FEDERAL MEDIATION AND CONCILIATION SERVICE

United Faculty of Florida,
Gulf Coast University Chapter,

Union,

Case No. 190826-10334

and

Florida Gulf Coast University
Board of Trustees,

University.

Opinion and Award

Arbitrator Michael G. Whelan
November 22, 2019

Appearances

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Introduction

The instant matter arises under the 2018-2021 Collective Bargaining Agreement ("CBA") between Florida Gulf Coast University Board of Trustees ("Employer," or "University") and the United Faculty of Florida, Gulf Coast University Chapter ("Union" or "UFF"). The Union submitted a grievance under the CBA on June 17, 2019. The parties were unable to resolve this grievance in their grievance procedure, and they selected Michael G. Whelan as the Arbitrator to decide the grievance. After making initial contact with the parties, the Arbitrator was advised by them that the University was asserting arbitrability defenses. Pursuant to Article 20.6.F.(4) of the CBA, arbitrability defenses are required to be bifurcated from the substantive issues and determined prior to a hearing on the substantive issues in the case.[1]

On October 3, 2019, a telephonic prehearing conference was conducted for the purpose of establishing hearing procedures for the arbitrability stage of the case. At the prehearing conference, it was determined that the hearing on the arbitrability issues would be conducted by video conference on October 28, 2019. It was also determined that the parties could submit prehearing submissions on or before October 21, 2019, and post-hearing briefs on or before November 12, 2019. Both parties timely submitted prehearing briefs, and they presented evidence and argument at the hearing on October 28, 2019. Both parties also timely submitted post-hearing briefs on or before November 12, 2019, and on that date the record on the arbitrability part of the case was deemed to be closed.

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[1] This section distinguishes "arbitrability" from "substantive" issues. The word "substantive" as used in this section should not be confused with matters of substantive arbitrability. Arbitrability issues are both procedural (e.g., whether a grievance was timely filed) and substantive (e.g., whether a dispute is covered by a contractual arbitration clause), but the word "substantive" as used in this Article is synonymous with "on the merits." This is a separate inquiry from whether the subject matter of the dispute is covered by the arbitration clause. Specifically, in this case, the substantive arbitrability issue of whether the subject matter of the grievance is covered by the arbitration clause is a separate issue from whether – if the grievance is determined to be arbitrable – the Employer violated the CBA on the merits of the case.

Issues

The parties presented different statements of the arbitrability issues and stipulated that the Arbitrator shall determine the issues to be decided. The parties' statements of the issues are as follows:

The Union's statement of the issue:

1. Is the June 17 grievance filed by the Union following the University's issuance of non-reappointment letters to its School of Resort and Hospitality Management Faculty subject to arbitration?

The Employer's statement of the issues:

1. Was the June 17, 2019 grievance filed by a party with the contractual right to file a grievance concerning faculty non-renewal notices? If yes,

2. Were the grievance procedure requirements complied with? If yes,

3. Did the grievance filed on June 17, 2019 address a grievable/arbitrable issue?

Employer Issues 1 and 2 present matters of standing and procedural arbitrability. Although, the Union's statement could be interpreted very broadly to include these arbitrability issues, in essence it addresses the substantive arbitrability issue presented in Employer Issue 3. The salient difference between Employer Issue 3 and the Union's issue is that the Union's statement more precisely identifies the substance of the grievance. Because Employer Issues 1 and 2 more clearly identify arbitrability issues in this case, those issues will be addressed as stated by the Employer. In addition, because the Union's statement of the issue more precisely identifies the substantive arbitrability issue here, that issue will be addressed as stated by the Union.

For these reasons, the Arbitrator determines that the issues to be decided in the arbitrability stage of the proceedings are:

1. Was the June 17, 2019 grievance filed by a party with the contractual right to file a grievance concerning faculty non-renewal notices?

2. Were the grievance procedure requirements complied with?

3. Is the June 17 grievance filed by the Union following the University's issuance of non-reappointment letters to its School of Resort and Hospitality Management Faculty subject to arbitration?

Relevant Contract Language

ARTICLE 8

Appointment

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8.4 Appointments Types.

A. Continuing Multi-Year Appointments (CMYA). A continuing multi-year appointment is an appointment of contingent duration, consisting of an initial three (3) year term extendible amually on the basis of overall satisfactory annual performance as determined through the criteria, standards, and procedures stipulated in Article 10, Evaluations. FGCU shall provide the option of a CMYA to all new ranked multi-year faculty member hires, with the exception of the appointment status categories listed in Section 8.4 (B) below.

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ARTICLE I2

Non-Reappointment

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12.3 Grievability. The decision to not reappoint is not grievable except, an employee who receives written notice of non-reappointment may, according to Article 20 Grievance Procedure and Arbitration, 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. Such grievance process must be filed with the Office of the Provost within thirty (30) days of receipt of the statement of the basis for the decision not to reappoint pursuant to Article 12.2 E above or receipt of the notice of non-reappointment if no statement is requested.

12.4 Non-Reappointment Considerations. If the decision not to reappoint was based solely upon adverse financial circumstances, reallocation of resources, reorganization of degree or curriculum offerings or requirements, reorganization of academic or administrative structures, programs, or functions, and/or curtailment or abolition of one or more programs or functions, the University shall take the following actions:

A. Make a reasonable effort to locate appropriate alternative or equivalent employment within the University; and

B. Offer such employee, who is not otherwise employed in an equivalent full-time position, re-employment in the same or similar position at the University for a period of two years following the initial notice of non-reappointment, should an opportunity for such re-appointment arise. For this purpose, it shall be the employee's responsibility to keep the University advised of the employee's current address. Any offer of re-employment pursuant to this Article must be accepted within fifteen (15) days after the date of the offer, such acceptance to take effect not later than the beginning of the semester immediately following the date the offer was made. In the event such offer of re-employment is not accepted, the employee shall receive no further consideration pursuant to this Article.

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ARTICLE I5

Multi-Year Appointments and Tenure Status: Extension, Probation, Reappointment

15.1 Continuing Multi-Year Appointment (CMYA)

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B. Contract Extension. If a CMYA faculty member receives an overall satisfactory annual evaluation as defined by the unit, he or she will receive a one-year contract extension, thereby maintaining a full three-year appointment cycle. This Article does not apply to the continuation of administrative appointments. In cases of voluntary resignation, retirement, removal for just cause, or layoff, not contract extension will be given.

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ARTICLE 20

Informal Resolution, Grievance and Arbitration Procedures

20.1 Purpose.

A. The parties encourage the informal resolution of faculty concerns. The parties recognize that there are other University offices that assist faculty with issues/concerns that fall outside of the Collective Bargaining Agreement. The UFF-FGCU and the University agree to collaborate to ensure that faculty are referred to the appropriate venues to explore and address unit members concerns.

B. The purpose of the informal resolution and grievance procedures is to promote opportunities for prompt and efficient discussion and resolution of work-related issues covered by the Collective Bargaining Agreement. The parties agree that it is desirable to encourage open communication in order to resolve concerns and issues at the lowest possible level within the organization through informal resolution. The grievance and arbitration procedures shall be the sole and exclusive method for resolving grievances.

20.2 Informal Resolution Procedure.

A. The informal resolution (IR) procedure is the first method used to resolve concerns and issues and is not intended to be "evidence gathering" for a grievance. No grievance shall be filed until the UFF-FGCU or faculty member has timely requested an informal resolution. The faculty member shall have the right to representation by the UFF-FGCU during attempts at informal resolution. If the faculty member is not represented by UFF-FGCU at this point, the University shall provide prompt notification to UFF-FGCU with a copy of the request for IR.

B. Faculty are encouraged to request informal resolution as early as practicable. All requests for informal resolution shall be in writing or by e-mail and submitted to the Office of Academic Affairs. However, faculty who wish to preserve their rights to file a grievance must file a request for IR within thirty (30) days of the act or omission giving rise to the dispute, or the date on which the faculty member knew or reasonably should have known of such an act or omission if that date is later. If filed after the thirty (30) days, the request will be subject only to IR.

C. If the request for informal resolution has been timely filed, as referred to in Article 20.2.B above, and a grievance is filed at a later date in accordance with the timeline for filing a grievance, then the resulting grievance shall be considered to be timely filed as long as the other deadlines specified below are observed. However, if the request for informal resolution has not been timely requested as outlined in Article 20.2.B, the later filed grievance shall be considered time-barred.

D. The request for informal resolution shall contain a brief, general description of the facts relating to the dispute, identify the relevant provisions of the Agreement that are at issue, and include dates, times, and locations of the action(s) giving rise to the dispute.

E. Upon receipt of a request for informal resolution, the Office of Academic Affairs' designee and the faculty member shall have thirty (30) days to attempt to informally resolve the dispute. Extensions may be granted upon mutual written agreement and such extensions shall not affect the faculty member's right to later file a grievance in a timely manner as long as the other deadlines specified below are observed.

(l) Any resolution of the dispute brought about by the informal resolution process shall be in writing with copies provided to the faculty member requesting the informal resolution to a dispute, the UFF-FGCU and the Office of Academic Affairs.

(2) The faculty member who requested an informal resolution may file a grievance earlier than the required thirty (30) days for attempting informal resolution (Article 20.2.E above) if at least twenty-one (21) days have lapsed since the date of the requested for informal

resolution was received by the Office of Academic Affairs and good faith attempts have been made by the grievant to achieve an informal resolution.

(3) The faculty member who requested an informal resolution may file a grievance earlier than the required 30 days for attempting informal resolution (Article 20.2.E above) if the parties mutually agree that informal resolution of the dispute is not possible.

(4) If the parties are unable to reach informal resolution of the dispute within the time provided, or if the faculty member has filed a grievance, the Office of Academic Affairs shall notify the UFF- FGCU that informal resolution of the dispute is not possible and all such attempts at informal resolution shall end.

F. During the informal resolution period efforts to resolve the dispute informally shall be made. Informal resolution methods may include discussions with the involved parties, for example, supervisor, Deans/Directors as applicable. The parties can also avail themselves of the Conflict Management System (http://www.fgcu.edu/cms/) or other informal methods for resolution.

20.3 Definitions Related to Grievances

A. "Grievance" shall mean a dispute filed on the appropriate grievance form (Appendix C) concerning the interpretation or application of a specific term or provision of the Collective Bargaining Agreement, subject to those exclusions appearing in other articles of the agreement. The parties agree that counseling does not constitute disciplinary action. Further, since the parties do not intend that this grievance procedure be a device for appellate review, the University's response to a recommendation of a hearing officer or other individual or group having appropriate jurisdiction in any other procedure shall not be an act or omission giving rise to a grievance under this procedure.

B. "Grievant" shall mean a member of the bargaining unit or group of members of the bargaining unit who has/have filed a grievance in a dispute over application of a provision of the Collective Bargaining Agreement. The UFF-FGCU may file a grievance in a dispute over application of a provision of this Agreement which confers rights upon the UFF-FGCU. Where several employees have essentially the same grievance, the parties may agree in writing to consolidate the grievances. Where the parties agree to consolidation, one grievance form may be attached bearing the signatures of the grievants. A separate mutual agreement must be obtained to maintain the grievances as consolidated at each step of the grievance and arbitration process.

20.4 Reprisal. No reprisal of any kind will be made by the University, or UFF-FGCU against any grievant, any witness, any UFF-FGCU representative, or any other participant in the grievance procedure by reason of such participation.

20.5 Filing a Grievance. The filing of a grievance constitutes a waiver of any applicable rights to review of University action pursuant to the Administrative Procedure Act, Chapter 120, Florida Statutes, or to the review of such actions under university regulations, policies, and procedures which may otherwise be available to address such matters.

20.6 Grievance Procedure.

A. Step 1: Notification and Filing Process

(l) If informal resolution has not satisfactorily resolved the issue(s) the faculty member may file a grievance at Step 1 or Step 2, as appropriate, after a minimum of twenty-one (21) days of informal resolution effort (Article 20.2.E. (2), but no later than seven (7) days after the end of the informal resolution period or the end of any extensions, whichever is later.

(2) A grievance shall be filed with the Office of Academic Affairs which will designate a University representative at Step I within seven (7) days following the grievance filing. If the alleged violation occurred outside the college/unit level (University Level) the grievance shall be filed at Step 2 instead of Step l.

(3) Whether filed at Step 1 or Step 2 the grievance may be amended without University consent only one time throughout the review process, prior to either the Step 1 or the Step 2 meeting. Only those acts or omissions and sections of the Collective Bargaining Agreement identified at the initial filing or as amended prior to the Step 2 meeting may be considered at subsequent steps

(4) An employee may seek redress of alleged salary discrimination by filing a grievance under the provisions of this article. The established date for the act or omission giving rise to such a grievance shall be the date of the employee's paycheck or direct deposit for the first full-pay period for the annual salary increases referenced in Article 23.

B. Grievance Form Requirements. Each grievance (Appendix C) and notice of arbitration (Appendix D) must be submitted in writing on the appropriate form and shall be signed by the grievant. Request for Step 2 Review shall be filed in writing by the grievant or the representative. If there is difficulty in meeting any time limit, the representative may sign such documents for the grievant; however, the grievant's signature shall be provided prior to the Step 2 meeting. All grievance forms and the request for Step 2 Review shall be dated when the grievance is received by the University. The grievance forms and the request for Step 2 Review may be filed by facsimile, United States mail, or any other recognized means of delivery, excluding electronic mail.

C. Time Limit Extensions. All time limits related to grievances may be extended by mutual agreement of the parties. Upon failure of the University to provide a decision within the time

limits provided in this Article, the grievant or the UFF-FGCU, where appropriate, may appeal to the next step. Upon the failure of the grievant or the UFF-FGCU, where appropriate, to file an appeal within the time limits provided in this Article, the grievance shall be deemed to have been resolved by the decision at the prior step.

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F. Step 3 Arbitration.

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(4) Arbitrability. Issues of arbitrability shall be bifurcated from the substantive issue(s) and, whenever possible, determined by means of a hearing conducted by conference call. The arbitrator shall have ten (10) days from the hearing to render a decision on arbitrability. If the issue is judged to be arbitral, an arbitrator shall then be selected to hear the substantive issue(s).

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20.8 Burden of Proof. In all grievances except disciplinary grievances, the burden of proof shall be on the employee. In disciplinary grievances, the burden of proof shall be on the University.

20.9 Representation. The UFF-FGCU shall have the exclusive right to represent any employee in a grievance filed hereunder, unless an employee elects self-representation or to be represented by legal counsel. If an employee elects not to be represented by the UFF-FGCU, the employee shall file a grievance in accordance with Article 20.5. If UFF-FGCU is not the selected representative, then the University shall provide, as practicable, prompt notification to the UFF-FGCU that includes a copy of the grievance form (Appendix C). No resolution of any individually processed grievance shall be inconsistent with the terms of this Agreement and for this purpose the UFFFGCU shall have the right to have an observer present at all meetings called for the purpose of discussing such grievance and shall be sent copies of all decisions at the same time as they are sent to other parties.

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20.16 Inactive Grievances. A grievance which has been filed at Step 3 and on which no action has been taken by the grievant or UFF-FGCU State Office for sixty (60) days shall be deemed withdrawn and resolved in accordance with the decision issued at the prior Step.

Background Facts

1. The parties

Florida Gulf Coast University is an institution of higher education located in Fort Myers, Florida. The United Faculty of Florida, Gulf Coast University Chapter, is the exclusive collective bargaining representative of a unit of faculty members at the University.

2. The nature of the dispute

The dispute at the core of these proceedings involves the University's decision to not reappoint several faculty members in its School of Resort and Hospitality Management. The resolution of this dispute involves issues of arbitrability and the interpretation of Article 12.3 of the CBA, which addresses decisions not to reappoint faculty members.

3. Program review of the University's School of Resort & Hospitality Management

The University is accredited by the Southern Association of Colleges and Schools to award 58 different types of bachelor's, 25 different master's, six doctoral degrees, and twelve graduate certificates. The University's academics are divided into six main colleges and other prominent schools, including the School of Resort & Hospitality Management ("RHM"). The mission of the RHM program is to provide students with core competencies and experiential learning opportunities in preparation for successful management careers and leadership roles in the resort and hospitality industry.

At its inception, the RHM program proved to be a popular choice of students. However, in recent years, the University began noticing significant year-over-year declines in student interest. At the beginning of 2019, the University retained a consultant who was charged with performing a detailed academic program review of the RHM program. On March 11, 2019,[2] the consultant delivered his report and recommendation to the University. Overall, the consultant found the state of faculty skills and relations to be "untenable," and noted that "the current state of the faculty is unlikely to accomplish much" since "too many faculty remain wedded to an old model…" Based on both its own assessments gleaned over months of internal study, along with the report of the consultant and the results of an unsuccessful reaccreditation effort, the University's administration came to the conclusion that many of the consultant's recommendations were advisable and should be implemented, including staffing changes.

[2] All dates refer to 2019, unless otherwise indicated.

4. The University issues letters of non-renewal to nine faculty members

On May 21, 2019, the University sent letters to nine faculty members in the bargaining unit informing them that due to structural changes in the School of Resort and Hospitality Management to be implemented over the next two months, their faculty appointments would not be renewed beyond May 21, 2020.[3] The Union had been notified the day before of the University's plan to implement such changes and issue non-renewal letters ("non-renewal letters" or "non-reappointment letters") to these faculty members. Several of these nine faculty members were employed under Continuous Multi-Year Appointments ("CMYA"). Pursuant to Article 8.4(A) and Article 15.1 of the CBA, a faculty member who serves under a CMYA is appointed for an initial three-year term, and, if he or she receives an overall satisfactory annual, he or she will receive a one-year contract extension, thereby maintaining a three-year appointment cycle.

5. Submission and processing of the grievance

The parties have included a grievance procedure in their CBA, which is set forth in Article 20. Prior to the filing of a written grievance, the procedure requires an informal resolution ("IR") process, which must be initiated within thirty days of the act or omission giving rise to the dispute. Union representatives had been in contract with University representatives about the letters of non-renewal since at least May 26, when the Union requested to meet with the University on May 30 to engage in IR. The parties met to discuss IR of the grievance on June 5, but they were unable to successfully resolve the matter.

Following the parties' unsuccessful efforts at IR, the Union filed a written grievance on June 17. In that grievance, the Union contended that the University's non-renewal letters violated several articles in the CBA, including Articles 8 and 15. In addition, the "statement of grievance" included on the grievance form states that by issuing the non-renewal letters at issue, the "[University] 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 evaluation." Following the Union's submission

[3] One of these nine faculty members received the letter on June 21.

of the written grievance, the parties met again on June 19 in another effort at IR. At that meeting, the University made it clear that additional attempts at IR would not resolve the grievance. The University did not submit a written response to the grievance and the Union timely submitted the grievance to arbitration, which led to the instant proceedings.

Positions of the parties

1. The Employer's position

Issue 1 – Standing

The Employer submits that the issue of standing must be pled and proven by the Union. The Employer acknowledges that a union may police the collective bargaining agreement which it has negotiated, however, the parties to an agreement may agree to modifications or limitations concerning the grievability of certain issues, who has standing to pursue certain grievances, and the procedures to be followed in pursuing grievances. Based on this principle, the Employer contends that under the CBA its issuance of non-renewal letters to the faculty of the RHM Program did not create an event the Union has standing to grieve in its own name.

In support of that contention, the Employer argues that under the plain language of Article 12.3 of the CBA, only "an employee" retains the right to file a grievance with respect to a decision not to renew a faculty member, and even then, the faculty member's grievance would have to address specific matters including allegations of constitutional rights violations. In addition, the Employer argues that Article 20.2(E)(2) and (3) of the CBA – which addresses the informal resolution process – expressly and clearly sets forth that a faculty 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. Finally, the Employer argues that Article 20.3(B) provides further clarity to the parties' intent with respect to the fact that there is a distinction in their agreement between the rights of the Union (in its own name) and individual members, where it 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]."

Based on these arguments, the Employer contends that the Union does not have the standing under the CBA to challenge individual notices of non-renewal, and that if a member of the faculty should receive such a notice, it would be up to her or him to follow the grievance resolution process of Article 20, as required by Article 12.3, to the extent the faculty member feels she or he has a grievable issue under the limited provisions of that section.

Issue 2 – Compliance with Grievance Procedure

The Employer raises several arguments contending that the Union did not comply with the grievance procedure in the CBA, and that the grievance is not arbitrable. First, the Employer alleges that affected faculty members did not timely request IR, as required under Article 20.2(A), and they did not request IR within 30 days of a disputed act, as required by Article 20.2(B), Sec. 20.2(C), and Sec. 20.14(B). The Employer acknowledges that Union officers may assist and represent individual members in the dispute resolution process, but the Employer maintains that the Union itself cannot step into the shoes of a member and assert a right of a faculty member. In this case, the Employer alleges that none of the members who received non-renewal letters took any steps to request informal resolution or to file a signed grievance in their own names, and as a result, the non-renewal letters they received are not now able to be challenged.

Second, the Employer contends that IR requests must be in writing and "contain a brief, general description of the facts relating to the dispute [and] identify the relevant provisions of the Agreement that are at issue," pursuant to Article 20.2(D) of the CBA. The Employer alleges that the May 28 email from the Union President did not contain "a brief, general description of the facts relating to the dispute and identify the relevant provisions of the CBA at issue." Rather, the Employer alleges that it amounted to nothing more than a request for consultation with the union on a broader generalized topic of concern surrounding the general process of non-renewal, and because the University is always open to consultation with the union's officials when such is requested, such consultations (conducted pursuant to Article 2, not Article 20) such requests are not transmuted into grievances simply because the Union desires to characterize them as such.

Third, the Employer argues that the CBA very explicitly prohibits the Union from having the right to file a grievance unless that grievance addresses a specific provision of the CBA which "*confers rights upon it*." The Employer alleges that the grievance form submitted by the Union President merely listed a host of CBA chapters, and made no attempt to list specific provisions of those chapters which conferred rights upon the Union which were alleged to have been violated.

Fourth, the Employer argues that even if the Union had the right to file the grievance at issue, and even if that grievance contained a grievable topic, the Union failed to wait for the requisite time period for filling the grievance, pursuant to Article 20. In support of that argument, the Employer notes that to be in compliance with the IR process set forth in Article 20.2(E), the Office of Academic Affairs (OAA) and the faculty member have 30 days to attempt IR, and under Article 20.6(A)(1), a grievance must be filed "no later than 7 days *after the end of the [30-day] informal resolution period.*" Based on these provisions, the Employer contends that even if May 28 was the date the IR process began, then the Union would not have been able to submit a grievance form until June 29. The Employer concludes that the Union submitted the grievance form on June 17, which was premature and did not have to be processed by the OAA.

