In the Matter of Arbitration Between:

United Faculty of Florida

AND

Florida Gulf Coast University Board of Trustees

Re: Arbitrability – Non-Reappointment of School of Resort and Hospitality Management Faculty
FMCS Case No.: 190826-10334

Before: Arbitrator Michael G. Whelan

Post-Hearing Brief Submitted on Behalf of United Faculty of Florida

Dated: November 12, 2019

For the Union:

Graham Picklesimer
6604 N Elizabeth St.,
Tampa, FL 33604

Staff Advocate for:

United Faculty of Florida
115 N Calhoun St., Suite #6,
Tallahassee, FL 32301

Contents

List of Exhibits 3
Issue 4
The Union has "standing" to pursue this grievance. 5
Union Position 5
Union Response to University Position 6
The grievance is without procedural defects. 9
Union Position 9
Union Response to University Position 9
The grievance is substantively arbitrable. 12
Conclusion and Remedy 13

List of Exhibits

- CBA – Parties' 2018-2021 Collective Bargaining Agreement
- UPHB – Union Pre-Hearing Brief
- EPHB – Employer Pre-Hearing Brief
- E1 – Report of Dr. Michael D. Johnson to Lutgert College of Business Dean Robert Beatty
- E2 – May 21 non-reappointment letters issued to SHRM faculty
- E3 – May 20 e-mail, Dr. Edwin Everham to SHRM faculty
- E4 – May 26 e-mail, Dr. Everham to Provost Dr. Jim Llorens
- E5 – May 28 e-mail, Dr. Everham to Dr. Llorens
- E6 – June 14 e-mail, Provost Llorens and Vice-President Dr. Susan Evans to SHRM faculty
- E7 – June 17 Step 1 Grievance Filing
- E8 – June 20 e-mail, Dr. Everham to Dr. Llorens and Associate Provost Dr. Tony Barringer
- E9 – June 26 e-mail, Dr. Everham to Drs. Llorens and Barringer
- E10 – June 28 e-mail, Dr. Barringer to Dr. Everham
- E11 – June 28 e-mail, Dr. Everham to Dr. Barringer
- E12 – June 28 e-mail, Dr. Everham to Drs. Llorens and Barringer
- E13 – July 11 e-mail, Dr. Everham to Dr. Barringer
- E14 – July 11 e-mail, Dr. Patrick Niner to Drs. Everham and Barringer
- E15 – July 12 e-mail, Dr. Barringer to Drs. Niner, Everham, and Llorens
- E16 – July 12 e-mail, Dr. Niner to Drs. Everham, Llorens, and Barringer
- E17 – July 12 e-mail, Dr. Everham to Ms. Andrea Clemons and Drs. Barringer and Llorens
- E18 – July 22 e-mail, Dr. Everham to Drs. Llorens and Barringer
- E19 – July 31 e-mail, Dr. Everham to Drs. Llorens and Barringer
- E20 – August 7 e-mail, Dr. Scott Michael to Dr. Barringer
- E21 – August 12 Notice of Arbitration
- E22 – August 26 e-mail, Mr. Graham Picklesimer to Dr. Barringer
- E23 – August 26 e-mail, Dr. Barringer to Drs. Niner and Michael
- E24 – August 27 e-mail, Mr. Picklesimer to Dr. Barringer
- E25 – Continuing Multi-Year Appointment letters issued to SHRM faculty, 2003-2010
- E26 – September 12 correspondence, Mr. Robert Eschenfelder to Mr. Picklesimer
- E27 – July 26 Mr. James Fraser, Drs. Lan Jiang & Michael Collins non-reappointments rescinded
- E28 – June 19 e-mail, Dr. Carolynne Gischel to Mr. Picklesimer
- E29 – August 1 e-mail, Dr. Chris Westley to Dr. Mary Wisnom

Issue

The Union submits the following statement of the issue to be decided:

> *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 University submits the following three-part issue:

> *Was the June 17th 2019 grievance filed by a party with the contractual right to file a grievance concerning faculty non-renewal notices? If yes,*
>
> *Were the grievance procedure requirements complied with? If yes,*
>
> *Did the grievance filed on June 17th 2019 address a grievable/arbitrable issue?*

The Union believes the answer to each of the three questions posed by the University is "yes." However, even if the arbitrator were to determine that the answer to either of its first two questions were "no," the arbitrator would then be faced with the question of whether the grievance is forfeited as a result. The first two questions posed by the University are relevant considerations in determining the ultimate question of whether the grievance is subject to arbitration but are not necessarily determinative on their own for reasons outlined in the Union's pre-hearing brief. The Union's statement of the issue is therefore the true question that must be answered by the arbitrator.

The Union has "standing" to pursue this grievance.

Union Position

The custom and past practice of parties to a collective bargaining agreement is enforceable as part of the parties' whole agreement. The choice of words used (and not used) in the drafting of a CBA is made against the background of a much wider labor-management relationship context. This context is relevant to the interpretation of ambiguous language. In Elkouri and Elkouri's *How Arbitration Works*, the authors cite the Supreme Court's discussion of the arbitrator's authority in one of the seminal *Steelworkers Trilogy* cases:

> *The labor arbitrator's source of law is not confied to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it.*[1]

In deciding a question regarding practice, Elkouri and Elkouri note that "the relevant bargaining history, the relationship between the parties, and the subject matter of the practice or custom and its treatment (if any) in the collective bargaining agreement are the commonly controlling factors." Where, as in the instant case, a grievance raises a near-pure question of contract interpretation, i.e., whether the employer correctly construes the contract in the action it took, the Union stands alone in its possession of the information needed to argue these controlling factors. No party *but* the Union can reasonably be expected to enforce a particular interpretation of the CBA that the Union has negotiated.

There is nothing in the CBA which states or even 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. The mantle of exclusive bargaining agent, as defined in Article 1[2] (which the University admitted in its own pre-hearing brief[3] is one of the Articles that, in its view, *does* "confer rights upon the union"), means nothing in the CBA if not this. In addition, Article 29 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.

Complicating matters further – as Dr. Carolynne Gischel (the Union's grievance chair) testified – because 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-

[1] *How Arbitration Works*, Frank Elkouri & Edna Asper Elkouri, 8th Edition, Ch. 12 p. 3, BNA, 2016
[2] CBA, p. 2
[3] EPHB, p. 12, footnote 6

reappointments[4] and offers of continued employment on a contingent basis[5], the Union had an obligation to enforce the rights of the entire unit. Elkouri and Elkouri describe the Union's right take such actions:

> *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. In upholding the right of the union to police the agreement, arbitrators have recognized that the interests of the union and those of an individual employee do not always coincide. Thus, the consequence is that an employee may waive a purely personal right under the agreement, but that the employee may not waive other rights against the wishes of the union.*[6]

Dr. Gischel testified that this was very much a situation where the interests of employees (in not inviting University retaliation for signing their names to a grievance) and the Union (in protecting the concept of a "Continuing Multi-Year Appointment" as negotiated) do not coincide. Even if the affected employees had no interest at all in enforcing the terms of their Continuing Multi-Year Appointments, the Union has both the right and the obligation to protect the integrity of the benefit it has negotiated on behalf of the rest of its bargaining unit. To rule that the Union does not have the ability to pursue a grievance where a member has declined to do so on their own would eviscerate not only Article 1 of the CBA, but the Union's very status as the exclusive bargaining agent.

Furthermore, this is not a matter where the Union has, as the University alleges, simply "stepped into the shoes" of the affected employees. As Dr. Gischel testified, virtually all members of the Union's bargaining unit work under a Continuous Multi-Year Appointment, and their terms and conditions of employment would be radically altered by the University's novel theory that a CMYA can be prematurely terminated under the guise of a "non-reappointment." The Union has stepped into its own shoes to enforce for the sake of the bargaining unit what it negotiated on behalf of the bargaining unit. The University's successful coercion of employees out of filing individual grievances should not allow it to undermine this cornerstone of the parties' CBA.

For the above reasons and all other reasons argued in its pre-hearing brief, the Union maintains that it has standing to pursue the instant grievance.

Union Response to University Position

In its post-hearing brief, the University argues that the Union must prove it has standing:

---

[4] E27
[5] E29
[6] *How Arbitration Works*, Ch. 5 p. 24

> *Unlike estoppel and waiver, lack of standing is not an affirmative defense and therefore it need not be pled and proven by the respondent. It is the party initiating the action which has the burden of establishing its standing.*[7]

This is arbitration, not court. Grievances are presumptively arbitrable. The University bears the burden of proving that this grievance is not arbitrable.

The University offered no new evidence or argument during the October 28 hearing. The University pins its "standing" argument on the following language in Article 20.3.B: "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." The University interprets this language as foreclosing the Union from filing grievances over certain matters. This is not what the language says. The language says what the Union *may* do; it says nothing about what the Union *may not* do. There are any number of alternative intentions and purposes of this language. The parties may have sought to prevent the common situation where an individual employee seeks to step into the shoes of the Union to enforce the Union's rights (e.g., by filing a grievance when the parties decide not to hold a Labor-Management Committee meeting pursuant to Article 2.2 during a semester). The parties may have sought to clarify an already-existing understanding that the Union and not individual employees have the right to file such grievances. The parties may have sought to simply prevent the Union from litigating a matter "purely personal" to an employee and subsequently mooted (e.g., an employee who received a written reprimand or a poor evaluation and later left the bargaining unit).

The interpretation of Article 20.3.B that the University now proffers would severely limit the rights of the Union to police its agreement. It is an extraordinary claim for which it offers no evidence at all, neither bargaining history, nor witness testimony. To the extent that technical interpretation of Article 20.3.B is relevant at all, the University has failed to carry its burden of proving that Article 20.3.B prevents the Union from filing the instant grievance.

In the next paragraph, the University argues:

> *Consistent with § 12.3's "an employee" language, § 20.2(E)(2) and (3) of the CBA expressly and clearly set forth that a Member (but not union) may file a grievance after 21 days if no resolution or if parties agree the informal resolution process is not possible.*[8]

Article 20.2(A) clearly allows for the Union to submit a request for informal resolution ("No grievance shall be filed until the UFF-FGCU or faculty member has timely requested an informal resolution.").[9] The University's construction of the CBA, that only an individual employee may file a Step 1 grievance, would prohibit the Union from ever advancing beyond the informal resolution

[7] EPHB, p. 11
[8] EPHB, p. 12
[9] CBA, p. 69

procedure. In addition to being absurd on its face, this is directly contravened by 20.3(B), which states (emphasis added) "The UFF-FGCU may file a grievance in a dispute…"[10] The University has not identified a foreclosure of the Union's right to advance a grievance, rather it has simply identified places in the CBA where terminology is used inconsistently. As the Union argued in its pre-hearing brief, doubts – including any that arise out of inconsistent usage of terminology in the CBA itself – should be resolved in favor of arbitrability.

[10] CBA, p. 70

The grievance is without procedural defects.

Union Position

The Informal Resolution process was exhausted in three ways. First, pursuant to Article 20.2(E)(2)[11], Informal Resolution was exhausted when the Step 1 Grievance was filed on June 17[12]. Then, pursuant to Article 20.2(E)(3)[13], it was exhausted when, per Dr. Gischel's unrebutted testimony, the parties mutually agreed on June 19 that informal resolution of the dispute was not possible[14]. Notably, the same language is used in both sections, "…that informal resolution of the dispute is not possible." Finally, as discussed below, 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.

Union Response to University Position

The University argues the Union never requested Informal Resolution, rather it only requested a general-purpose consultation about non-reappointments:

> *In this case, the May 28th email from the local 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, 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.*[15]

The May 28th e-mail[16] was the second of two e-mails in which a meeting with the University and Union leadership, including its grievance chair, Dr. Carolynne Gischel, was requested by the Union. The first e-mail[17] was on May 26th. Notably, the subject of both e-mails is "Resort and Hospitality Reorganization – follow up." The University's claim now that this meeting had nothing to do with the RHM faculty and was simply a vague discussion around the general process of non-renewal is either willful ignorance or a clumsy attempt to rewrite the plain history of this dispute.

The University later argues that the grievant didn't sign the notice of arbitration:

> *Finally, § 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*

[11] CBA, p. 70
[12] E7
[13] CBA, p. 70
[14] See also E28
[15] EPHB, p. 15
[16] E5
[17] E4

> *record in this matter clearly shows that it was not signed by any of the non-renewed faculty members.*[18]

The University conflates the term "grievant(s)" with "the non-renewed faculty members" and hopes the arbitrator fails to notice. The notice of arbitration was signed by Union co-presidents Drs. Patrick Niner and Scott Michael on behalf of the Union[19], as the Step 1 grievance was signed by the Union's then-president, Dr. Edwin Everham[20]. This is not a new and distinct procedural objection, it is simply a restatement of the University's previously discussed objection to the Union filing the grievance in its own name.

Finally, the University, out of either incompetence or dishonesty, proffers multiple and contradictory interpretations of the term "day" in its various arguments that the grievance is time-barred. First, on page 14, it construes the grievance procedure's use of "days" in Article 20.2 to mean "calendar days" when it argues (note that the reference to 20.2(C) should be to 20.2(B)[21]):

> *Informal resolution requests not filed within 30 days of the disputed act cannot be formally grieved. Sec. 20.2(C) and Sec. 20.14(B). Accepting that the non-renewal letters of May 21st 2019 constitute the "act giving rise to the dispute", then the members of the union who were given non-renewal letters would have had to have requested informal resolution by June 21st 2019.*[22]

Later, on page 16, it construes usage of the term "days" in the very same Article 20.2 (namely, Article 20.2(E)(2)[23]) to mean "business days" when it argues (note that May 28 should be May 26 per Exhibit 4):

> *Even if the union's subsequent attempt to file a grievance form, taking May 28th 2019 as the beginning of the informal resolution process… then by the union's own date, it would not have been able to submit a grievance form until June 29th. Since the union submitted a grievance form on June 17th 2019, even if it had been valid, the submission was premature and thus did not have to be processed by the OAA.*[24]

