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

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

Dated: October 21, 2019

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Issue

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?

Background

Florida Gulf Coast University ("FGCU" or "University") opened its doors to students in the fall of 1997, and currently educates over 15,000 undergraduate and graduate students as one of the twelve members of the State University System of Florida. It is classified as an "M1: Master's Colleges and Universities – Larger programs" institution under the Carnegie Classification of Institutions of Higher Education. Since 1976, the United Faculty of Florida ("UFF" or "Union") has represented full-time faculty and various other academic personnel across the State University System, including at FGCU. Until 2001, the unionized academic employees were part of a single statewide bargaining unit as employees of the Florida Board of Regents. After the Florida Board of Regents was abolished by legislative action in 2001, UFF was certified anew as the bargaining agent for academic employees of the Florida Gulf Coast University Board of Trustees in 2003. Today, the UFF chapter at FGCU represents approximately 450 full time faculty. Significant portions of the current CBA between the FGCU Board of Trustees and UFF were "inherited" from the pre-2001 CBA between the Florida Board of Regents and UFF.

Unlike the overwhelming majority of public and private institutions of higher education in Florida and around the nation, full-time faculty at FGCU do not earn tenure. Instead, the standard employment status of full-time faculty and other academic personnel is referred to as a *Continuing Multi-Year Appointment* ("CMYA"). A CMYA, defined in Article 8.4.A, is essentially a three-year appointment onto which an additional year is added so long as the faculty member earns a satisfactory annual performance evaluation. The foundational right of all faculty members at the University is their CMYA; it is the only form of job security they have.

On May 21, 2019, non-reappointment letters were sent via certified mail from Dr. Christopher Westley, Interim Dean of the Lutgert College of Business to all faculty members in the School of Resort and Hospitality Management ("RHM"), one of the Lutgert College of Business's academic units. The letters alluded to "structural changes to the School of Resort and Hospitality Management," informed faculty members that their "full time faculty appointment will not be renewed beyond May 21, 2020," and asserted that "these changes are grounded in Article 12.4" of the parties' Collective Bargaining Agreement ("CBA").

On May 26, 2019, the Union's then-president, Dr. Edwin Everham III, sent an e-mail to Dr. James Llorens, the University's Interim Provost and Vice-President of Academic Affairs, requesting a meeting to discuss the non-reappointment letters. Attempts to resolve the dispute informally proved unsuccessful. On June 17, the Union filed a Step 1 grievance. On June 19, the parties met and the University, through Dr. Llorens, conveyed its belief that the Union had skipped the informal resolution part of the grievance procedure. Further attempts to resolve the dispute in a meeting on July 19 proved equally unfruitful. Because both the June 19 and July 19 meetings occurred with a representative from the Office of Academic Affairs, the Union eventually invoked its right to

proceed directly to Step 3, arbitration by delivering a Notice of Arbitration to the University on August 12.

In the following weeks, the Union made several demands of the University to select an arbitrator to resolve the grievance. On September 12, Mr. Robert Eschenfelder, the University's Associate General Counsel, conveyed to the Union a lengthy list of objections to the arbitrability of the grievance. The parties then agreed to bring the question of arbitrability to the instant proceeding.

The University's objections to the arbitrability of the grievance, as the Union understands them, are summarized as follows:

1) The union does not have standing to file this grievance at any level; it has improperly attempted to "step into the shoes" of its members.
2) Affected employees were neither identified on nor their signatures affixed to the Step 1 grievance form, and it would now be untimely for any such employees to file a grievance individually.
3) The union failed to properly invoke the Informal Resolution step of the grievance procedure, and even if it had it also prematurely invoked Step 1 of the grievance process.
4) The union failed to identify specific provisions of the agreement which were violated on the Step 1 grievance form.
5) The subject matter of the grievance – non-reappointment of faculty – is expressly excluded from the grievance process.

The Union asks that the arbitrator deny each of the above objections, determine that the grievance is arbitrable, and direct the University to promptly confer with the Union to select an arbitrator to hear the merits of the grievance.

Analysis

The exclusion of non-reappointment decisions from challenge through the grievance procedure is irrelevant to the grievance and poses no substantive bar to its arbitrability.

In raising its substantive arbitrability objection, the University engages in fragmented reading of Article 12.3 ("the decision to not reappoint is not grievable…"[1]). The full sentence reads as follows:

> *The decision to not reappoint is not grievable except, an employee who receives written notice of non-reappointment may, according to Article 20 Grievance Procedure and Arbitration, contest the decision because of an alleged violation of a specific term of the Agreement or because of an alleged violation of the employee's constitutional rights.*

In this case, the non-reappointment *decision* is not the subject of the grievance. As acknowledged by Dr. Everham in his May 20 e-mail to SHRM faculty[2], the University is within its rights to end a faculty member's employment at the end of their current appointment. But the University believes it can notify employees holding a CMYA on May 21, 2019 that they will be released from employment on May 21, 2020. The Union believes that the effective date of release from employment must be farther in the future, according to CBA provisions governing CMYAs found in Article 15 (Multi-Year Appointments and Tenure Status: Extension, Probation, Reappointment). There is no provision that precludes this dispute from being resolved through the CBA's grievance and arbitration machinery. In fact, a plain reading of 12.3 expressly invites the resolution of such disputes through the grievance procedure.

Under the University's reasoning, it could release any employee from employment at any time and deprive the employee or the Union of any recourse through the CBA simply by calling it a "non-reappointment." This would render not only Article 15, but also Article 13 (Layoff and Recall) and Article 16 (Coaching, Disciplinary Action, and Job Abandonment), meaningless. This is a harsh and absurd result that should be avoided by the arbitrator.

Procedural objections raised for the first time on September 12 should be dismissed as time-barred.

The University objected in its meeting with the Union on June 19 that the Union skipped the Informal Resolution portion of the grievance procedure.[3] The Union disagrees for reasons discussed below. But, had the University, at this time or shortly thereafter, complained of the Union

[1] E26, p. 8
[2] E3
[3] E28

attempting to step into the shoes of members, failing to identify affected members on the grievance form and obtaining their signatures, or failing to identify alleged violations of the CBA with appropriate specificity, the Union's efforts to address the University's complaints may have led it down a different path. No other procedural objections were raised at this time, or at any other time before Mr. Eschenfelder's September 12 correspondence to the Union.[4] In waiting until September 12, when it knew a new or amended grievance would clearly have been time or procedurally-barred, the University waived any additional procedural objections. The arbitrator should not reward the University's gamesmanship – or its flouting of Article 20.1[5] – by entertaining any procedural objections aside from the question of whether the Informal Resolution procedure was properly followed.

The University must overcome a presumption of arbitrability to achieve dismissal of a grievance on a procedural grounds.

As noted in Elkouri & Elkouri's *How Arbitration Works*: "A general presumption exists that favors arbitration over dismissal of grievances on technical grounds."[6] Moreover, "an employer can be deemed to have waived objections to the union's failure to follow a contract's procedural requirements, particularly when the employer cannot prove that it had been prejudiced thereby."[7]

Many examples cited are directly applicable to the instant matter. For example, "a union's grievance filed on its own behalf against an employer is presumptively arbitrable where the dispute concerns the interpretation and application of the collective bargaining agreement."[8] Similarly, "it is widely accepted that a union has standing to file a group grievance that affects a significant portion of the bargaining unit…a grievance filed by the union need not be signed by an employee member of the bargaining unit."[9] As to the question of the union inserting itself to enforce individual employees' rights, "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."[10]

Even where a collective bargaining agreement contains specific procedural provisions that are violated, mitigating circumstances, including a reasonable effort by the grievant to abide by

[4] E27, pp. 7-8
[5] CBA, p. 69 – "The parties agree that it is desirable to encourage open communication in order to resolve concerns and issues at the lowest possible level within the organization through informal resolution."
[6] *How Arbitration Works*, Frank Elkouri & Edna Asper Elkouri, 8th Edition, Ch. 5 p. 10, BNA, 2016
[7] Ibid., Ch. 5, p. 23
[8] Ibid., Ch. 5, p. 18
[9] Ibid., Ch. 5, p. 20
[10] Ibid., Ch. 5, p. 24

procedures, may tilt the balance in favor of arbitrability. For example, Elkouri & Elkouri refer to a case by arbitrator Roger Abrams (the full case is attached to this brief):

