provision clearly "precludes this dispute from being resolved."

The union also violated the CBA by filing its grievance form without waiting the requisite 30 days as required by § 20.2(E). While § 20.6(A)(1) allows a "***faculty member***" the ability to escalate to a grievance after only 21 days, the union is not given a similar right of grievance acceleration. The union's violation of this provision clearly "precludes this dispute from being resolved."

And finally, there are the provisions that clearly set forth the contractual requirement that grievances over non-reappointments may not be filed by the union. Section § 20.3(B) expressly provides that the union may only file a grievance "in a dispute over application of a provision of this Agreement ***which confers rights upon the [union]***." And § 12.3 of the CBA allows "***an employee***" the opportunity to grieve within 30 days a non-renewal ***because of an alleged violation of a specific term of the Agreement or*** because of ***an alleged violation of the employee's constitutional rights***. If these terms are given their proper effect, they "preclude this dispute from being resolved."

In sum, the union's position here is that 'anyone, including the Local, can grieve anything at any time in any way.' Florida's Public Employee Relations Commission has confirmed that is not the case where the parties to an agreement negotiate limiting terms as to arbitrability rights:

> As we have explained in prior cases, Section 447.401 clearly contemplates that parties must negotiate a grievance procedure that ends in final and binding arbitration. However, that section does not further require that *particular* wages, hours, or terms and conditions of employment be included in a contract so that disputes concerning these matters are subject to arbitration. To the contrary, Sections 447.203(14) and 447.309(1) require that the parties themselves must, through negotiations, decide what wages, hours or terms and conditions

[1] The Arbitrator should bear in mind that the CBA agreed to by the Parties contains a stepped grievance process which contemplates the setting forth of a specific dispute, one or more meetings to discuss the dispute, and the issuance of a written decision. See § 20.6(D-E). By pushing through to filing a demand for arbitration before the expiration of the required 30-day period in subsection D, the union failed to comply with the CBA's informal resolution discussion time requirements.

[2] Pursuant to §20.3(B), if a dispute impacts several members, these members may agree in writing to consolidate their grievances, but ***each member must sign the grievance form***.

> of employment to include in their contract. If one party…refuses to agree to a particular provision…we cannot require the parties to include that subject…in their contract.

***City of Casselberry*, 9 FPER ¶ 14120, 1983 WL 863607 (1983)**. Emphasis in original. As to the CBA terms to govern a dispute resolution, it is accepted law that the detail of the dispute resolution process is a permissive (not mandatory)[3] topic of bargaining, and that:

> a typical grievance procedure delineates only who can initiate a grievance, the method for initiating a grievance, the pre-arbitral steps to be taken, and the method of referral to arbitration, should the parties fail to resolve the grievance.

***District 2A, Transportation, Technical, Warehouse, Industrial and Service Employees Union v. Canaveral Port Authority*, 26 FPER ¶ 31221, at 422, 2000 WL 35899285 (2000), *aff'd per curium*, 799 So.2d 1062 (Fla. 5th DCA 2001)**. It is also clear in Florida law that while a Florida public employer cannot impose through impasse language limiting the standing of a union to file certain grievances in its own name, "[i]t is well settled that parties can agree to include a permissive subject of bargaining in a contract." ***Communications Workers of America v. School Bd. Of St. Lucie County*, 29 FPER ¶ 250, 2003 WL 26069120 (2003)** (confirming that while the school district could not impose via the impasse process a permissive term which would limit the union's standing to file grievances in its own name, the district and union could, by agreement, agree to such a term). See also, ***District 2A, Transportation, Technical, Warehouse, Industrial and Service Employees Union v. Canaveral Port Authority*, 26 FPER ¶ 31221, at 422, 2000 WL 35899285 (2000), *aff'd per curium*, 799 So.2d 1062 (Fla. 5th DCA 2001)** (wherein the Commission ruled that exemptions or limitations on grievance topics or parties is a partial waiver of the right provided by Florida Statutes § 447.401 and cannot be imposed, but that "District 2A could voluntarily agree upon such anomalous restrictions upon arbitration in exchange for negotiated benefits…"); and ***Turnberry Associates v. Service State Aid, Inc*., 651 So.2d 1173 (Fla. 1995)** (the parties to an arbitration agreement may "voluntarily agree" to include waivers of rights in arbitration agreements).

