

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration between

PROFESSIONAL STAFF CONGRESS/CUNY

and

THE CITY UNIVERSITY OF NEW YORK

Re: "Pathways Initiative" Grievance

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Before **MELISSA H. BIREN**, Impartial Arbitrator

AAA Case No.
13 672 00349 13

**OPINION
AND AWARD
ON
ARBITRABILITY**

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ON ARBITRABILITY**

The Professional Staff Congress/CUNY ("PSC") filed a grievance on May 9, 2012, as amended on October 15, 2012, on its own behalf against City University of New York ("CUNY" or the "University") alleging three separate claims relating to what has become known as the "Pathways Initiative" or "Pathways", as follows: (a) failure and refusal to act in accordance with the Bylaws and college governance plans in the development and implementation of changes to curriculum; (b) improper breach of academic freedom; and (c) arbitrary and discriminatory retaliation against members of the faculty for exercising their rights under the Bylaws and the local governance plans. The grievance was denied at Step Two; the Step Two decision held that the claims raised in the grievance were not arbitrable under the parties' collective bargaining agreement. PSC timely filed for arbitration. On September 20, 2013, CUNY filed a Motion to Dismiss on the ground that the grievance is not arbitrable. The parties agreed to bifurcate the case to first address whether the grievance is arbitrable and, if appropriate, to then address the merits.

Pursuant to the authority granted under the parties' collective bargaining agreement, I conducted a hearing at PSC's offices located at 61 Broadway, New York, New York on October 22, 2013, limited to the question of whether the grievance asserted in this matter is arbitrable. Peter Zwiebach, Esq., PSC Director of Legal Affairs, and Barbara Bowen, PSC President, represented PSC at the hearing. Frederick Schaffer, Esq., CUNY General Counsel, represented CUNY at the hearing. Both parties had full opportunity to make argument and submit legal

authority in support of their respective positions. Neither party has raised any objection to the fairness of this proceeding.

Having carefully considered the entire record on arbitrability, CUNY's Motion to Dismiss is denied; the grievance is arbitrable.

Background and Position of the Parties:

This grievance arises out of the CUNY Board of Trustees' adoption and implementation of a resolution, dated June 27, 2011 that "established a new system of general education requirements and new transfer guidelines across the University designed to effectuate the efficient transfer of credits among CUNY Colleges." (Step Two decision, December 28, 2012.) A copy of the Board of Trustees' Resolution, entitled "Initiative on Creating an Efficient Transfer System" (*i.e.*, the Pathways Initiative) was submitted as CUNY Exhibit 4. Although significant details regarding Pathways were provided during argument in the arbitrability hearing, both parties agreed that consideration of these facts is more appropriate if and when the grievances are decided on the merits, and not in connection with arbitrability. Accordingly, I will not summarize the facts presented at the hearing in this decision, except to the extent necessary to provide a context for my decision.

In arguing that this grievance is not arbitrable, CUNY cites Section 20.2 of the parties' collective bargaining agreement that defines a grievance as follows:

"A grievance is an allegation by an employee or the PSC that there has been:

- (1) a breach, misinterpretation or improper application of a term of this Agreement; or
- (2) an arbitrary or discriminatory application of, or a failure to act pursuant to the Bylaws and written policies of the Board related to the terms and conditions of employment."

CUNY maintains that the subject matter of this grievance involves the Board of Trustees' right and authority to adopt governance plans and to formulate academic policy for the University pursuant to both NYS Statute and the Bylaws; the grievance does not relate to terms and conditions of employment. According to CUNY, there is a distinction between terms and conditions of employment where faculty have the right to representation and policy questions regarding the structure of governance which remain the prerogative of the Board of Trustees; grievances may be filed in connection with the former, but not the latter. Although the Bylaws

delegate limited authority to various bodies across the University, any such delegation can be changed at will by the Board of Trustees and, moreover, any authority so delegated remains subject to the ultimate authority of the Board. Because the issues raised in this case regarding the Pathways Initiative relate to governance and academic policy and not to any term and condition of employment, the grievance is not arbitrable.

To support this position, CUNY cites a 1974 decision, *Board of Higher Education*, PERB ¶7-3028 (1974) in which the NYS Public Employment Relations Board (PERB) held that “the composition of the personnel committees that evaluate faculty with respect to matters such as appointment, reappointment, promotion, and tenure, is not a term and condition of employment and therefore not within the scope of mandatory bargaining.” (CUNY Motion to Dismiss at p. 2.) CUNY argues that while the context is different, the reasoning is the same. The subject matter of the grievance, the Pathways Initiative, involves a governance plan and academic policy that, like the composition of the personnel committee, are not terms and conditions of employment.

CUNY contends that the same argument applies not only to PSC’s grievance regarding the development and implementation of curriculum with respect to the Pathways Initiative but also to its claims regarding academic freedom. According to CUNY, by this grievance, PSC incorrectly argues that implicit in academic freedom is a faculty right to govern on academic issues. As set forth in the Preamble to the parties’ agreement and in CUNY policies, however, academic freedom involves individual rights to teach, perform research and speak; it is not about governance. Thus, notwithstanding that the issue is framed in terms of academic freedom, it does not involve terms and conditions of employment and, therefore, is not arbitrable under Article 20.¹

PSC argues that this grievance is arbitrable. As a preliminary matter, PSC clarified that it is not challenging the Board of Trustees’ right to adopt the Pathways Initiative in this arbitration.² Rather, the Bylaws set up a procedure for faculty development of courses and curriculum at each college. Even assuming that the Board could unilaterally change these procedures (which PSC does not concede), it did not do so in connection with the Pathways Initiative. Instead PSC contends that the resolution provided that the development of the specific

¹ CUNY conceded that the third issue in this grievance, i.e., arbitrary and discriminatory retaliation against members of the faculty for exercising their rights under the Bylaws and the local governance plans, is arbitrable, but claims that the grievance is without merit.

² There is litigation pending at this time in Court challenging the Board of Trustees’ right to adopt this Initiative. A Motion to Dismiss that proceeding was pending at the time of the hearing on arbitrability.

courses and curricula to be part of the Pathways Initiative would be accomplished through the procedures set forth in the Bylaws for curriculum development. CUNY then failed or refused to follow these governance plans and procedures.³

PSC contends that CUNY violated the Bylaws and governance plans by failing or refusing to follow the procedures set forth for curriculum development and implementation. According to PSC, by not following the process and procedure set forth in the Bylaws and college governance plans the faculty has been deprived of certain rights; they are required to teach courses that have not been properly approved under the governance structure set by the University. Violation of this procedure under the Bylaws is arbitrable. Indeed, PSC argues that allegations such as are made in this grievance have long been deemed arbitrable, noting that the parties have a longstanding practice of submitting these types of issues to arbitration and citing numerous cases decided after the 1974 PERB decision where alleged violations of governance plans and academic policy, particularly as they relate to faculty rights and responsibilities, have routinely been found arbitrable and have been decided on the merits. PSC maintains, therefore, that “terms and conditions of employment” in Section 20.2, by the parties’ own interpretation and by arbitral precedent, includes alleged violations of governance plans or academic policy as they relate to faculty and academic freedom.

PSC also notes that CUNY’s arguments regarding arbitrability impermissibly rely on the merits to support its position. For example, whether academic freedom is a right belonging only to individual faculty members or to faculty members as a whole involves interpretation of the parties’ agreement. This must be done after a hearing on the merits. It does not support a finding that the grievance itself is not arbitrable.

³ Both parties cited provisions of Bylaws Article 8 in their arguments, including, but not limited to, Section 8.5, Duties of Faculty, which states in pertinent part that: “The faculty shall be responsible, subject to guidelines, if any, as established by the board, for the formulation of policy relating to ... curriculum... It shall make its own bylaws, consistent with these bylaws, and conduct the educational affairs customarily cared for by a college faculty...” Other provisions of Article 8 set forth provisions for governance at each college, including that each college “shall have a faculty or academic council, which shall be the primary body responsible for formulating policy on academic matters. The composition of a college’s faculty or academic council shall be set forth in its governance plan approved by the board of trustees.” (Section 8.6) Similarly, Section 8.10 provides for a “university faculty senate, responsible, subject to the board, for the formulation of policy relating to the academic status, role, rights and freedoms of the faculty, university level educational and instructional matters, and research and scholarly activities of university-wide import...” Finally, PSC also notes that under Section 8.11, “[t]he provisions in duly adopted college governance plans shall supersede any inconsistent provisions contained in this article.”

DISCUSSION:

On the entire record before me, I find that the grievance is arbitrable. I reach this conclusion for the following reasons.

Substantive arbitrability involves a determination as to whether the parties agreed that a particular dispute would be submitted to arbitration and, therefore, whether the arbitrator has jurisdiction to decide the dispute. In *AT&T Techs. v. Communication Workers of America*, 475 U.S. 643, 656 (1986), the United States Supreme Court, citing settled principles set forth in the *Steelworkers Trilogy*, held that:

[I]t has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[an] order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.' *Warrior & Gulf*, 363 U.S., at 582-583.

The New York Court of Appeals has held that in deciding substantive arbitrability, the question is whether there is a "reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA" (internal citation omitted.) *City of Johnstown v. Johnstown Police Benevolent Ass'n*, 99 N.Y.2d 273, 279-280 (2002).

PSC and CUNY have agreed to a broad arbitration clause. Under Article 20, PSC has the right to bring a grievance alleging CUNY's violation of the collective bargaining agreement as well as CUNY's failure to act pursuant to the Bylaws and written Board policies related to terms and conditions of employment. Given the standards for determining arbitrability as described above, the issues raised in this grievance must be considered arbitrable.

Significantly, PSC has clarified that it does not challenge in this arbitration the Board of Trustees' authority to adopt the resolution referred to as the Pathways Initiative.⁴ Rather, the grievance in this case assumes that the Board had the authority to do so, but alleges violations of the Bylaws and college governance plans in connection with the implementation of that resolution, in particular, development and implementation of curriculum and academic freedom. I cannot agree that the issues presented in this grievance, as so clarified, do not reasonably relate to terms and conditions of employment for faculty members. The Bylaws expressly provide that curriculum development is among the duties of faculty and sets forth specific procedures to be

⁴ Given this representation, I do not decide whether a challenge to CUNY's right to adopt the Pathways Initiative resolution is arbitrable.

followed by the colleges for addressing curriculum and other academic matters.⁵ (See e.g., Bylaws Article 8.) Similarly, the Preamble to the parties' collective bargaining agreement expressly recognizes and seeks "to maintain and encourage" academic freedom for faculty members. As such, the issues raised in this grievance are reasonably related to a term and condition of faculty employment and, therefore, whether there was a failure to act pursuant to the Bylaws and written Board policies is arbitrable under Section 20.2 of the parties' agreement.

Indeed, by their very nature, faculty duties and responsibilities with respect to curriculum development and implementation, as well as issues of academic freedom, are important elements of faculty terms and conditions of employment at an institution of higher education. In responding to CUNY's arguments that academic freedom was not a term or condition of employment and finding the grievance before him was arbitrable, Arbitrator Robert L. Stutz held that "it is difficult to conceive of a more fundamental condition of employment at any academic institution than academic freedom and the responsibilities attached to its exercise." *PSC and Board of Higher Education of the City of New York (David Barkin Grievance)*, AAA No. 1339-1219-75 at page 6 (Arbitrator Robert L. Stutz, January 19, 1977), See also, *PSC and Board of Higher Education of the City of New York (William D'Arienzo Grievance)* AAA No. 1339-1220-75 (Arbitrator Robert L. Stutz, January 28, 1977). The same can be said of faculty duties and responsibilities with respect to curriculum development and implementation at the college level.

Contrary to CUNY's assertions, its claim that the issues in this case relate to governance plans and academic policy within the prerogative of the Board of Trustees does not, in and of itself, require a finding that the grievance is not arbitrable. As PSC has argued, the parties' practices and arbitrators⁶ have long established that grievances may be arbitrable notwithstanding that they allege violations of governance plans and academic policy that the Board has authority to establish; having established plans and procedures relating to terms and conditions of employment, CUNY's arbitrary or discriminatory application of or failure to act pursuant to those plans and procedures has been deemed arbitrable and addressed on the merits. For example, while the Board has the right to establish the composition of Personnel and Budget Committees and procedures for those committees, grievances alleging CUNY's arbitrary or

⁵ Indeed, CUNY acknowledged in oral argument that selection and submission of courses would normally be done by faculty.

⁶ Significantly, other than the 1974 PERB decision, CUNY has not cited any arbitral precedent to support that the grievance in this case is not arbitrable because it involves governance plans or academic policy or otherwise.

discriminatory application of or failure to comply with those procedures have either not been challenged on arbitrability grounds (proceeding directly to the merits) or have been held to be arbitrable under the parties' agreement.⁷ This is true notwithstanding the 1974 PERB decision holding that the composition of the Personnel and Budget Committees is not a mandatory subject of bargaining. Similarly, grievances relating to academic freedom have been deemed arbitrable by the parties and by arbitrators, despite that academic freedom is addressed in the Preamble to the parties' agreement.⁸ While there may be competing rights and responsibilities that must be weighed and balanced in addressing the grievance on the merits, I cannot agree with CUNY's argument that the particular issues raised in this grievance relate solely to governance plans and academic policy and not to terms and conditions of employment and, therefore, are not subject to arbitration.

Finally, various CUNY arguments to support its position that the grievance is not arbitrable are properly considered not in deciding arbitrability but rather in the context of a hearing and decision on the merits. For example, CUNY's argument that the duties and responsibilities of faculty and the procedures established under the Bylaws are subject to the ultimate authority of the Board is an argument on the merits as to whether there was, in fact, any violation of Bylaws and college governance plans as PSC alleges; it does not go to arbitrability. Similarly, whether, as CUNY argues, academic freedom applies only to individual rights to teach, research and speak and whether these rights are properly considered in connection with the Board's adoption of a governance plan or academic policy for the University such as the Pathways Initiative are arguments requiring interpretation of the parties' agreement and are properly considered in a hearing on the merits.

In conclusion, while this case does not involve issues such as appointment, reappointment, tenure or promotion, PSC's grievance alleges violation of the Bylaws and college governance plans with respect to faculty duties and responsibilities and other academic matters that are reasonably related to terms and conditions of faculty employment at an institution of

⁷ See e.g., *Ella Puccio v CUNY (Kingsborough Community College)*, AAA No. 13 390 02440 10 (Arbitrator Richard Adelman, November 9, 2011); *CUNY (York College) v PSC (Eugene Levin Grievance)*, AAA 1339-1410-84 (Arbitrator John Sands, August 14, 1985); *PSC v Board of Higher Education of the City of New York (R. Peranio Grievance)* AAA 1339-1216-75 (Arbitrator George Nicolau, May 6, 1977); *PSC v Board of Higher Education of The City of New York (SICC) (Max Spalter grievance)* AAA No. 1339-12238-73 (Arbitrator Arthur Stark, January 30, 1975).

⁸ See, e.g., *PSC v CUNY (Medgar Evers College) (C. Nathaniel Ezuma Grievance)*, AAA No. 13 390 02710 07 (Arbitrator Melissa H. Biren, March 26, 2009); *Barkin Grievance*, *supra*; *D'Arienzo Grievance*, *supra*.

higher education, i.e., curriculum development and implementation and academic freedom. Given this conclusion, coupled with the presumption of arbitrability, I find that PSC's grievance meets the definition of a grievance under Article 20. As to the third issue in this grievance, i.e., alleged arbitrary and discriminatory retaliation against faculty members, there is no dispute that the issue is arbitrable. PSC's entire grievance, therefore, is arbitrable and the Motion to Dismiss must be denied.

In rendering this decision, I make no decision at all as to the merits of this case. Whether PSC will prevail with respect to its challenges to the Pathways Initiative as alleged in this arbitration is not properly decided at this time. That determination can be made only after a hearing on the merits at which all the evidence and all arguments can be presented and considered. All that is decided here is that PSC's grievance is arbitrable and, therefore, a hearing will be necessary to address the grievance on the merits.

By reason of the foregoing, I hereby issue the following:

AWARD ON ARBITRABILITY

CUNY's Motion to Dismiss is denied. PSC's May 9, 2012 grievance, as amended on October 15, 2012, and as clarified at the October 22, 2013 hearing, with respect to the Pathways Initiative is arbitrable and shall proceed to a hearing on the merits.

Dated: December 12, 2013



Melissa H. Biren

AFFIRMATION

I, Melissa H. Biren, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Opinion and Award on Arbitrability.



Dated: December 12, 2013

Melissa H. Biren