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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0741-21**

**NEW JERSEY INSTITUTE
OF TECHNOLOGY,**

Plaintiff-Appellant,

v.

**NJIT PATROL OFFICERS'
ASSOCIATION, FRATERNAL
ORDER OF POLICE LODGE
93, and NJIT SUPERIOR
OFFICERS' ASSOCIATION,
FRATERNAL ORDER OF
POLICE LODGE 93,**

Defendants-Respondents.

Submitted January 31, 2023 – Decided April 4, 2023

Before Judges Gilson and Gummer.

On appeal from the Superior Court of New Jersey,
Chancery Division, Essex County, Docket No.
C-000123-21.

Genova Burns LLC, attorneys for appellant (Leonard S.
Spinelli and James M. Burns, of counsel and on the

briefs; David P. Cerqueira and Christopher J. Manley, on the briefs).

Markowitz & Richman, attorneys for respondents (Matthew D. Areman, on the briefs).

PER CURIAM

Plaintiff New Jersey Institute of Technology (NJIT or the University) appeals from the dismissal of its complaint seeking to enjoin arbitration of grievances brought by unions representing NJIT's campus police officers. The unions allege that NJIT failed to comply with its Emergency Closing Policy (Closing Policy) by refusing to pay campus police officers double-time while the University was operating in reduced capacity during the Covid-19 pandemic.

The chancery court held that the dispute concerning compensation was an issue subject to arbitration under collective negotiation agreements (CNAs) between NJIT and the unions. We agree and affirm.

I.

NJIT is a public employer, see N.J.S.A. 34:13A-3(c), and has CNAs with the NJIT Patrol Officers' Association, FOP Lodge 93 (POA) and the NJIT Superior Officers' Association, FOP Lodge 93 (SOA) (collectively, the Unions). The POA is the exclusive bargaining representative for NJIT police officers. The SOA is the exclusive bargaining representative for NJIT police sergeants.

The CNAs have substantially identical language providing for arbitration of grievances. Those provisions state that any union member may file a grievance concerning:

A claimed violation or other improper application by the University of the terms of this Agreement, University rules, regulations or governing policy specifically affecting the grieving Officer's [or Sergeant's] negotiable terms and conditions of employment.

Grievances under the CNAs are to be addressed in three steps. In "Step One," the grievance is submitted in writing to NJIT's Director of Public Safety or Chief of Police. If the grievant or Union is "dissatisfied with the decision at Step One," the grievant or Union can file a written grievance with NJIT's Vice President of Real Estate Development and Capital Operations (Vice President of Development), and a hearing will be conducted. If the Union is dissatisfied with the decision at Step Two, it can demand arbitration "in accordance with the rules and regulations of" the Public Employment Relations Commission (PERC). In that regard, both CNAs state:

If the [Union] is dissatisfied with the decision at Step Two, and the alleged grievance involves a specific violation of this locally negotiated [CNA], as described in the definition of a grievance in E.1. [or, F., Grievance Procedure, 1.(a.)], and the [Union] desires and is authorized by law to institute arbitration or other appeal

proceedings, it must . . . give proper notice to either [PERC], or to the Board of Trustees

The CNAs also state that the arbitrator's recommendation or decision cannot modify the CNA or any policy of NJIT. In that regard, the CNAs provide:

The recommendation or decision of the reviewing individual or body shall not in any manner modify or cause anything to be added to or subtracted from this [CNA] or any policy of the University.

NJIT has an Emergency and Continuity of Operations Plan (E&C Plan), which was updated and reissued in September 2019. The E&C Plan addresses how NJIT will operate during "short-term" and "long-term" emergencies or disasters, including a "pandemic." The E&C Plan includes an Emergency Closing Policy (Closing Policy), which addresses when NJIT may close or limit its operations and how employees will be compensated when the Closing Policy is in effect. In relevant part, the Closing Policy states:

A. The [U]niversity may, from time to time, officially close its operations in whole or in part following procedures outlined in the Contingency Plans for Emergency Closing, in response to unusual conditions such as inclement weather or unanticipated occurrences emanating from internal or external factors and rendering the [U]niversity, or any part thereof, unfit for regular operations. The authority to close operations is vested in and restricted to the President and, as permanent designee, the Senior Vice President for Administration and Treasurer.

. . . .

C. When the closing is effected, all employees covered by the declaration shall be released from reporting at work and shall be compensated at their regular rate of pay for such released period. All employees directed to report or remain at work during an emergency closing, and only such employees, shall be considered essential services personnel for the period in question and, if of the legal category of personnel eligible for overtime, shall receive double their regular rate of pay for that period of actual work reporting during the [U]niversity declared emergency closing.

Beginning in early March 2020, Governor Philip D. Murphy issued a series of executive orders to address the Covid-19 pandemic. In Executive Order 103, issued on March 9, 2020, the Governor declared a public health emergency and state of emergency in New Jersey. Exec. Order No. 103 (Mar. 9, 2020), 52 N.J.R. 549(a) (Apr. 6, 2020). In Executive Order 104, issued on March 16, 2020, the Governor directed, among other things, the suspension of "in-person instruction" at institutions of higher education. Exec. Order No. 104 (Mar. 16, 2020), 52 N.J.R. 550(a) (Apr. 6, 2020). Thereafter, the Governor issued several executive orders extending and then reducing restrictions on in-person instruction at colleges and universities in New Jersey. See Exec. Order No. 107 (Mar. 21, 2020), 52 N.J.R. 554(a) (Apr. 6, 2020) (extending suspension of in-person instruction at institutions of higher education); Exec. Order No. 155

(June 18, 2020), 52 N.J.R. 1356(a) (July 20, 2020) (permitting limited in-person instruction at institutions of higher education); Exec. Order No. 175 (Aug. 13, 2020), 52 N.J.R. 1699(a) (Sept. 21, 2020) (permitting reopening of schools for in-person instruction).

NJIT responded to the pandemic and the Governor's executive orders by implementing a hybrid remote-learning operation. NJIT reduced certain operations at its campus, while continuing other operations to support remote learning. In that regard, the University limited on-campus building access and provided limited services.

Between May 2020 and June 2021, NJIT transitioned back to more on-campus operations. For example, in the fall of 2020, a larger number of students returned to residential dorms on campus, although dorm capacities were limited. In-person courses also resumed, but staff attendance on campus averaged between twenty-five and fifty percent per department.

During the reduced operations, NJIT employees either worked remotely or reported to work at the University's campus. Campus police officers were compensated at their regular rate of pay and sometimes worked on campus and at other times worked "from home." NJIT maintains that it coordinated with the

Unions to set up schedules where campus police officers would work reduced on-campus hours with no loss of pay.

At some point in 2021, the Unions, on behalf of their members, raised the question of whether the police officers should have received double their regular rate of pay for the periods they had worked on campus while NJIT was operating at a reduced level. In April 2021, after the parties could not reach agreement on that issue through informal discussions, the Unions filed grievances under Step One. The Unions alleged that the CNAs and the Closing Policy required campus police officers to be paid double-time when they were working on campus between March 18, 2020, and June 4, 2021. NJIT rejected those grievances as seeking a "facially unreasonable outcome."

The Unions maintain that they submitted their grievances to the Vice President of Development on April 21, 2021, via an email. NJIT acknowledges that the Unions submitted their grievances in accordance with Step Two but contends the submission was untimely. Both parties agree that the procedural arbitrability issue of whether the Unions properly complied with Step Two is an issue to be addressed by the arbitrator and is not part of this appeal. In that regard, NJIT maintains that the grievances are not substantively arbitrable, but if we reject that position, it will raise the procedural issue with the arbitrator.

On April 28, 2021, the Unions filed separate requests with PERC for the appointment of arbitrators to adjudicate the grievances. In response, on July 16, 2021, NJIT filed a verified complaint and order to show cause in the Chancery Division. NJIT sought to restrain arbitration of the grievances, arguing that they were not substantively arbitrable.

On September 15, 2021, the Chancery Division denied NJIT's request for an injunction and issued a supporting written statement of reasons. The chancery court found that the grievances concerning union members' entitlement to double-time pay under the Closing Policy was within the CNAs' contractual rights to arbitrate because it concerned the officers' negotiable terms and conditions of employment. Thereafter, on September 30, 2021, the chancery court entered a final order dismissing NJIT's verified complaint with prejudice. NJIT now appeals from that final order and the September 15, 2021 order denying its request to enjoin the arbitration.

II.

On this appeal, NJIT makes two primary arguments, contending that (1) the Closing Policy was not subject to arbitration given the unique situation created by the Covid-19 pandemic; and (2) alleged violations of the Closing Policy were not violations of the CNAs and were not subject to arbitration. In

connection with those arguments, NJIT asserts that the Closing Policy was not activated by the University's President, but rather resulted from the issuance of the Governor's executive orders, and decisions on how to reduce operations during the pandemic were within the University's managerial discretion.

The issue before us is narrow. We are not determining the merits of the grievances. Instead, we are determining only whether the grievances are subject to arbitration under the CNAs. That is a legal issue requiring an interpretation of the scope of the CNAs' arbitration provisions. Accordingly, we review that issue de novo. See Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 316 (2019) (explaining that "[d]e novo review applies when appellate courts review determinations about the enforceability of contracts, including arbitration agreements").

More particularly, the question before us involves a determination of substantive arbitrability. See Amalgamated Transit Union, Loc. 880 v. N.J. Transit Bus Operations, Inc., 200 N.J. 105, 115 (2009). "To determine a question about substantive arbitrability, a court need only decide 'whether the party seeking arbitration is making a claim which on its face is governed by the [CNAs].'" Ibid. (alteration in original) (quoting Standard Motor Freight, Inc. v. Loc. Union No. 560, 49 N.J. 83, 96 (1967)).

Arbitrations of grievances are statutorily authorized as part of a public-sector collective negotiation agreement. See N.J.S.A. 34:13A-5.3. The Legislature has declared that grievance procedures in public sector agreements "may provide for binding arbitration as a means for resolving disputes." Ibid. "In interpreting the meaning and extent of a provision of a collective negotiation agreement providing for grievance arbitration, a court or agency shall be bound by a presumption in favor of arbitration. Doubts as to the scope of an arbitration clause shall be resolved in favor of requiring arbitration." Ibid. That statutory presumption also reaffirms the principle that "[a]rbitration is a favored means of resolving labor disputes." Mount Holly Twp. Bd. of Educ. v. Mount Holly Twp. Educ. Ass'n, 199 N.J. 319, 333 (2008) (quoting Pascack Valley Reg'l High Sch. Bd. of Educ. v. Pascack Valley Reg'l Support Staff Ass'n, 192 N.J. 489, 496 (2007)).

Employment issues in public-sector collective negotiations fall into one of two categories: mandatory negotiable terms involving conditions of employment, and non-negotiable matters of managerial prerogative or governmental policy. Robbinsville Twp. Bd. of Educ. v. Washington Twp. Educ. Ass'n, 227 N.J. 192, 198 (2016). A subject is negotiable when:

(1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially pre-empted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy.

[In re City of Newark, 469 N.J. Super. 366, 384 (App. Div. 2021) (quoting Borough of Keyport v. Int'l Union of Operating Eng'rs, 222 N.J. 314, 334 (2015)).]

In their grievances, the Unions contend that NJIT violated its Closing Policy by not paying its members double their standard hourly rate when they had to report to work during the University's reduced operations. The CNAs' arbitration provisions state that the Unions can arbitrate a grievance "involv[ing] a specific violation of this locally negotiated Agreement, as described in the definition of a grievance." In both CNAs, a grievance is defined as:

A claimed violation or other improper application by the University of the terms of this Agreement, University rules, regulations or governing policy specifically affecting the grieving Officer's [or Sergeant's] negotiable terms and conditions of employment.

The question of whether NJIT must pay double-time to its campus police officers affects those officers' compensation, which is a negotiable term and condition of employment. Moreover, the Unions claim that NJIT is violating the Closing Policy, a University policy, and that violation affects the

compensation allegedly due to campus police officers. In short, the grievances fall within the ambit of the CNAs' arbitration provisions.

NJIT argues that the Closing Policy was not meant to apply to the Covid-19 pandemic, and the Policy was never invoked. Those are issues that can be considered by the arbitrator. "[W]here a collective bargaining agreement provides for binding arbitration, 'it is the arbitrator's construction that is bargained for,' not a court's construction." Policemen's Benevolent Ass'n v. City of Trenton, 205 N.J. 422, 429 (2011) (quoting Loc. No. 153, Off. & Pro. Emps. Int'l Union, AFL-CIO v. Tr. Co. of N.J., 105 N.J. 442, 452 (1987)).

NJIT also argues that the grievances involve questions that are not directly linked to the CNAs. In that regard, NJIT contends that the Unions were permitted to grieve NJIT's violation of the Closing Policy but are barred from arbitrating those grievances. To support that argument, NJIT focuses on the arbitration provisions, which state that the Unions can arbitrate "grievances involv[ing] a specific violation of this locally negotiated Agreement" NJIT, however, ignores the remainder of that sentence, which states that the grievances can involve grievances "described in the definition of a grievance."

NJIT also argues that whether it chose to close all or part of the University's operations was a managerial right that is not subject to arbitration.

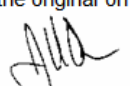
The Unions do not dispute that contention. They point out, however, that they are not challenging the University's right to curtail its operations. Instead, the Unions are seeking higher compensation for their members as purportedly provided for in the Closing Policy.

Finally, NJIT makes what is essentially an equitable argument for restraining arbitration. It characterizes the Unions' requests for double pay as "sheer brazenness," "overreaching," and a claim that "flies in the face of logic." Again, the merits of the grievances are not before us. NJIT can make those arguments to the arbitrator. Whether the Unions' claims for double pay are equitable or unconscionable, does not go to the substantive arbitrability issue before us.

In summary, we hold that the Unions' grievances fall within the scope of the arbitration provisions in the CNAs. Accordingly, the chancery court correctly dismissed NJIT's complaint seeking to enjoin the arbitration.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION