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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3564-19

UNION COUNTY COLLEGE,

Plaintiff-Appellant,

v.

UNION COUNTY COLLEGE CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,

Defendant-Respondent.

____

Argued October 20, 2021 – Decided May 13, 2022

Before Judges Fuentes, Gooden Brown and Gummer.

On appeal from the Superior Court of New Jersey, Chancery Division, Union County, Docket No. C-000007-20.

Matthew J. Giacobbe argued the cause for appellant (Cleary Giacobbe Alfieri Jacobs, LLC, attorneys; Matthew J. Giacobbe and Gregory J. Franklin, of counsel and on the briefs).

Carl J. Levine argued the cause for respondent (Levy Ratner, PC, attorneys; Carl J. Levine and Dana E. Lossia, on the briefs).

PER CURIAM

Plaintiff, Union County College (College), appeals from the April 30, 2020 Chancery Division order confirming the December 23, 2019 arbitration award prohibiting the assignment of Associate Professor JoAnne Kennedy to the College's Academic Learning Center (ALC) and denying plaintiff's application to vacate the award. Defendant, Union County College Chapter of the American Association of University College Professors (AAUP), is an employee representative within the meaning of the New Jersey Employer-Employee Relations Act (EERA), N.J.S.A. 34:13A-1 to -39, and represents "all full-time instructional and professional library staff" employed by plaintiff, including Kennedy. Plaintiff and defendant are parties to the collective negotiations agreement (CNA) underlying the appeal.

After plaintiff assigned Kennedy to the ALC, defendant filed a grievance on her behalf, alleging plaintiff violated various provisions of the CNA. The matter proceeded to arbitration, resulting in an arbitration award in defendant's favor. Following the adverse ruling, plaintiff filed a complaint in the Chancery Division seeking to vacate the award. Among other things, plaintiff argued that

because it has the non-negotiable – and thus non-arbitrable – managerial prerogative to determine faculty assignments, the matter should be sent to the New Jersey Public Employment Relations Commission (PERC) for a scope of negotiations determination. Given plaintiff's failure to file a scope of negotiations petition with PERC before proceeding to arbitration, the trial court rejected plaintiff's request and confirmed the award. We vacate the court's order and transfer the matter to PERC.[1]

By way of background, in September 2004, plaintiff hired Kennedy as an Assistant Professor of Mathematics, and, in 2008, promoted Kennedy to Associate Professor. In 2009, Kennedy was awarded tenure, and she successfully completed post-tenure review in 2016. However, over time, plaintiff became aware of numerous student complaints about Kennedy's teaching performance. The complaints included claims that students had "a hard time learning" from Kennedy, and she did not review the "assignments, quizzes, and test[s] that were given . . . in class." Additionally, there were complaints that Kennedy ignored students' questions or refused to answer them and

[1] A second grievance involving Kennedy was consolidated with the grievance that is the subject of this appeal. However, plaintiff does not contest the second grievance and it is not part of this appeal.

"assign[ed] multiple assignments" without providing adequate time for completion.

In 2017, plaintiff conducted peer review evaluations of Kennedy. The evaluations reported that "Kennedy was very careful to ensure that each student in the room understood the concepts"; that she "[met] [e]xpectations" for "[e]ffectively introduc[ing] [the] topics[s] [and] goal[s] of [the] lesson"; and she "covered material at an effective pace [and] explained concepts well." However, the evaluations also showed that Kennedy did "[n]ot [m]eet [e]xpectations" for "accommodat[ing] . . . various learning styles" or "[m]aintain[ing] student engagement throughout the class session."

In February 2018, after two students complained about Kennedy's policies regarding make-up exams, Kennedy's supervisor, Dr. Liesl Jones, Dean of Science, Technology, Engineering, and Mathematics (STEM) at the College, exchanged a series of emails with Kennedy directing her to permit the two students to take "a make-up exam" after they missed the original exam due to "extenuating circumstances." Dr. Jones also advised Kennedy that they needed to "work together on [her] syllabi" because they were "punitive . . . towards students." Kennedy responded she would take the suggestion of allowing a make-up exam for the two students "under advisement." Kennedy believed that

her policy of dropping the lowest test grade would eliminate any adverse impact the missed exam would have on the students' overall grades.

On March 5, 2018, plaintiff issued Kennedy a written warning for insubordination in connection with the February emails between Kennedy and Jones. The warning stated, "the tone, tenor, and content of . . . Kennedy's . . . responses to her [s]upervisor were unprofessional and unacceptable." Kennedy acknowledged receipt of the warning but "disagree[d]."

Shortly thereafter, on March 16, 2018, the Peer Evaluation Committee declined to recommend Kennedy for a promotion to full professor. Kennedy appealed the decision to the Faculty Appeals Committee, which overturned the decision and recommended Kennedy for the promotion. However, despite the recommendation, plaintiff concluded "evidence of [Kennedy's] teaching excellence and evidence of [her] service to the [c]ollege d[id] not support a promotion at th[at] time."

On April 4, 2018, plaintiff assigned Kennedy to the ALC for the 2018 to 2019 academic year so that she could improve her teaching performance. About a month later, on May 7, defendant filed a grievance, alleging plaintiff violated Articles I(I)(I) and IX(A) of the CNA by assigning Kennedy full-time to the ALC for consecutive semesters.

Article I(I)(I) defined full-time and non-full-time faculty members as follows:

> "Full-time members of the instructional staff" means all individuals who are members of the instructional staff and who normally are assigned to teach thirty (30) credit hours or their equivalent credit hours each academic year. "Temporary members of the instructional staff" means all individuals who are members of the instructional staff who are assigned to teach fifteen (15) credit hours or their equivalent credit hours for one semester within an academic year.

Article IX(A) described the work of full-time faculty members as follows:

> l. The teaching of courses for college credit and the teaching of developmental courses and laboratories which are offered through a division of the [c]ollege shall be considered work of the faculty. Offerings designed as an adjunct to, supplemental to, or remediation for any credit, credit equivalent, developmental or laboratory course(s) may be offered for three (3) semesters under the auspices of the Vice President for Academic Affairs.
>
> a. A non-unit member may not teach a course in a division where a faculty member in that division is qualified to teach that course, and is willing to teach that course. The assignment of courses for credit, developmental courses and/or laboratories to persons other than full time members of the instructional staff shall be considered tentative, pending the cancellation of courses, or the final assignment or reassignment of courses to full time members.

> b. A member of the instructional staff who teaches fifteen (15) credit or equivalent credit hours a semester for two (2) consecutive semesters shall be considered a faculty member as of the beginning of that second semester, as defined in Article I, Sections I and K of this [a]greement and shall be subject to all terms and provisions of this [a]greement.

Plaintiff denied the grievance and defendant advanced the matter to arbitration. Although plaintiff did not exercise its right to file a scope petition with PERC, among other things, plaintiff argued to the arbitrator that it was within its managerial prerogative to assign Kennedy to the ALC as her full-time assignment so long as the assignment ended at the end of each semester. Relying on Articles XXXIV(C)(4)(b) and (d) of the CNA, plaintiff asserted the dispute was not arbitrable.

Articles XXXIV(C)(4)(b) and (d) exempted from arbitration:

> b. Grievances concerning the application or interpretation of New Jersey Statutes, Rules and Regulations, and disputes involving the discipline of employees which are subject to appeal to and adjudication by the Board of Trustees of the College[; and]
>
> . . . .
>
> d. Matters which would significantly interfere with the exercise of inherent managerial prerogatives pertaining to policy.

Arbitration hearings were held over four non-consecutive days between February and July 2019. Pertinent to this appeal, the issue presented to the arbitrator was whether plaintiff violated the CNA when it assigned Kennedy to the ALC for the 2018 to 2019 academic year, and, if so, the appropriate remedy. Both parties produced several witnesses and voluminous exhibits. The documents admitted into evidence included peer and student evaluations, emails, and student complaints. In addition to Kennedy, Associate Professor Derek McConnell, President of the College's AAUP Chapter, Professor Elizabeth Neblett, AAUP's Assistant Grievance Officer, Gail Hein, former Director of the ALC, and Professor Nan Statton testified for defendant. Jones and Dr. Maris Lown, the College's Vice-President of Academic Affairs, testified for plaintiff.

As the since retired Director of the ALC, Hein testified that the ALC "offer[ed] tutoring support and academic support for students . . . enrolled in classes at the college." To her knowledge and in her twenty-seven-year tenure as Director, "it [was] rare" for full-time faculty members to be "assigned to work at the [ALC]" for an entire semester. Hein was aware of only two instances where such assignments had occurred – one where "there [were] not enough credit[] [hours] for the full-time [faculty member]" and one where the faculty

member "was returning from disability." Hein was unaware of any instances where a full-time faculty member was assigned to the ALC because of "poor performance as an instructor." In support of Hein's testimony, Statton testified that in her case, she was assigned to the ALC after being on leave for five weeks during the Spring 2018 semester for jury duty.