The union voluntarily agreed, via the negotiation process, to the terms which limit its right to file a grievance in its own name to only those portions of the CBA which grant that right only "in a dispute over application of a provision of this Agreement which confers rights upon the [union]", and which required a grievance over a non-renewal under Article 12 to be filed by an individual employee impacted by such decision. But as will be discussed further below, that fact does not mean that individual employees are left without a remedy.

**THE "EQUITABLE TIME BAR" ARGUMENT**:

The next argument the union's brief makes is that the University should not be allowed to raise objections to the union's failure to comply with the procedural requirements of the CBA because the University failed, at the time the union was making said errors, to correct its mistakes:

[3] "[Florida Statutes § 447.401 does not require] that the union also negotiate whether or not it may file or process grievances in its own name." ***Duval County School Bd. v. Duval Teachers United, FEA/United, AFT, AFL-CIO, Local No. 3326*, 393 So.2d 1151, 1152 (Fla. 1st DCA 1981)**.

> …had the University…complained of the Union attempting to step into the shoes of its members, failing to identify affected members on the grievance form and obtaining their signatures, or failing to identify alleged violations of the CBA with appropriate specificity, the Union's efforts to address the University's complaints may have led it down a different path. *** In waiting until September 12, when it knew a new or amended grievance would clearly have been time or procedurally-barred, the University waived any…procedural objections.

**Union Pre-Hearing Brief, pg. 7-8**. The union goes on to accuse the University of "gamesmanship" for which it should not be rewarded. There are several problems with this argument.

The first is that an arbitrator does not sit as a court of equity, and does not possess the authority to impose what is "right or just" on the Parties. Rather, the clear role of an arbitrator is to interpret and apply the terms of the contract document signed by the Parties.

But beyond that legal argument, the University takes offense to the attempt to characterize its actions as "gamesmanship." At the time when the University was studying the RHM program and finalizing its decisions with respect to what would be done, its administration was communicating with the union, students, Trustees, and other stakeholders. Clearly, the University understood that its decision to send the non-renewal letters to the program's faculty would likely generate concerned interest from the union. And under Article 2 of the CBA, the union had the absolute right to request consultation with the administration concerning the decisions surrounding the RHM program, particularly when faculty members may be seeking information from the union.

Thus, when the union first began to discuss the RHM changes with the University, it did not invoke terms such as Informal Resolution or Grievance. Rather, in the union president's May 26th 2019 email to the Provost, he simply stated that the union had "talked to the State UFF office", had "scheduled a FGCU-UFF Executive Committee meeting on Tuesday afternoon", and expressed "hope [that] we could meet with you again possibly on Thursday, May 30" and that, "[b]y then we should have a clearer sense of where we are as a Chapter." That same email asked the Provost to send a copy of the consultant's report, enrollment data, and a copy of one of the letters sent to the impacted staff. How is the Provost supposed to glean from that communication that the CBA's dispute resolution has kicked into gear, as opposed to the union's officers doing what would be natural and engaging in consultation on the general matter.

And the union president's May 28th 2019 email to the Provost merely confirms that the union's Executive Committee had met, and had "clarified talking points" for the upcoming meeting he had requested with the Provost. Again, how can it be "gamesmanship" for the Provost to not issue warnings to the union officers that they may be proceeding down a road that would result in their individual members failing to avail themselves of their contractual rights. It is not the University Provost's job to make sure the union's officers or members don't make mistakes in how they read and act under the CBA. That is particularly so since the union president had been making it clear that he was seeking the advice and counsel of the state union's headquarters.

The union president's May 20th 2019 email to the non-renewed faculty members expressly stated that "[t]he Provost shared with FGCU UFF the changes to your program and employment. We are working to ensure that your rights under the collective bargaining agreement are honored." That email also informed the impacted faculty members: "*You* have the right to request a written statement on the basis of the decision…[and]…[t]hey are expected to [m]ake a reasonable effort to locate appropriate alternative or equivalent employment within the University." The president closed by informing his members that the union was "consulting with the State UFF office for advice. We will contact you again following that consultation."