The University cannot have it both ways. Either "days" means "calendar days" or "business days." The repeated references throughout the grievance procedure to timelines of multiples of 7 and 30 days give rise to a logical inference that "calendar days" is intended and that the above deadlines are understood to stand in for various numbers of weeks and months. Recalculating the 21-day timeline

[18] EPHB, p. 16
[19] E21
[20] E7
[21] CBA, p. 69
[22] EPHB, p. 14
[23] CBA, p. 70
[24] EPHB, p. 16

from May 26 using calendar days reveals that a Step 1 grievance would have been ripe on Sunday, June 16. A step 1 grievance was filed on Monday, June 17.

The University's shifting of the meanings of clear and simple terms from one paragraph to the next in order to maximize advantage to itself is rank sophistry. Its timeliness arguments should be dismissed due not only to its failure to lodge them in a timely fashion, but also to their plain incoherence. The University has simply thrown everything it can think of at the wall and hopes something sticks. The character of the arguments it advances not only justify the various tactical decisions the Union made in its filing of the grievance, but also underscore an overall lack of good faith in the handling of this matter.

Finally, the University alleges a failure by the Union to identify the exact language of the CBA that was violated:

> *The form filed by the union president simply called out a series of CBA chapter numbers, then throwing in catch-all "and others that may also apply" language. This form of grievance is inconsistent with the CBA's mandate that a grievance invoke specific terms or provisions over which a dispute exists.*[25]

The actions taken by the University potentially disturbed many articles of the CBA. The University characterized its actions as "non-reappointment" (Article 12), without regard for the length of the employees' existing continuous multi-year appointments (Articles 8 and 15), but could have easily attempted to recharacterize them as disciplinary terminations (Article 16) or layoffs (Article 13). The Union itself is challenging the actions by virtue of its status as exclusive bargaining agent (Article 1), and also alleges that the University is attempting to change the terms and conditions of employment in the middle of the CBA (Article 29) and without mutual agreement of the parties (Article 31).

Had the University been willing to hold a Step 1 meeting with the Union, further discussion could have taken place and the alleged violations could have narrowed considerably. Instead, the University refused to hold bona fide grievance meetings with Union representatives, refused to discuss the subject matter of the grievance when it did meet with the Union, and refused to issue responses in writing following any such meetings. For the University to now claim it is the victim of the Union's unwillingness to candidly discuss the matter of non-reappointment of the Resort and Hospitality Management faculty is asinine. The University had numerous opportunities to meet in good faith to discuss the grievance with the Union but refused at every opportunity. The Union was forced to move on in spite of the University's procedural chicanery. The arbitrator should not reward such subterfuge with a finding that the grievance is inarbitrable due to procedural defects.

[25] EPHB, p. 16

The grievance is substantively arbitrable.

In its pre-hearing brief and in its cross-examination of Dr. Gischel, the University emphasized the language of Article 12.3, which says that "the decision to not reappoint is not grievable except, an employee…"[26] and argues the subject matter of the grievance is not arbitrable. The University misunderstands the nature of the grievance.

The University clearly 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 is contesting the *effective date* a non-reappointed employee may be released from employment, which is not excluded from the grievance procedure generally nor from the scope of grievances that may be raised by the Union specifically. 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 believes 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. Nothing prevents this question from being brought to arbitration. The University has neither made any argument nor offered any evidence which would indicate otherwise.

[26] CBA, p. 32

Conclusion and Remedy

While the Union believes all of the objections raised by the University are successfully disposed of by the arguments advanced above and in its pre-hearing brief, forfeiture would not be appropriate even if the grievance were procedurally defective as alleged by the University. The parties clearly intended for a wide range of procedural defects to result in forfeiture of a grievance (see 20.2(B)[27], 20.2(C)[28], 20.6(C)[29], 20.6(E)(1)c[30], 20.6(E)(1)d[31], and 20.16[32]). None of the arbitrability objections raised by the University are among them. If the parties intended for a grievance to be forfeited due to "premature" filing of a Step 1 grievance, for instance, the CBA would say so. The arbitrator cannot provide the University with additional grounds for forfeiture of a grievance without "adding to" the terms of the CBA, which is prohibited by Article 20.6(F)(3)a[33].

For all of the above reasons, the Union respectfully urges the arbitrator to deny the University's arbitrability objections, determine that the grievance is arbitrable, and order the University to promptly proceed to a hearing to resolve its merits.

[27] CBA, p. 69
[28] CBA, p. 69
[29] CBA, p. 72
[30] CBA, p. 72
[31] CBA, p. 73
[32] CBA, p. 77
[33] CBA, p. 74