Neblett acknowledged that assignment of full-time faculty members to the ALC was covered under Article XXIX(B)(1) of the CNA, which provided that "[f]aculty members assigned to the [ALC] shall work thirty-five . . . hours per week," and "[t]heir assignments will conclude on any given semester once final exams for that semester have concluded." McConnell confirmed that similar to a faculty member teaching a course, assignment to the ALC concluded once "final exams [were] concluded" for the semester. Also, like Hein and Statton, McConnell was aware of full-time faculty members being assigned to the ALC only on a limited basis, such as returning from medical leave or jury duty.

Both Jones and Lown testified that Kennedy was assigned to the ALC to improve her teaching and to help students. They confirmed that their assessment of her poor teaching performance was based on student complaints, requests to withdraw from her classes, and completion rates that were consistently lower than her peers. Completion rates were determined by the number of students

who "pass[ed] the course." Kennedy attributed her low completion rates and unfavorable student evaluations to her insistence that students "learn the material" and her less lenient grading approach from that of her colleagues. She also claimed plaintiff did not adequately assist her in correcting any purported performance deficiencies as promised.

In a December 23, 2019 written opinion, the arbitrator sustained the grievance, ruling that the grievance was arbitrable and that Kennedy's assignment to the ALC violated the CNA. First, the arbitrator determined plaintiff's assertion that the "dispute[was] not arbitrable based on its managerial rights" was unfounded. The arbitrator stated plaintiff "had ample time to raise [the arbitrability] issue" with PERC but failed to do so. In any event, the arbitrator agreed with defendant that PERC "has previously found that performance of non-teaching duties is mandatorily negotiable and, therefore, whether . . . Kennedy can be removed entirely from classroom teaching and assigned primarily to duties not involving student contact, does not, as a matter of law, impinge impermissibly on the [College's managerial] prerogatives." The arbitrator further determined "there [wa]s nothing in the [a]greement that would limit the[g]rievance[] from proceeding to arbitration," and that neither of the CNA exemptions relied on by plaintiff was applicable.

Next, the arbitrator determined that assigning Kennedy to the ALC full-time for consecutive semesters violated provisions of the CNA. Although the arbitrator recognized "[plaintiff's] right to assign faculty members to the ALC," citing Article XXIX(B)(1), the arbitrator determined that under the CNA, an assignment to the ALC was limited to "a finite amount of time" and "end[ed] at the end of the semester." Thus, "[t]here [was] an end date agreed to by the parties." According to the arbitrator, there was "no language permitting [plaintiff] to assign a full-time member of instructional staff full-time, semester after semester[,] to the ALC" as plaintiff had done in Kennedy's case.

The arbitrator explained that giving plaintiff "that additional right" would impermissibly "add language to the [a]greement," thus violating Article XXXIV(C)(3)(c), which stated "[i]n no event shall the arbitrator have the authority to add to, subtract from, modify or amend the terms of th[e a]greement." The arbitrator continued that if the CNA language was "not clear enough, it was undisputed that there has been a proven past practice of assigning [instructional] staff members to the ALC in only two specific instances," both involving assignments to the ALC for a limited time and the faculty member "returning to class the next semester."

In that regard, the arbitrator expressly rejected plaintiff's contention "that it had the right to permanently assign [Kennedy to the ALC] year after year as her full-time assignment," reasoning that the assignment "[did] not fit the definition of the responsibilities of a faculty member as envisioned in the [a]greement." Although the arbitrator acknowledged that "Kennedy was performing some sort of teaching in the ALC," she reasoned that "tutoring students in the ALC [was] not the same as instructing students in the classroom" as defined in Article IX(A), and tutoring students for thirty-five hours per week "[was] not what was meant by teaching [thirty] credit hours" as required in Article I(I)(I). Thus, the arbitrator ordered that Kennedy "be assigned instructional courses beginning in the spring of 2020 and resume her normal workload as a full-time faculty member as defined in Articles I(I) and IX(A)(1)" of the agreement.