Fifth, the Employer argues, pursuant to Article 20.3(A), that a "*Grievance*" is defined as a "dispute…concerning the interpretation or application of a specific term or provision of the CBA," and that the grievance file by the Union simply called out a series of CBA chapter numbers and included catch-all "and others that may also apply" language. The Employer contends that this grievance was inconsistent with the CBA's mandate to invoke *specific terms or provisions* over which a dispute exists, and that 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 relying on.

Finally, the Employer notes that Article 20.6(F)(1)(d) of the CBA requires that all arbitration requests "*shall* be signed by the grievant[s]," and argues that the arbitration form submitted to the University was not signed by any of the non-renewed faculty members.

Issue 3 – Whether the subject matter of the grievance is arbitrable

The University argues that the grievance filed by the Union in the Union's own name and challenging the non-renewals of faculty members is not arbitrable. In support of that argument, the University relies on the principles that the parties to a collective bargaining agreement can only be compelled to arbitrate matters to which they have agreed upon and matters specifically excluded by the parties from arbitration need not be arbitrated.

In keeping with those principles, the University argues that the parties in this case have agreed on a dispute resolution policy which encompasses many elements of their CBA, but with certain limitations. The University contends that the first of those limitations is that non-renewal letters – which may have been subject to the invocation of the informal resolution process and grievance process by any of the individual faculty members who received – were clearly and expressly carved out of the purview of the Union to file on its own.

The University contends that the second limitation in the CBA is that non-renewal may only be contested on the basis of one or more of the reasons set forth set forth in Article 12.3, which are "an alleged violation of a specific term of the Agreement or because of an alleged violation of the employee's constitutional rights." In support of that contention, the University notes that many courts, arbitrators and labor bodies have upheld the right of parties to exclude from arbitration certain topics, such as the non-renewal matter at issue here, and it cites to previous arbitral awards which have held that employers who have failed to reinstate following non-reappointment or rehire after retrenchment were within their management rights to do so.

2. The Union's position

Issue 1 – Standing

The Union contends that it has standing to pursue the grievance on behalf of affected faculty members and argues that there is nothing in the CBA which states or implies that the Union itself, being one of the parties to the CBA, lacks the authority to enforce the interpretation of the CBA it has negotiated, or to hold the Employer to the maintenance of a past practice. In support of that contention, the Union relies on its role as exclusive

bargaining agent, as defined in Article 1; Article 29, which grants the Union the right to have its CBA honored until its expiration; and Article 31 grants the Union the expectation that no action by the University would be permitted to upset the benefits negotiated in the CBA.

The Union submits that the instant grievance raises a near-pure question of contract interpretation – that is, whether the employer correctly construes the contract in the action it took – and the Union stands alone in possession of the information needed to argue these controlling factors and it is the only party that can reasonably be expected to enforce a particular interpretation of the CBA that it negotiated. Further, in deciding this question of contact interpretation, the Union argues that any ambiguity in the parties' grievance procedure must be interpreted in the context of the entire CBA, past practice, and their labor-management relationship.

As to the specific standing issue presented in this case, the Union contends that the individual employees affected by non-reappointment were coerced out of signing their name to a grievance due to the University's subsequent selective rescindments of non-reappointments and offers of continued employment on a contingent basis, and because of that coercion the Union had an obligation to enforce the rights of the entire unit. The Union also argues that even if the affected employees had no interest at all in enforcing the terms of their Continuing Multi-Year Appointments, it has both the right and the obligation to protect the integrity of that benefit it negotiated, which is a cornerstone of the CBA that applies to virtually all members of the Union's bargaining unit.

Issue 2 – Compliance with Grievance Procedure

The Union submits that it complied with the parties' grievance procedure and it presents several arguments in support of its position. To begin, the Union argues that the University must overcome a presumption of arbitrability to achieve dismissal of a grievance on procedural grounds. As applied to this case, the Union submits that the University must show not only that the procedural requirements spelled out in the CBA were violated, but also that the CBA requires the forfeiture of the grievance for the established procedural defects. The Union contends that there are several clear provisions in the CBA that provide

for the forfeiture of a grievance due to a procedural defect, but that none of them been claimed by the University.

Further, the Union contests the University's claim that the Union did not adhere to the grievance procedure. As to the University's claim that the Union's request for IR was deficient, the Union argues that the IR process was exhausted in three ways. First, the Union argues that pursuant to Article 20.2(E)(2), Informal Resolution was exhausted when the Step 1 Grievance was filed on June 17. Second, the Union argues that, pursuant to Article 20.2(E)(3)13, the IR process was exhausted when the parties mutually agreed on June 19 that informal resolution of the dispute was not possible. In that regard, the Union notes that the same language is used in both sections, "...that informal resolution of the dispute is not possible." Third, the Union argues that because more than 21 days elapsed between the first request for an informal meeting to discuss the non-reappointment of the Hospitality and Resort Management faculty the grievance was timely filed. Finally, the Union argues that the University's claim is moot because Article 20.2.E(4) does not provide for forfeiture of the right to pursue a grievance in the event a formal grievance is filed during the IR period.

As to the University's claim that the Union's grievance was filed prematurely, the Union argues that the CBA provides flexibility to a grievant to end IR by simply filing a Step 1 grievance. Thus, in this case, the Union claims that the filing of a Step 1 grievance on June 17 ended the informal resolution process and began the formal grievance procedure. Arguing in the alternative, the Union submits that even if a grievant did not have the right to end IR by simply filing a grievance, Article 20.2.E(3) provides an end to the IR process if the parties mutually agree to end IR, which, the Union alleges, occurred here.

Finally, the Union argues that the University waived any objections relating to standing, failing to identify affected faculty members on the grievance form and obtaining their signatures, or failing to identify alleged violations of the CBA with appropriate specificity by not raising them in a meeting between the parties on June 19 or an any time before they were raised in a letter from University Counsel on September 12.

Issue 3 – Whether the subject matter of the grievance is arbitrable

The Union acknowledges that the University has the authority to non-reappoint, and the decision to non-reappoint is, generally, not subject to the grievance procedure, but the Union is not contesting the *decision* to non-reappoint. The Union argues that it is contesting the effective date a non-reappointed employee may be released from employment, which it alleges is not excluded from the grievance procedure generally nor from the scope of grievances that may be raised by the Union specifically. Specifically, the Union contends that the effective date of release from employment must be farther in the future than stated on the non-renewal letters, according to CBA provisions governing CMYAs found in Article 15 (Multi-Year Appointments and Tenure Status: Extension, Probation, Reappointment).

The Union claims that the University appears to believe that, regardless of the length of time remaining in the employee's appointment, "non-reappointment" allows it to release that employee from employment as soon as one calendar year from the date the non-reappointment letter is issued. The Union submits this is a violation of the plain letter of relevant CBA provisions cited in the grievance as well as the long-established past practice of the parties. The Union argues that there is no provision that precludes this dispute from being resolved through the CBA's grievance and arbitration machinery, and that a plain reading of 12.3 expressly invites the resolution of such disputes through the grievance procedure.

Discussion

In contract interpretation cases, the moving party – typically a grievant or a union – bears the burden of production and persuasion. R. Abrams, *Inside Arbitration* 301-302 (2013); F. Elkouri & E. Elkouri, *How Arbitration Works* 422-424 (6th ed. 2003). Indeed, the CBA explicitly places the burden of proof in non-disciplinary cases on the employee, and the employee – or the Union, as the case may be – bears the burden of proof on the merits of such cases. However, the arbitrability issues presented at this stage of the proceedings

brought by the University are akin to affirmative defenses. As such, the University bears the burden to establish these defenses.[4]

The dispute at the core of the instant grievance involves the University's decision to not reappoint several faculty members in its School of Resort and Hospitality Management. Article 12.3 of the CBA addresses whether decisions not to reappoint faculty members may be grieved. This Article states:

> 12.3 Grievability. The decision to not reappoint is not grievable except, an employee who receives written notice of non-reappointment may, according to Article 20 Grievance Procedure and Arbitration, 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. Such grievance process must be filed with the Office of the Provost within thirty (30) days of receipt of the statement of the basis for the decision not to reappoint pursuant to Article 12.2 E above or receipt of the notice of non-reappointment if no statement is requested.

Pursuant to this Section, there is no dispute that decisions to not reappoint are generally not grievable, but in this case the Union is alleging that the non-renewal decisions at issue fall within the exceptions underlined above, which would permit them to be grieved. Whether the University's non-renewal of these faculty members violated a "specific term of the Agreement" or an "employee's constitutional rights" is not at issue in this stage of the proceedings, as such an issue would address the merits of the grievance. Rather, the issues to be addressed at this stage concern the arbitrability of the grievance.

Before discussing these arbitrability issues, it is worth considering the context of the grievance procedure in the parties' CBA. Parties to contracts outside the labor relations context typically use the courts to seek declarations of their rights and remedies for violations. Unlike these parties, parties to collective bargaining agreements may, and in some settings – including the public sector in Florida – are required to have a grievance procedure as an alternative to litigation in the courts. Grievance procedures are an important feature in

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[4] As a practical matter, which party bears the burden of proof is not of great significance because determinations on the issues presented here will be made in favor of the party with the most persuasive arguments based on the facts, the CBA, and guiding legal principles. R. Abrams, *Inside Arbitration* 302 (2013).

our nation's labor relations scheme because they assist in the maintenance of labor peace. Rights contained in collective bargaining agreements – such as promotional procedures, salary schedules, and discipline and discharge policies – are of great consequence to employers, employees, unions and, society at large. Grievance procedures are a means to channel and dissipate workplace conflict over these and other emotionally charged issues so that the level of conflict inherent in these matters does not lead to dysfunction.

Many grievance procedures, including the one in the parties' CBA, do so by first requiring the parties to attempt to resolve disputes among themselves. Typically, grievance procedures require that a grievance be submitted initially at lower levels in an organization. If the dispute is not resolved at the lower levels, grievance procedures usually have additional steps where higher level supervision or management will have an opportunity to resolve the matter. If the parties are not able to resolve the dispute by themselves, most grievance procedures permit the grievance to be submitted to a neutral arbitrator for final and binding resolution. The purposes served through such procedures is two-fold. First, time limits for submitting grievances at the beginning stage of the procedure – usually from the date of occurrence or knowledge of the event giving rise to the grievance – force employees or their representatives to address disputes quickly so that stale claims do not linger in the workplace. Arbitrators will often give parties submitting grievances some leniency in meeting these deadlines for legitimate reasons but are otherwise inclined to enforce deadlines when there is no such reason for delay. Second, requiring a grievance to progress from a low level in an organization – such as an employee's direct supervisor – allows the parties to attempt to resolve the dispute at the level of the organization where it began. However, workplace disputes frequently do not involve the actions or omissions of lower-level supervisors, so some grievance procedures permit employees to bypass the initial steps, or the lower-level supervisors simply deny such grievances and they are passed up the steps in the procedure.

Full utilization of the steps in a grievance procedure are important, but at the same time the procedure should readily avail itself to being used, which is why arbitrators often apply a presumption of arbitrability. When addressing procedural objections to a grievance

that do not relate to timeliness, the purpose of the procedure must also be considered. For example, the purpose of a provision requiring specificity in a grievance is so that the parties have proper notice of the nature of a dispute. If a grievance does not strictly comply with such a procedure, but it is clear from the record that the parties were sufficiently aware of the nature of the dispute to attempt to resolve it, such provisions should not be strictly enforced, unless a party was prejudiced because of the lack of specificity. Grievance procedures are in place to be used for their intended purpose of resolving workplace disputes, and, while the parties may agree to limit access to grievance procedures, such limitations must be clear and unambiguous, especially when strict enforcement of procedural limitations causes the forfeiture of a substantive right.

I. Whether the Union has standing to bring the grievance

This first arbitrability issue concerns whether the Union has standing to submit the instant grievance, or whether – as the University argues – only the affected faculty members have standing, either individually or as a group. The general rule is that unions have standing to submit group grievances that affect a significant part of the bargaining unit. F. Elkouri & E. Elkouri, *How Arbitration Works* 212 (6th ed. 2003). The instant grievance has a direct impact on several bargaining unit members, and its outcome could potentially affect approximately 95% of the bargaining unit members who have Continuing Multi-Year Appointments. For this reason, the Union would clearly have standing under the general rule.

The CBA also provides evidence of an intent to permit the Union to file grievances on behalf of unit members. First, there is nothing in the CBA that explicitly states that the Union may not file a grievance on behalf of a group of unit members.

Second, Article 20.3(B) defines "Grievant" as "a member of the bargaining unit *or group of members* of the bargaining unit." (emphasis added). Such provisions have been held to imply that a union can file a grievance on behalf of the group. F. Elkouri & E. Elkouri, *How Arbitration Works* 212 (6th ed. 2003).

Third, Article 20.3(B) states that the Union "may file a grievance in a dispute over application of a provision of this Agreement which *confers rights upon the [Union].*" (emphasis added). The parties disagree over the meaning of the italicized phrase, with the

University arguing that it means only contractual rights specific to the Union, and the Union arguing that it means any of the rights it has bargained for and attained on behalf of the unit. This ambiguity is best resolved by examining this phrase in context. Because this phrase appears in a sentence directly after the definition of "grievant" as including a "group of members" it suggests that such group grievances are the type that the Union may file. Further, the next sentence in Article 20.3(B) states that "[w]here several employees have essentially the same grievance, the *parties* may agree in writing to consolidate the grievances." (emphasis added). The reference here to "parties" also implies that the Union is a party to the grievance because the only parties to the CBA are the University and the Union. Also, pursuant to Article 1 and the Union's certification though the Florida Public Employees Relations Commission, the Union is the exclusive bargaining representative of all employees in the unit. This means the University cannot refer any contractual rights directly on employees, and all rights must be conferred on the Union as the representative of the employees. Viewed in the context of Article 1 and the entirety of Article 20.3(B), a persuasive interpretation of the phrase "confers rights upon the [Union]" is that the Union may file grievances, including group grievances that involve rights contained in the CBA.

Under the interpretation of Article 20.3(B) put forth by the University, the rights conferred upon the Union would be exceedingly narrow, such as the right to act as the exclusive representative of the unit and to collect dues. These particular rights are included in the CBA but the obligation to provide them has its genesis in state law, which also provides remedies for their violation. Under these circumstances, there would be little need for the Union to have the ability to grieve this narrow set of rights, and the language conferring that right would be of little meaning.

Fourth, there are compelling equitable considerations in allowing the Union to file certain group grievances, and this case provides a good illustration of one such consideration. In this case, not long after the faculty members received their non-renewal letters on May 21, those letters were rescinded for three members and others were offered the possibility that they too may receive continued offers of employment. Under these circumstances, prudent affected faculty members who were hoping that the University may offer continued

employment could reasonably believe that filing a grievance contesting their non-renewal letters may negatively impact their chances of receiving an offer. This type of "chilling effect" on employees' exercise of the contractual right to file grievances provides an appropriate and necessary circumstance for the Union to preserve that right by filing a group grievance on behalf of the affected members.

For the above-stated reasons, the Arbitrator determines that the Union has a contractual right to grieve the faculty non-renewal notices at issue.

II. Whether the Union complied with the grievance procedure

As discussed above, a general presumption exists that favors arbitration over dismissal of grievances on technical grounds. F. Elkouri & E. Elkouri, *How Arbitration Works* 206 (6th ed. 2003). In this case, the University argues that grievance should be denied because the Union did not comply with the requirements of the grievance procedure. Specifically, the University contends that (1) there was no timely request for IR; (2) the IR request did not contain the requisite information; (3) the grievance did not list specific rights that were conferred upon the Union; (4) the Union did not wait for the requisite time period for filing the grievance; (5) the grievance did not invoke the specific terms or provisions over which a dispute exists; and (6) the grievance form was not signed by the non-renewed faculty members. Each one of these contentions and their effect on the viability of the grievance will be discussed.

1. Whether the IR request was timely

The University's claim that employees did not timely request IR is based on its position that employees – and not the Union – must initiate IR. As determined above, the Union may press a grievance on an employee's behalf, so this claim is rejected. Because the non-renewal letters were sent by the University on May 21 and the Union initiated IR on May 26, the Union timely requested IR within 30 days that it knew or should have known of the event, as required under Article 20.2 (B).

2. Whether the IR request contained the requisite information

The University contends that IR requests must be in writing and "contain a brief, general description of the facts relating to the dispute [and] identify the relevant provisions of

the Agreement that are at issue," pursuant to Article 20.2(D) of the CBA. It is correct that the Union did not submit a written IR request on May 26 when it first sought to meet with the University for IR; however, the purpose of this provision is to give the University adequate notice of the facts and circumstances underlying the dispute, and the University was well aware of the nature of the dispute before the parties met on June 5 and was not prejudiced by not having a written statement. If the University had any question about the nature of the dispute at that time, or it desired technical compliance with the IR procedure before the parties met on June 5, it could have asked the Union for a written statement and allowed the Union to cure the procedural deficiency. The University's failure to do so constituted a waiver of that requirement.