Under these facts, the Arbitrator should not adopt the union's "equitable estoppel" argument due to alleged "gamesmanship" on the part of the University. In addition to the University's not being responsible to provide advice to the union and its members as to how they should go about using or not using the rights afforded by the CBA, the Arbitrator should recall that the union, far from being led blindly into a trap, admitted it, not the University, tried to game things. Specifically, the testimony of the union's representative at the arbitration hearing was that she was the author of the grievance document, and that the union had tactically decided, after having consulted with the impacted members, to draft the grievance document in the name of the union alone, to not get any of the impacted employees to sign the document, and to follow the aggressive timeline for pushing toward an arbitration.[4]

So, even if the Arbitrator were empowered to consider equitable matters, clearly equity would not require a ruling which would force the University to give up its right to insist upon compliance with all of the procedural terms and conditions of the CBA.

**THE "PRESUMPTION OF ARBITRABILITY" ARGUMENT**:

The union's brief next argues that it does have the right to pursue a grievance seeking individual member relief in its name only because of the presumption of arbitrability. Specifically, the union, citing only the *Elkouri & Elkouri* manual's general discussion of the topic, argues:

> As to the question of the union inserting itself to enforce individual employees' rights, "An individual employee whose contract rights personal to him or her allegedly have been violated may refuse to file or prosecute a grievance. But arbitrators have held that the union, as a party to the contract, may step in and press the issue, if it is one affecting employees generally, in order to ensure observance by the employer of the provisions in question.

**Union Pre-Hearing Brief, pg. 8**. As a general proposition, the University not only agrees that arbitrators have so found, but at page 11 of its *Pre-Hearing Brief*, it cites the Arbitrator to several such opinions. However, the University goes on to provide substantial judicial and PERC authority supporting its position that parties to a CBA, through adoption of specific provisions, can indeed parcel out areas of a contract which would provide an exclusive right to either individual union members, or the union itself, to the exclusion of the other, to press a grievance or demand an arbitration.

[4] The union's own Pre-Hearing Brief, at pg. 12, admits that it "made a *tactical decision* to file a grievance in its own name." Emphasis added.

Florida Statutes § 447.401 clearly provides that an arbitrator does not have the power to add to, subtract from, modify, or alter the terms of a collective bargaining agreement. Yet the union's demand to arbitrate the merits of the grievance form it filed by necessity would require this Arbitrator to ignore the many specific provisions outlined herein and in the University's *Pre-Hearing Brief* which the University argues were not followed properly and which therefore make the grievance document not subject to further processing to an arbitrator.

The Florida Public Employees Relations Commission has made clear that it (and presumably also arbitrators) "must look to the contract to determine if the grievances are arguably arbitrable. The *precise language of the contract is the cornerstone of that analysis*." ***Juan Eguino, Daisy Spira, and Rafael Chang-Muy, Charging Parties, v. City of Miami, Respondent*, 40 FPER ¶ 23 (2013) Florida Public Employees Relations Commission November 7, 2013**. Clear and unambiguous terms must be given their meaning, which means that arbitrators are not free to alter terms to remedy inequities. ***City of Greenacres, Florida and Grievant*, 12-2 ARB ¶ 5654**.

The University should *not* be heard to argue that union officers or stewards cannot aid and assist members who seek to partake of the dispute resolution process. It completely agrees that such a right absolutely exists. The University's argument, though, is that where the CBA grants a dispute resolution right to individual employees but removes that right from the union itself, then, to the extent that an employee covered by such a CBA contends there was a violation of a provision thereof, *the employee* will be obliged to resort to the dispute resolution and grievance procedures specified therein. ***Kantor v. School Bd. of Monroe County*, 648 So. 2d 1266, 97 Ed. Law Rep. 598 (Fla. 3rd DCA 1995)**.

**THE "NO SPECIFIC FORFEITURE LANGUAGE" ARGUMENT**:

The union's next argument is that the contractual terms the University is pointing to as having not been complied with by the union or its members with respect to the correct dispute resolution process don't have explicit forfeiture language, and therefore, there should be no penalty for not following them. The union argues therefore that the University is asking the Arbitrator to "establish additional grounds for forfeiture…contrary to the intent of the parties." **Union Pre-Hearing Brief, pgs. 9-10**.

For instance, the union argues, let's agree that the CBA only gives us the right to submit a grievance over a CBA term which "confers a right on the union." But, the union then argues, that language does not also say, "and if you union do try to file a grievance over a CBA term which does not confer a right on you, and your member fails to exercise his or her individual right to do so within the required time, the opportunity to do so is lost." Thus, the union finally argues, we really haven't lost any opportunity to proceed.

This is faulty logic, as illustrated by the following example. Article 18 of the CBA addresses inventions and works created by faculty members. Section 18.4(C)(2) states that if the University wishes to assert its interest in the invention, the President shall inform the employee within 60 days of the employee's disclosure of the invention or work. Using the logic of the union, since this provision does not have forfeiture language, the University will be able to argue that even if

the University's President fails to provide the 60-day notice, the University could still assert ownership rights in the faculty member's invention or work because, 'hey, there was no express language saying that the University would forfeit its right to do so after the 60 days had elapsed.' Clearly, the law will not require parties to a CBA to explicitly set forth, after each and every clause or term, wording to the effect that, 'and if you don't, you won't be able to in the future…' Therefore, this argument does not support a finding of arbitrability.

**THE "INFORMAL RESOLUTION NOT NEEDED" ARGUMENT**:

In this argument, the union contends:

> Leaving aside the question of whether the University accurately characterizes the facts, Article 20.2.E(4) renders its objections of improper following of the Informal Resolution process moot…[since that section]…does not provide for forfeiture of the right to pursue a grievance in the event a formal grievance is filed during the informal resolution period. *** In other words, the CBA provides flexibility to a grievant to end Informal Resolution by simply filing a Step 1 grievance. Dr. Everham's filing of a Step 1 grievance on June 17 therefore ended the informal resolution process, and began the formal grievance process. The University's quibbles over whether the proper incantations were uttered to initiate informal resolution and whether it was attempted for a sufficient length of time are irrelevant.

**Union Pre-Hearing Brief, pgs. 10-11**.

The University respectfully disagrees with the union's characterization of its insistence on compliance with the CBA's written procedural terms as "quibbles", and with its characterization of such compliance as "incantations." First, this argument appears to just be a re-packaging of its prior "no waiver" argument, which the University has addressed above.

Next, the union's brief cites no authority to the effect that a union can agree to certain procedural dispute resolution rules in a CBA, and then discard them at its will. And, indeed, it cannot because Florida law is to the contrary:

> A limitations period for filing a grievance is primarily for the employer's benefit since it extinguishes any claim against the employer for a particular action on the employer's part. Consequently a unilateral action on the part of the Union *cannot cause a waiver on the Employer's part of strict enforcement of the time limit for filing a grievance*.

Emphasis added. ***UIC United Faculty Local 6456, IFT-AFT, AAUP (Non-Tenure Track System Faculty) and University of Illinois at Chicago,* Lab. Arb. Awards 18-1 ARB P 7090** (finding an employee who did not comply with the clear time limits set forth in the CBA resulted in the grievance not being procedurally arbitrable).

In this case, § 20.2(E)(2) and (3) of the CBA expressly and clearly set forth that a Member (*but not the union*) may file a grievance after 21 days if no resolution or if parties agree the informal resolution process is not possible. The union invokes this right as if it also possessed such authority

but clearly the relevant text of the CBA makes a distinction between the individual faculty member and the union as union, and as to the union itself, even if it were processing a grievance in its own name over a section of the CBA in which it has been conferred rights, it would need to engage in the informal resolution process for the 30 days before proceeding to the grievance stage. So setting aside the fact that in this case it had no right to process this matter in its own name, even if it had, it pulled the grievance trigger too soon.

**THE "THIS REALLY IS A PAST PRACTICE UNION-WIDE GRIEVANCE" ARGUMENT:**

In this argument, the union states:

> Were this a simple dispute over the factual basis resulting in actions taken by the University with respect to an individual employee…the Union would agree that Article 20.3.B requires such a grievance to be challenged by the affected employee(s). But the core dispute in this case is whether the University may use the "non-reappointment provisions of the CBA to prematurely terminate a Continuing Multi-Year Appointment. The Union asserts that this is the first time such an action has been attempted by the University and the attempt would constitute a significant change in the past practice of the parties…

**Union Pre-Hearing Brief, pg. 12**.

Initially, the University notes that the Arbitrator is bound to make his ruling based upon the record evidence placed before him by the Parties. In this case, neither the union's exhibits, nor its witness testimony, offered any attempt to review the history of the University's interpretation of its rights to non-renew faculty under the current wording of the CBA. Indeed, this is part of the University's strong objection to this proceeding. The grievance document does not outline this argument at all. It does not provide any factual basis for such an argument. The grievance document does not purport to seek a declaratory interpretation of the contract, but rather seeks only individualized relief in the form of reinstatement for the RHM faculty who received non-renewal letters. Yet now, in its brief on arbitrability, the union seeks to advance an argument not set out in its grievance document. Generalized grievances such as the one submitted by the union leave the employer guessing as to what, exactly, the grievant's arguments and theories are. An employer should not be made to engage in a game of whack-a-mole at the arbitration stage of a dispute resolution. That is why CBAs generally, and the CBA of the Parties in particular, set out a requirement for specificity which the grievance form in this case failed to provide.