> *[T]he arbitrator allowed the union to file a group grievance challenging pay practices, even though the employer complained that the union should have filed the grievance with the "names, addresses, telephone numbers of the grieving employees and their representatives" instead of just filed on behalf of "all bargaining unit employees." The employer "certainly knew who those employees were," the arbitrator said. The employer also argued that the union should have filed the grievance "on behalf of the employees," and not as a "union grievance." The arbitrator rejected this argument, holding: "The Agency's argument, in effect, is that the Agreement constructs a medieval maze. If the Union heads down one path – a union grievance – it comes to a dead-end. If it takes another path – a representative grievance – another dead-end. There is no way out. That was certainly not what the parties intended when they constructed a procedure designed to settle disputes 'fairly.'"*[11]

In this case, the University must show not only that the procedural requirements spelled out in the CBA were violated, but also that the CBA requires the forfeiture of the grievance for the established procedural defects. Doubts regarding either point should be resolved against forfeiture, "a long-standing policy in arbitration."[12]

The CBA does not provide for the forfeiture of a grievance on any grounds raised by the University.

As discussed above, grievances are presumptively arbitrable. In order to obtain forfeiture of any right, including the right to advance a grievance through the grievance procedure, the party seeking forfeiture must establish that the CBA provision relied upon in its efforts is subject to no other reasonable interpretation. As Elkouri & Elkouri note: "If an agreement is susceptible to two constructions, one of which would work as a forfeiture and one of which would not, the arbitrator will be inclined to adopt the interpretation that will prevent the forfeiture."[13]

There are several clear provisions in the CBA for the forfeiture of a grievance due to a procedural defect, none of which have been claimed by the University in this case (emphasis added):

- Article 20.6.C – "Upon the failure of the grievant or the UFF-FGCU, where appropriate, *to file an appeal within the time limits provided in this Article*, the grievance shall be deemed to have been resolved by the decision at the prior step."[14]

[11] Ibid., Ch. 5, p. 21, citing 131 BNA LA 1508 (Abrams, 2013)
[12] 131 BNA LA 1508 (Abrams, 2013), p. 9
[13] *How Arbitration Works*, Ch. 9, p. 54
[14] CBA, p. 72

- Article 20.6.E.1.c – "If the grievant or grievant's representative *files a Step 2 grievance and also files a Step 3 grievance*, the grievance process will be terminated and the grievance shall be deemed to have been resolved by the decision at Step 1."[15]
- Article 20.6.E.1.d – "*If the seven (7) day period expires without the grievant filing a request for Step 2 review*, the grievance shall be considered time-barred for a Step 2 grievance and the grievance shall be deemed to have been resolved by the decision at Step 1."[16]
- Article 20.16 – "A grievance which has been filed at Step 3 and on which *no action has been taken by the grievant or UFF-FGCU State Office for sixty (60)* days shall be deemed withdrawn and resolved in accordance with the decision issued at the prior Step."[17]

These are the only procedural defects for which the CBA provides the forfeiture of a grievance. Had the parties intended for any other procedural defects to prohibit a grievance from being advanced through the grievance process, the CBA would contain language analogous to the sections cited above with respect to those procedural defects. Yet it does not. The interpretive principle *expressio unius est exclusio alterius*[18] applies. The University now asks the arbitrator to establish additional grounds for forfeiture in the CBA contrary to the intent of the parties.

The Informal Resolution procedure was contractually exhausted when the Step 1 grievance was filed.

The University alleges that the Union's request for informal resolution was deficient in its failure to contain a description of the facts relating to the dispute and the relevant CBA provisions, and that the Union did not wait for a sufficiently long period of time before filing a Step 1 grievance. It argues that the arbitrator lacks jurisdiction to hear the grievance as a result of these alleged procedural deficiencies.

Leaving aside the question of whether the University accurately characterizes the facts, Article 20.2.E(4) renders its objections of improper following of the Informal Resolution process moot. Article 20.2.E(4) reads, in pertinent part (emphasis added):

> *If the parties are unable to reach informal resolution of the dispute within the time provided, or if the faculty member has filed a grievance, the Office of Academic Affairs shall notify the UFF-FGCU that informal resolution of the dispute is not possible and all such attempts at informal resolution shall end.*[19]

[15] Ibid.
[16] Ibid., p. 73
[17] Ibid., p. 77
[18] See, e.g., *How Arbitration Works*, Ch. 9, p. 40
[19] CBA, p. 70

Article 20.2.E(4) does not provide for forfeiture of the right to pursue a grievance in the event a formal grievance is filed during the informal resolution period. As discussed above, the parties have included a number of express provisions for the forfeiture of a grievance. They would have included such a provision in Article 20.2.E(4) if their intent were for the "premature" filing of a Step 1 grievance to result in its forfeiture. Clearly, this was not the parties' intent. What, then, is the meaning of Article 20.2.E(4)'s declaration that "all such attempts at informal resolution shall end" once a formal grievance is filed? The only plausible interpretation is that when attempts at informal resolution end, attempts at formal resolution (through the Steps of the grievance procedure) begin.

In other words, the CBA provides flexibility to a grievant to end Informal Resolution by simply filing a Step 1 grievance. Dr. Everham's filing of a Step 1 grievance on June 17 therefore ended the informal resolution process, and began the formal grievance procedure. The University's quibbles over whether the proper incantations were uttered to initiate informal resolution and whether it was attempted for a sufficient length of time are irrelevant.

Even if a grievant did not have the right to end Informal Resolution by simply filing a grievance, Article 20.2.E(3) provides another short-circuit (emphasis added):

> *The faculty member who requested an informal resolution may file a grievance earlier than the required 30 days for attempting informal resolution (Article 20.2.E above) if the parties mutually agree that informal resolution of the dispute is not possible.*[20]

In this case, the parties met on June 19 and agreed that Informal Resolution was not possible. Notes taken during this meeting by Dr. Carolynne Gischel, the Union's Grievance Chair, indicate a willingness by the University to forego Informal Resolution.[21] In conversation, the University's position was even clearer. Since the parties were in agreement that Informal Resolution was not possible, the Union was well within the requirements of the CBA to proceed with a formal grievance.

The Union's right to challenge the University's interpretation of the CBA and alteration of past practice is found in Article 1.

In urging the arbitrator to dismiss the grievance due to the Union's lack of standing, the University relies on Article 20.3.B, which reads, in pertinent part:

> *"Grievant" shall mean a member of the bargaining unit or group of members of the bargaining unit who has/have filed a grievance in a dispute over application of a provision of the Collective*

[20] Ibid.
[21] E28

Bargaining Agreement. The UFF-FGCU may file a grievance in a dispute over application of a provision of this Agreement which confers rights upon the UFF-FGCU.[22]

The University's argument that no rights of the Union are at issue could not be further from the truth. Were this a simple dispute over the factual basis resulting in actions taken by the University with respect to an individual employee (e.g., whether there is just cause for discipline, whether evaluation procedures were adhered to, etc.), the Union would agree that Article 20.3.B requires such a grievance to be challenged by the affected employee(s). But the core dispute in this case is whether the University may use the "non-reappointment" provisions of the CBA to prematurely terminate a Continuing Multi-Year Appointment. The Union asserts this is the first time such an action has been attempted by the University and the attempt would constitute a significant change in the past practice of the parties even if the relevant contract language were ambiguous. The University's interpretation of Article 12 would grant it the right to prematurely terminate employees *during* their CMYA, a power far beyond its right to simply not offer further employment to employees at the end of their CMYA. This power cannot be acquired outside of the collective bargaining process, and the University's attempt to do so is a plain violation of Article 1, hence its citation in the grievance. A finding that the recognition clause does not confer upon the Union a right to challenge an employer's radical departure from both past practice and what the Union believes it has successfully bargained would neuter Article 1 of the CBA, and should therefore be avoided by the arbitrator.

Furthermore, from the moment the non-reappointment letters were issued, speculation abounded that the University would begin to selectively rescind the non-reappointment letters and/or offer further contingent employment in some capacity for faculty members. These speculations were ultimately vindicated when the University rescinded several non-reappointments on July 26[23] and later offered further contingent employment to other faculty members.[24] Even the specter of such actions being taken by the University posed two problems for any potential grievance signed by one or several of the affected employees. There is the obvious threat of retaliation in the form of not offering further employment to a faculty member who signed his or her name to a grievance. Alternatively, even if the Union could find a faculty member willing to take the risk, the University could have rendered the grievance moot by simply rescinding that faculty member's non-reappointment. Rather than build an employee grievance on shifting sands, the Union made a tactical decision to file the grievance in its own name. This decision is procedurally valid for reasons described above. But even if the Union did not have the right under Article 1 to file a grievance challenging an erroneous interpretation of the CBA or improper departure from past practice, the

[22] CBA, pp. 70-71
[23] E27
[24] E29

Union's interest in minimizing procedural objections to the grievance far outweighs any prejudice to the University of any resulting procedural defect.