In addition, the parties met on June 19 in another attempt at IR. By that time, the Union had submitted a written grievance that identified the provisions of the CBA which it believed were violated and a brief general description of the facts. At that meeting, the Union asked the University if it wanted to engage in IR, to which the University responded, "absolutely not." At that point, the written grievance could have served as a timely request for IR, but the University was clearly not interested in continuing IR. Finally, although there is language in the CBA that requires a grievance to be forfeited for a process deficiency, there is no such language for failing to submit a written, detailed statement to request IR. Under these circumstances, the purposes of IR were served, and the Union was in substantial compliance with the IR provisions of the CBA.[5]

3. Whether the grievance listed specific rights that were conferred upon the Union

The University claims that the Union can only grieve if (1) the CBA confers a right upon the Union, and (2) the grievance lists specific provisions of CBA violated. As discussed above, the Union may press a grievance on an employee's behalf, so this part of

[5] At their meeting on June 19, the University asked if the Union would be willing to amend its written grievance to remove the Union's statement that IR was attempted on June 5 and agree to waive IR. The Union disagreed with the University's implication that IR had not occurred on June 5 and was unwilling to amend its grievance. Nevertheless, if the University was willing to waive IR, its claim that a minor technical violation of the IR procedure should result in a denial of the grievance is not persuasive.

the claim is rejected. In addition, the University's claim that the grievance form did not list the specific provisions of the CBA that were violated is not persuasive. A review of the grievance form shows that it lists Articles 8 and 15 among the articles violated and describes the nature of the violation squarely in terms of a violation of Article 15.1(B).

4. Whether the grievance was filed during the requisite time period

The University argues that the Union failed to wait for the requisite time period for filling the grievance, pursuant to Article 20. In support of that argument, the Employer notes that to be in compliance with the IR process set forth in Article 20.2(E), the Office of Academic Affairs (OAA) and the faculty member have 30 days to attempt IR, and under Article 20.6(A)(1), a grievance must be filed "no later than 7 days *after the end of the [30-day] informal resolution period.*" Based on these provisions, the University contends that even if May 28 was the date the IR process began, then the Union would not have been able to submit a grievance form until June 29. The University concludes that the Union submitted the grievance form on June 17, which was premature and did not have to be processed by the OAA.

The University's argument is based on its claim that the grievance was filed too soon. This is an unusual claim, as employers typically seek to enforce timeliness provisions based on late filing of grievances. The merit in the contractual provision on which the University's argument is based is that there needs to be some time to let the IR process work. Under Article 20.6(A)(1) a grievance must be filed after a minimum of 21 days of IR, but not later than seven days after the end of the IR period. In this case, the Union requested IR on May 26, and the Union filed the written grievance on June 17. Thus, the grievance was filed within the contractual window.

5. Whether the grievance invoked specific terms or provisions violated

The Employer argues, pursuant to Article 20.3(A), that a "*Grievance*" is defined as a "dispute…concerning the interpretation or application of a specific term or provision of the CBA," and that the grievance file by the Union simply called out a series of CBA chapter numbers and included catch-all "and others that may also apply" language. The Employer contends that this grievance was inconsistent with the CBA's mandate to invoke *specific*

terms or provisions over which a dispute exists, and that 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 relying on. As discussed above, a review of the grievance form shows that it lists Articles 8 and 15 among the articles violated and describes the nature of the violation squarely in terms of a violation of Article 15.1(B). Thus, the grievance form meets the requirements of Section 20.3(A).

6. Whether the grievance form was not signed by the non-renewed faculty members

Finally, the Employer notes that Article 20.6(F)(1)(d) of the CBA requires that all arbitration requests "*shall* be signed by the grievant[s]," and argues that the arbitration form submitted to the University was not signed by any of the non-renewed faculty members. A grievance filed by a union need not be signed by unit members on whose behalf it is filed. F. Elkouri & E. Elkouri, *How Arbitration Works* 212 (6th ed. 2003). Here, the Union filed the grievance on behalf of the affected unit members, and under that circumstance, this provision is inapplicable.

For the above-stated reasons, the Arbitrator determines that the grievance procedure was complied with.

III. Whether the non-renewal letters are subject to arbitration

The University argues that, pursuant to Article 12.3 of the CBA, only an "employee" who received written notice of non-reappointment may file a grievance and the grievance must only be based on an alleged violation of a specific term of the CBA or the employee's constitutional rights. Based on the same reasons discussed above in the Article on standing, wherein it was determined that the Union may file a grievance on behalf of unit members, the University's argument that only an employee may grieve a notice of non-reappointment under to Article 12.3 is not persuasive.

This leaves the issue of whether the grievance alleged a violation of a specific term of the CBA or an employee's constitutional rights. As a preliminary matter, it must be acknowledged that there are two potential sources of rights that would be grievable, and the enumeration of those rights are written in the disjunctive. Thus, an employee who alleges the violation of a specific term of the CBA *or* a constitutional right (or both) would have access

to the grievance procedure. In this case, there is no allegation of a violation of a constitutional right, so the issue becomes whether the Union has alleged the violation of a specific term of the CBA.

The grievance alleges violations of several articles in the CBA, including Articles 8 and 15, which both address CMYAs. Specifically, Article 15.1(B) provides, in relevant part, that "[i]f a CMYA faculty member receives an overall satisfactory annual evaluation as defined by the unit, he or she will receive a one-year contract extension, thereby maintaining a full three-year appointment cycle." The "statement of grievance" included on the grievance form reads that by issuing the non-renewal letters at issue, the "[University] 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 evaluation." Because the grievance form specifically identifies Articles 8 and 15, and provides facts which place themselves squarely within the parameters of a violation of Article 15.1, the Union has met the exception to contest non-reappointment provided in Article 12.3 of the CBA. Therefore, the non-renewal letters are subject to arbitration.

Conclusion

For the above-stated reasons, the Arbitrator concludes that the instant grievance is arbitrable and shall be heard on the merits in the next stage of the proceedings.

Award

For the foregoing reasons, I, the undersigned Arbitrator, hereby AWARD, as follows:

1. The grievance is sustained at this stage of the proceedings. That is, the grievance is arbitrable and shall proceed to be heard on the merits.

Michael G. Whelan

11/22/19
Date