One vexing problem an employer will have in a setting where a union, in its name only, seeks to grieve an individual personnel decision where the employee at issue is not participating in the grievance, is that the real party in interest isn't at the table. And so, the employer cannot know what that party really wants or will accept in the form of a resolution (remember the process starts at informal resolution, not immediate arbitration). This is the very issue the court faced in the case of ***Fraternal Order of Police, Miami Lodge No. 20, v. City of Miami,* 233 So.3d 1240 (Fla. 3rd DCA 2017)**. In that case, the union had filed an action on behalf of numerous individual officers alleging that the officers were financially damaged due to an erroneous implementation of a contract term related to promotions. None of the individual officers actually joined the suit as

plaintiffs, and the City challenged the union's standing to seek individualized relief for its members.

The Court ruled in favor of the City. It noted that in some settings, such as where a union seeks a declaratory ruling on a given contract term, it may well have standing to seek such member-wide relief. However, it did not agree that a union should have standing to maintain an action only in its own name, which sought particularized relief personal to the employees allegedly owed that relief. Specifically, the Court reasoned:

> Our conclusion finds further support among the fundamental principles of standing. The concept of standing contains the "requirement that the claim be brought by or on behalf of one who is recognized in the law as a 'real party in interest.' " *Kumar Corp. v. Nopal Lines, Ltd*., 462 So.2d 1178, 1183 (Fla. 3d DCA 1985). The "real party in interest" is "the person in whom rests, by substantive law, the claim sought to be enforced." Id. (citation and quotation omitted); see also Fla. R. Civ. P. 1.210; *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So.2d 936, 941 (Fla. 2002) ("Under traditional *jus tertii* jurisprudence, 'In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.' ") (citation omitted). The purpose behind the real party in interest rule is "to protect a defendant from facing a subsequent similar action brought by one not a party to the present proceeding and to ensure that any action taken to judgment will have its proper effect as res judicata." *Kumar*, 462 So.2d at 1178 (quoting *Prevor–Mayorsohn Caribbean, Inc. v. Puerto Rico Marine Mgmt., Inc*., 620 F.2d 1, 4 (1st Cir. 1980)). Our conclusion that a union does not have standing to seek damages on behalf of its members where their individualized participation is required coheres with these general standing principles.

***F.O.P.*, at n. 5**.

And, as to the topic of "past practice", within the same sentence on page 12 of its *Pre-Hearing Brief*, the union asserts that "this is the first time" the University has issued such non-renewal letters (again this contention is not supported by a factual record), and, inconsistently, that there is a "past practice" of the University's having issued such letters (also a contention not supported by a factual record). It goes without saying that one cannot have established a past practice of doing a given act if this is the first time one has done that act.

**THE "INDIVIDUAL MEMBERS WERE AFRAID" ARGUMENT**:

In its penultimate argument, the union alleges:

> …from the moment the non-reappointment letters were issued, speculation abounded that the University would begin to selectively rescind the…letters… These speculations were ultimately vindicated when the University rescinded several non-reappointments on July 26 and later offered further contingent employment to other faculty members. Even the specter of such actions being taken by the University posed two problems for any potential grievance signed by one or several of the affected employees. There is the obvious threat of retaliation in the form of not offering further employment to a faculty member who

> signed his or her name to a grievance. Alternatively, even if the Union could find a faculty member willing to take the risk, the University could have rendered the grievance moot by simply rescinding that faculty member's non-reappointment. Rather than build an employee grievance on shifting sands, the Union made a tactical decision to file the grievance in its own name.

**Union Pre-Hearing Brief, pg. 12**.

To begin, there was no "specter" of the potential that the University may rescind some of the non-renewal letters. The University Provost's communications with the RHM faculty and other stakeholders was clear and consistent from the beginning. He indicated that the University had assessed the program, found revision and repositioning was needed, made clear that leadership, staffing and accreditation changes would be a part of that process, but also made it clear that as the development of the new program's course content came into focus, the qualifications of current faculty who had been issued non-renewal letters would be considered. That the University issued the non-renewal letters to all 9 of the affected faculty members should not be complained of since doing so gave the earliest possible notice to impacted faculty that they may need to begin seeking alternative positions.

And, as the new curriculum came into focus, it should also not be a surprise that the University would rescind its letters for those faculty who did possess the requisite credentials, skills and experience to provide effective instruction of the new curriculum. Indeed, the union president's own May 20th email to impacted faculty observed that under certain non-renewal conditions, the University would be required to help provide equivalent employment for non-renewed faculty. Had the University not carefully considered those members for reinstatement, it is fairly certain the union would be complaining. So, the University does not understand how the "specter" of rescission of some of the non-renewal letters would be a factor which would compel the union to file a grievance in its own name seeking individualized relief, and to counsel individual members to ignore their individual rights and related deadlines under the CBA.

As to the assertion that the University would have retaliated against individual members who chose to request informal resolution and to sign a grievance, other than the union's own conclusory assertion of such a potential, the record evidence does not exist to support it. Indeed, the universe of faculty members impacted by the University's decision to overhaul the RHM program was small, initially just nine members. Is the union really arguing that by filing a grievance only in the union's name, the University would somehow not know that each of the faculty members who did not receive rescission letters would not be hoping that they could somehow get their positions back? Of course not![5] This is not a case, such as a whistle-blower claim, where the person making the claim is truly not known by the employer against whom the claim is made, and the identity of that person deserves confidentiality. The University clearly knew which faculty its decision had impacted, and it had (and continues to) communicate with them as openly as possible about the decision and how it was going to be implemented.

[5] The union's own *Pre-Hearing Brief*, at pg. 13, declares, "the University knows exactly the employees to which the Union's grievance refers."

Had any of those individual faculty members who had received non-renewal letters decided that one or more specific terms of the CBA or their constitutional rights had been violated, they would have had the right under §12.3 of the CBA to initiate the dispute resolution process within 30 days. Had any such members done so, the University would have followed the CBA's procedures and processed the request. That the union[6] made the tactical decision to file a grievance form with generalized allegations, citations only to chapter numbers, only in its own name, and not bearing signatures of any impacted member, is a tactical decision the University should not be penalized for. And requiring the University to proceed to arbitration over such a grievance (when it still to this day isn't sure all of the arguments the union will be wanting to make given its blanket citation of so many chapters "and any others that may be relevant") is, indeed, a penalty.

**THE "NO HARM/NO FOUL" ARGUMENT**:

In the union's final argument, it contends that even if it didn't follow the procedures, the grievance should still be arbitrated:

> In this case, the University knows exactly the employees to which the Union's grievance refers, even without their signatures present on the form. The presence of signatures on the form is therefore, at most, "mere formality" in this case. *** Prior to the filing of the Step 1 grievance, Union representatives had already encountered the University's sophistic argument that Article 12.3 foreclosed the possibility of any action described as "non-reappointment" from being grieved. In anticipation that the University may attempt to move the goalposts later in the grievance process – for instance, by recharacterizing its actions as a layoff or as discipline, and then asserting that the Union could not amend the grievance to include these articles – the Union made a tactical decision to cite too many articles in the initial grievance filing rather than too few. *** While the University may find it annoying to be required to read the CBA to which it is a party, nothing in the definition of a grievance precludes the possibility of citing multiple or even numerous CBA provisions on a single grievance form.

**Union Pre-Hearing Brief, pgs. 13-14**.

To begin, the language of the CBA makes it clear that grievances ***must*** bear the signature(s) of the faculty member(s) seeking to grieve a matter. This contractual language is not, as the union argues, "a mere formality." A recurring theme of the union in this case is that any procedural or content requirement in the CBA governing how and when and in what form the dispute resolution/ grievance process should occur is a mere formality, waivable by the union at its will simply by characterizing it as a "mere formality." However, the University is an equal party to the CBA. It bargained for and ultimately agreed to all of the terms and conditions in the CBA, and it is entitled to rely upon them, and to insist upon its rights including the right to hold the union and its members to following them.

The Tallahassee headquarters of the statewide union was guiding the local union in this matter. Thus, this is not a case where the employer led a poor unsuspecting member down a wrong road

[6] Notably, the union's witness confirmed at the hearing that the union made this tactical decision after having consulted with the impacted faculty members and finding none of them wanted to sign a grievance.

so as to trip them up. All along the University had told local union officials that the correct process was not being followed, and while the University's officials agreed to engage in consultations with union officials about the RHM decision (as Article 2 off the CBA contemplates), they did not, by doing so, waive the University's right to require that an actual grievance seeking individualized relief be signed and filed by the individual member(s) seeking such relief.

While the union's brief employs yet another derogatory characterization (sophistic argument) in contending that the University argues that § 12.3 prohibits any action described as "non-reappointment" from being grieved, it knows that such is not the case. As noted earlier, the University completely agrees that pursuant to § 12.3, a non-renewed member may "*contest the decision because of an alleged violation of a specific term of the Agreement or because of an alleged violation of the employee's constitutional rights*. Thus, had any of the individual faculty members who had received non-renewal letters decided that one or more specific terms of the CBA or their constitutional rights had been violated, they would have had the right to contest the decision via the CBA's dispute resolution process within 30 days.

What the University has always argued, and continues to argue, is that § 12.3 gives this right only to "*an employee*", and that it does not "*confer rights on the union*" such that the union, in its own name, could contest such decisions.

Finally, the union asks the Arbitrator to overlook the fact that, as admitted in its own Brief, it "intentionally decided to cite "too many" articles" because, if it didn't dump everything but the kitchen sink (and possibly the kitchen sink if it were relevant) into its grievance form, the University may "move the goalposts" by saying it was really disciplining or laying off the faculty members. This contention strains credulity. The union clearly knows that if the University, after having created so much documentation as to the reasons behind its decision to revamp the RHM program (including a detailed consultant's report and the written communication from the Provost to the Board of Trustees), had changed its reasoning to one of these other forms of dismissal, it would have been untenable. And, further, even had it done so, the union knows full well that under the CBA, it would have had to show financial issues requiring shutting down or downsizing (as to layoffs) or evidence of individual misconduct (as to discipline). Clearly, such unrealistic hypothetical occurrences cannot be justification for a union to knowingly file a grievance document chock full of general chapter references which it acknowledges are "too many."

To be sure, the University agrees with the union's contention that a single grievance may assert that an employer has violated several, or indeed many, different provisions of the CBA. But the specificity requirement is there to require the grievant to set forth, in sufficient detail, the chapter and verse of which passages of the CBA have been violated, which key facts support each such alleged violation, and what specific relief is sought. The union's grievance form failed to comply with these basic requirements, resulting in the reality that, as this matter stands, the University still is unaware of what, exactly, an arbitrator would be arbitrating were this Arbitrator to rule that the grievance form was arbitrable.

In an analogous setting, Florida's Public Employee Relations Commission had the recent opportunity to discuss the need for specificity in a charge against a public employer, namely this very same University. In that case, a former professor Florida Gulf Coast University filed a charge

with the Commission characterized as being "an amalgam of legal argument, commentary, opinion, case citations, and conclusional statements." ***Frank J. Gable v. Florida Gulf Coast University Board of Trustees*, 45 FPER ¶ 309, 2019 WL 1752555 (2019)**. In rejecting the charge on the specificity ground, the Commission noted that

> due process requires that an unfair labor practice charge be factually detailed and specific. Charges which contain allegations that are vague, general, or conclusional will not be found sufficient even if the required factual detail may be gleaned from the supporting documentation. As stated by the Commission in *United Faculty of Florida v. Board of Regents*, 8 FPER ¶ 13187 at 383 (1982):
>
> > While a charge need not set forth every detail of the alleged illegal conduct, it must be sufficiently detailed to indicate who were the individuals involved, what happened, and when and where it happened. Setting forth such matters in a "clear and concise statement" is required by § 447.501(1).
>
> See also Fla. Admin. Code R. 60CC-5.001(3)(c).
>
> A factual detailed and specific charge is required because, in the event the charge is found sufficient, the respondent must be able to cogently answer the charge's factual allegations and, thus, frame the factual issues to be litigated at hearing.

While the *Gable* case addressed an unfair labor practice charge rather than a grievance filing, the concepts discussed by the Commission verifying the necessity for specificity translate equally to the contract dispute setting, particularly where, as in this case, the contract language mirrors the statutory mandate for specificity in a charge.

In sum, by citing "too many" CBA articles with no further elaboration textual or factual elaboration, the union provided too little notice to the University as to what it was being asked to defend itself over.

***Conclusion***

The union concludes its pre-hearing argument by asserting that:

> None of the alleged defects…compromised the University's ability to resolve the underlying concerns giving rise to the grievance or its ability to defend itself in arbitration…", that "almost every action the University claims the Union should have taken in order to properly process this grievance could have given rise to a different set of equally plausible procedural objections", and that "[t]he rigmarole demanded by the University in order to process a grievance is not supported by the language of the CBA…"

**Union Pre-Hearing Brief, pg. 15**.

The union's arguments here are irrelevant…and wrong. Again, the University was, is, and will always be willing and ready to process any dispute resolution request (at the informal resolution,

grievance, or arbitration stage) that is submitted by a union member or, over parts of the CBA which confer rights upon the union, by the union itself. But grievance forms which do not follow the timelines, which do not contain the requisite content, and which are filed by a party not having standing to file them, *do very much* "compromise" the University's ability to fully defend itself. If the University did not believe such provisions were a necessary part of ensuring issues were properly, specifically and timely identified by parties with standing to do so, it would not have bargained for those provisions. If the Arbitrator allows the union to cast them all into the waste bin as "rigmarole" or "mere formalities" merely because the union wants to ensure it retains the right to make "tactical decisions" in anticipation of hypothetical "equally plausible procedural objections", then the Arbitrator will allow the union to effectively write out of the CBA all of those provisions, leaving the University without the right moving forward to rely on these terms being followed, and thus depriving the University of the benefit of the bargains it made in negotiations.

The question may remain in the Arbitrator's mind, if the University's position in this case prevails, will the University's faculty (as the union seems to argue) never have the opportunity to contend that a non-reappointment decision violates one or more terms of the CBA? The answer of the University, as already set forth in this Brief, is yes. The University bargained for, and fully stands behind, the language in § 12.3 of the CBA. That language unequivocally affords "*the employee*" the right to contest a non-reappointment decision if certain allegations are made.[7]

Indeed, the Arbitrator need not just take the University's assertions in this Brief that it is open to accepting dispute resolution petitions over non-renewals. He can also look to the Commission's factual discussion in the recent case of ***Frank J. Gable v. Florida Gulf Coast University Board of Trustees*, 45 FPER ¶ 309, 2019 WL 1752555 (2019)**. In that case, a professor of this University had been informed by the Dean of the University's College of Arts & Sciences of its decision not to renew him. Pursuant to the exact same contract provision (§ 12.3) as is at issue in this case, the professor invoked the right to a written statement of reason, and the right to informal resolution. The factual findings in the opinion confirm that the University processed and granted these requests without argument or contention.

While Professor Gable appears to have then demanded PERC intervention rather than proceeding to arbitration, the fact remains that the union cannot credibly make the case that the University would not have granted similar requests from the individual faculty members of the RHM Program who had received non-renewal letters. But the fact remains that they elected, for their own reasons and in consultation with their union, not to do so, as was their right. All the University is seeking in this case is that it, too, is afforded its rights under the CBA, including the right not to be compelled to process a grievance which was not authorized to be filed by the union, and which was otherwise not filed in compliance with the procedural and content requirements set forth in the CBA.

[7] To be sure the University has contended, and continues to contend, that non-reappointment decisions are not grievable with respect to the underlying justification thereof. So, for instance, the faculty of the RHM would not have the right to file a grievance surrounding the University's justifications for its decision to revise and reposition the RHM program. But if a specific term of the CBA, or a constitutional right belonging to the impacted member were at issue, same could, at the option of the employee (and not the union) be contested by following the provisions of Article 20 of the CBA.

Based on the foregoing, as well as on the University's *Pre-Hearing Brief*, and on the record evidence on file, the University respectfully urges that the Arbitrator must rule that the grievance filed by the union is not arbitrable.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **November 12th 2019**, I filed the foregoing with the Arbitrator via electronic service at mwhelan@ithaca.edu, and provided service of same on Graham Picklesimer, Union Representative, via electronic service at graham.picklesimer@floridaea.org.

/s/ ***Robert Michael Eschenfelder***
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