The alleged lack of names, signatures, and specific contract provisions on the Step 1 grievance would not have prejudiced the University.

As discussed above, the Union has standing to file this grievance in its name, with the signature of its president. Regardless, Elkouri & Elkouri describe such requirements as an "aid [to] the employer in evaluating and responding to the grievance,"[25] and draw a distinction between a grievance of a "personal nature" and "a 'policy' or 'general' grievance" for this purpose. In this case, the University knows exactly the employees to which the Union's grievance refers[26], even without their signatures present on the form. The presence of signatures on the form is therefore, at most, "mere formality"[27] in this case.

The University cites the definition of a grievance in Article 20.3.A: "a dispute concerning the interpretation or application of a specific term or provision of the Collective Bargaining Agreement" in support of its complaint that the Union "simply called out a series of CBA chapter numbers."[28] The CBA contains strict limitations on the Union's ability to amend grievances. Article 20.6.A(3) reads:

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

Prior to the filing of the Step 1 grievance, Union representatives had already encountered the University's sophistic argument that Article 12.3 foreclosed the possibility of any action described as "non-reappointment" from being grieved. In anticipation that the University may attempt to move the goalposts later in the grievance process – for instance, by recharacterizing its actions as a layoff or as discipline, and then asserting that the Union could not amend the grievance to include these articles – the Union made a tactical decision to cite too many articles in the initial grievance filing rather than too few.

The University complains that the "effort" involved in reviewing the cited articles is "fundamentally unfair." While the University may find it annoying to be required to read the CBA to which it is a party, nothing in the definition of a grievance precludes the possibility of citing multiple or even numerous CBA provisions on a single grievance form. Indeed, a single act or omission by an

[25] *How Arbitration Works*, Ch. 5 p. 18
[26] E26, p. 7 – "To date, no member who received a non-renewal letter has submitted a grievance form…"
[27] *How Arbitration Works*, Ch. 5 p. 19
[28] E26, p. 8

employer could (and frequently does, and did in this specific case) simultaneously violate many CBA provisions. The University's reading of Article 20.3.A would apparently require the Union to submit separate grievance forms for each Article and/or Section violated. The parties did not intend for Article 20.3.A to demand such procedural inefficiency.

Moreover, the "Statement of grievance" section of the grievance form is very specific as to the acts giving rise to the grievance. The reference to the length of the employees' CMYA's and their previous evaluation results makes the "focus" of the grievance more than obvious. The University clearly knew the act of "non-reappointing" an entire department would interest the Union, as evidenced by its notification to the Union of its intent to do so on May 17, also referred to on the grievance form. The University's now-feigned ignorance of the Union's concerns does not give rise to a legitimate objection to the arbitrability of the grievance.

Conclusion

The University's substantive challenge to the arbitrability of the grievance misconstrues the Union's position entirely. The Union does not challenge whether the University has the ability to non-reappoint faculty, only whether the non-reappointment letters it issued violated various other CBA provisions, particularly those governing Continuing Multi-Year Appointments. This question is entirely within the power of an arbitrator to resolve.

The purpose of a grievance procedure is, as stated in Article 20.1 of the parties' collective bargaining agreement, "to promote opportunities for prompt and efficient discussion and resolution of work-related issues covered by the Collective Bargaining Agreement." The University's conduct throughout the grievance process has been to frustrate attempts at resolution while the professional lives of numerous capable and talented scholars hang in the balance. The grievance is not procedurally defective as alleged by the University, and even if it were, the CBA does not provide for the forfeiture of a grievance for the alleged defects. None of the alleged defects, even if true, compromised the University's ability to resolve the underlying concerns giving rise to the grievance or its ability to defend itself in arbitration, as evidenced by its failure to lodge most of them until nearly three months after the Union filed a Step 1 grievance.

Moreover, almost every action the University claims the Union should have taken in order to properly process this grievance could have given rise to a different set of equally plausible procedural objections. The University's construction of the grievance process essentially lays a minefield between a dispute and its resolution and is clearly contrary to the intent of the parties. The rigmarole demanded by the University in order to process a grievance is not supported by the language of the CBA, and is contrary to the intent of the parties and to the purpose of a grievance procedure in general.

For all of the reasons described above, the general presumption of arbitrability of grievances should prevail, and the arbitrator is respectfully urged to rule the grievance to be arbitrable.