In response, plaintiff filed a complaint and order to show cause in the Chancery Division pursuant to Rule 4:67-2, seeking to vacate the award. Defendant cross-moved to confirm the award. In the one-count complaint, plaintiff alleged "the award was procured by undue means and mistake of law pursuant to N.J.S.A. 2A:24-8(a) and (d)." Specifically, plaintiff contended the arbitrator misinterpreted terms, ignored plain language, and improperly ruled

that past practice superseded the clear and unambiguous language of the agreement. Plaintiff also argued "the [a]rbitrator ignored legal precedent that [plaintiff] ha[d] the non-negotiable managerial prerogative to determine assignments" and requested that the matter be sent to PERC for a scope of negotiations determination "because th[e] matter lack[ed] substantive arbitrability."

Defendant countered that the dispute was arbitrable under the CNA and plaintiff "waived any objections to arbitrability." Defendant objected to the matter being transferred to PERC as a scope petition because plaintiff's request was untimely, and plaintiff cited no supporting caselaw. Defendant also argued that the award was "based upon the plain language of the agreement," consideration of "past practice" was consistent with New Jersey law, and the award could not be vacated on public policy grounds.

In an order dated April 30, 2020, the judge denied plaintiff's application and confirmed the award. In the accompanying written statement of reasons, the judge found "that the matter was properly arbitrable" and within the scope of the agreement because Kennedy's assignment to the ALC "concerned a breach of the [a]greement" pertaining to "the workload of faculty members." In support, the judge relied on Byram Township Board of Education v. Byram

Township Education Ass'n., 152 N.J. Super. 12, 26 (App. Div. 1977), where we stated that "[w]ork hours and work loads clearly relate to terms and conditions of employment and thus are mandatorily negotiable."

The judge also declined to transfer the matter to PERC because "[t]he [c]ollege neglected to file for a [s]cope of [n]egotiations [determination] and then proceeded through arbitration." The judge explained that allowing plaintiff to now file a scope petition "would frustrate the purpose of arbitration to provide for a 'speedy and inexpensive' means to settle disputes." Additionally, the judge found the arbitrator did not exceed her authority when she "examin[ed] the past practice of assigning staff members to the ALC" because the language in the agreement regarding "assign[ing] faculty members to the ALC on a full-time basis" was "unclear and ambiguous."

In this ensuing appeal, plaintiff renews the arguments rejected by the judge. First, plaintiff argues "there is no contractual provision that restricts [it] from exercising its exclusive option to reassign full-time faculty members to the ALC for multiple and/or consecutive semesters under the CNA, provided they do not work between semesters." Thus, according to plaintiff, there "was no basis for the [a]rbitrator's ruling that ALC assignments of faculty members [were] limited to one . . . semester only," and, by so deciding, the arbitrator

"committed a mistake of law by ignoring the plain language of the CNA and disregarding the testimony before her."

Plaintiff further argues the "[a]rbitrator exceeded the scope of her authority . . . when she misapplied certain contractual terms" and "added new contractual terms that the parties did not negotiate." Additionally, plaintiff asserts the arbitrator erroneously relied on past practice "despite the clear and unambiguous language of the CNA." Thus, according to plaintiff, the award was procured by "undue means," including mistake of law, "in violation of N.J.S.A. 2A:24-8(a) and (d)," and "is not reasonably debatable." See Weiss v. Carpenter Bennett & Morrissey, 143 N.J. 420, 443 (1996) ("[I]f the arbitrator's resolution of the public-policy question is not reasonably debatable, and plainly would violate a clear mandate of public policy, a court must intervene to prevent enforcement of the award.").

Critically, plaintiff posits, "the grievance at hand – the determination of the assignment of . . . Kennedy to the ALC – is a matter which would significantly interfere with the exercise of an inherent managerial prerogative pertaining to policy," and is "exclude[d] from the arbitration process." Thus, according to plaintiff, "this grievance falls outside the scope of . . . arbitration." Plaintiff asserts it "properly raised the issue of arbitrability" to the arbitrator and

the judge, both of whom "ruled incorrectly on the issue." Further, plaintiff maintains neither the trial court nor the arbitrator addressed whether the "public policy interests were . . . frustrated by the [a]ward," and "the [t]rial [c]ourt neglected its responsibility to scrutinize the [a]ward's impact on the [c]ollege's determination of educational policy for its students."

Our review is guided by well-established legal principles. "[P]ublic employees have the right to engage in collective negotiation[s] . . . ." Council of N.J. State Coll. Locals v. State Bd. of Higher Educ., 91 N.J. 18, 26 (1982). "[T]he majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate . . . terms and conditions of employment." N.J.S.A. 34:13A-5.3. "However, 'the scope of negotiations in the public sector is more limited than in the private sector' due to the government's 'special responsibilities to the public' to 'make and implement public policy.'" In re Cnty. of Atl., 445 N.J. Super. 1, 21 (App. Div. 2016) (quoting In re IFPTE Local 195 v. State, 88 N.J. 393, 401-02 (1982)), aff'd on other grounds sub nom. Matter of Cnty. of Atl., 230 N.J. 237 (2017).

PERC is charged with administering the EERA and has "'primary jurisdiction'" to determine "'whether the subject matter of a particular dispute is within the scope of collective negotiations.'" Cnty. of Atl., 445 N.J. Super. at

20 (quoting Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 154 (1978)). To that end, N.J.S.A 34:13A-5.4(d) provides in pertinent part:

> The commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations.

Under N.J.S.A 34:13A-5.4(d), PERC is "'the forum for the initial determination of whether a matter in dispute is within the scope of collective negotiations.'" Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 614 (2020) (quoting State v. State Supervisory Emps. Ass'n, 78 N.J. 54, 83 (1978)). "No court of this State is empowered to make this initial determination." State Supervisory Emps. Ass'n, 78 N.J. at 83. "PERC's decision, however, is subject to review by the Appellate Division." Barila, 241 N.J. at 614 (citing N.J.S.A. 34:13A-5.4(d)).

In Ridgefield Park, the Court further explained the primacy of PERC's jurisdiction over issues of negotiability and arbitrability:

> PERC has primary jurisdiction to make a determination on the merits of the question of whether the subject matter of a particular dispute is within the scope of collective negotiations.
>
> . . . .

> . . . If PERC concludes that the dispute is within the legal scope of negotiability and agreement between the employer and employees, the matter may proceed to arbitration. Where PERC concludes that a particular dispute is not within the scope of collective negotiations, and thus not arbitrable, it must issue an injunction permanently restraining arbitration.
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> [Ridgefield Park Educ. Ass'n, 78 N.J. at 154 (citations omitted).]

PERC has adopted regulations that set forth the procedures a public employer or employee representative must follow to obtain a determination of whether a particular matter is within the scope of negotiations. N.J.A.C. 19:13-1.1 to -11. Under these regulations, either a public employer or public employee representative "may initiate scope of negotiation proceedings by filing with [PERC] . . . a petition for [a] scope of negotiations determination." N.J.A.C. 19:13-2.1. The regulations do not, however, require a scope petition to be filed before arbitration. Although both Ridgefield Park and the PERC regulations indicate that this is the preferred procedure, it is not required. See Ridgefield Park Educ. Ass'n, 78 N.J. at 154; N.J.A.C. 19:13-1.1.

When plaintiff raised the issue of non-arbitrability in the arbitration proceeding, the arbitrator should have stayed the arbitration and required the issue to be submitted to PERC, rather than undertaking to decide it herself. See Ridgefield Park Educ. Ass'n, 78 N.J. at 155 (noting "PERC is empowered to

order that arbitration proceedings be suspended during the pendency of a scope-of-negotiations proceeding."). Likewise, the judge should have declined to consider plaintiff's claim that its assignment decision was non-negotiable and thus non-arbitrable and referred the dispute to PERC. See Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 84 (1981) (stating that where the public employer challenged the negotiability of the subject matter, the trial court followed the proper procedure by "refrain[ing] from passing on the merits . . . and instead referr[ing] the case to [PERC] for a scope of negotiations ruling"); City of Newark v. Newark Council 21, N.J. Civ. Serv. Ass'n, 320 N.J. Super. 8, 17 (App. Div. 1999) (holding the trial court should not "have addressed the merits but rather referred the matter to PERC" where the public employer challenged arbitrability "on the ground that the subject of the grievance constitute[d] a management prerogative and [was] hence not negotiable in the first instance"); Bd. of Educ. of Plainfield v. Plainfield Educ. Ass'n, 144 N.J. Super. 521, 526 (App. Div. 1976) (concluding that "PERC holds primary jurisdiction over scope questions and that the trial judge erred in concluding that concurrent jurisdiction exists between the Chancery Division and the agency").

To support its argument that plaintiff is now estopped from initiating a scope petition before PERC because it failed to file a scope petition before the

arbitration, defendant relies on Township of Teaneck v. Teaneck Firemen's Mutual Benevolent Ass'n. Local No. 42, 353 N.J. Super. 289, 299 (App. Div. 2002), aff'd 177 N.J. 560 (2003). However, unlike this case, which involves a grievance arbitration under the EERA, Township of Teaneck involved a compulsory interest arbitration under the Police and Fire Public Interest Arbitration Reform Act, N.J.S.A. 34:13A-14a to -16.6. 353 N.J. Super. at 292. In the exercise of its authority under that legislation, PERC had adopted a regulation stating, "[t]he failure to file a request for a scope determination . . . shall be deemed a waiver of the negotiability objection." N.J.A.C. 19:16-5.5(c). That regulation was the basis for the court's determination in Township of Teaneck that the employer's failure to file a scope petition before a compulsory interest arbitration equitably estopped the employer from raising the issue after the arbitration. 353 N.J. Super. at 299-300.

Because PERC has not adopted a comparable regulation foreclosing raising the issue under the EERA at a later stage of the proceedings, the rationale in Township of Teaneck does not apply to this case. In the absence of such a regulation, we reject defendant's estoppel argument and conclude that plaintiff should not be estopped from raising the non-arbitrability defense in a scope

petition. Although plaintiff did not file a scope petition with PERC before arbitration, it presented the defense to the arbitrator and the judge.

The judge rejected plaintiff's request to remand the matter to PERC for a scope of negotiations determination, relying on In re Township of Ocean Board of Education, P.E.R.C. No. 83-164, 9 N.J.P.E.R. ¶ 14181, 1983 WL 862922 (1983). There, PERC refused to entertain a scope petition submitted by the Board of Education where the issue of non-arbitrability was raised for the first time after an adverse arbitration award had been rendered and the time for filing an action to vacate the award under N.J.S.A. 2A:24-7 had expired. Id. at 11. PERC condemned the Board's attempt "to displace the statutorily prescribed route for seeking to vacate arbitration awards" with a "scope petition in which it [sought] a Commission determination that the award [was] null and void." Ibid.

While expressing a preference for pre-arbitration scope petitions to "avoid a waste of time and money and . . . frustration of the arbitration process and . . . parties," id. at 5-6, PERC pointed out that "no case has held that the failure of an employer to file a pre-arbitration scope of negotiations petition, standing alone, automatically precludes a post-arbitration challenge to an arbitration award based on scope of negotiations considerations," id. at 7. PERC explained:

> If an employer wishes to preserve a "dispute" over the legal arbitrability of an arbitration award, it should commence proceedings to vacate or modify the award under N.J.S.A. 2A:24-7 and then ask the Chancery Division to transfer the scope of negotiations question to the Commission for resolution . . . .
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> [Id. at 12.]

PERC stressed that the Commission "will, of course, entertain any scope of negotiations questions which a court refers to [it] as part of a statutory proceeding to review an arbitration award." Id. at 12-13.

Our cases endorse the same procedure. In City of Newark, Judge Pressler explained,

> it has long been settled that where grievance arbitration of a particular matter is challenged by the public employer on the ground that the subject of the grievance constitutes a management prerogative and is hence not negotiable in the first instance, the jurisdiction of PERC is primary and the trial court should defer to PERC.
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> [320 N.J. Super. at 17.]

Here, plaintiff's request to refer the matter to PERC was rejected by the judge. To be sure, the current procedural posture would have been avoided had plaintiff initially resisted arbitration on the ground of non-negotiability. Nonetheless, because we conclude that the preservation of PERC's primary jurisdiction over scope of negotiations issues requires transfer of the scope issue

to PERC, we vacate the judge's order and transfer the matter to PERC for resolution of the issue. Based on our decision, we decline to address plaintiff's remaining arguments.

We recognize that in Board of Education of Township of Bernards v. Bernards Township Education Ass'n., 79 N.J. 311, 317-18 (1979), our Supreme Court declined to remand a scope of negotiations issue to PERC and decided the issue itself. However, there, PERC had decided the same issue presented to the Court in a prior proceeding, and PERC appeared before the Court as amicus curiae, taking the position that a remand to PERC "would not add anything as th[e] Court already ha[d] the benefit of PERC's thinking on the subject." Ibid. In contrast, here, there is no indication that PERC has previously addressed the non-negotiability issue presented by this appeal, and PERC has not made an appearance before us.

Accordingly, we vacate the April 30, 2020 Chancery Division order and transfer the matter to PERC for a scope of negotiations determination. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION