BEFORE ARBITRATOR MICHAEL WHELAN
IN THE MATTER OF ARBITRATION BETWEEN

United Faculty of Florida, Florida
Gulf Coast University Chapter,

UNION,

Issue: Arbitrability

v.

FMCS Case No.: 190826-10334

Florida Gulf Coast University
Board of Trustees,

UNIVERSITY.
_____/

EMPLOYER'S PRE-HEARING BRIEF

Respectfully submitted,

/s/ ***Robert Michael Eschenfelder***
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Pursuant to the Parties' October 3rd 2019 case management call with the Arbitrator, the University hereby files its Pre-Hearing Brief. The University argues that the issues to be decided by the Arbitrator are:

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

Factual Background

THE UNIVERSITY:

Florida Gulf Coast University (the University) is a public university in Fort Myers, Florida. It belongs to the twelve-member State University System of Florida as its second youngest member. The University was established on May 3rd 1991, and is accredited by the Southern Association of Colleges and Schools (SACS) to award 58 different types of bachelor's, 25 different master's, six doctoral degrees, and twelve graduate certificates. All of the University's undergraduate engineering degrees are accredited by the Accreditation Board for Engineering and Technology (ABET). In the 2018 academic year, the University had 15,080 students, of which 14,024 were undergraduates and 1,056 were postgraduates.

The University's academics are divided into six main colleges: U.A. Whitaker College of Engineering, Lutgert College of Business, Marieb College of Health & Human Services, College of Education, College of Arts and Sciences, and Honors College. The prominent schools and departments within the colleges include; Bower School of Music & the Arts, The Emergent Technologies Institute (ETI), School of Nursing, and School of Resort & Hospitality Management (RHM). University decisions with respect to the operation of the RHM School are the focus of the facts informing this arbitration proceeding.

THE RHM SCHOOL:

The mission of the Resort and Hospitality Management program is to provide students with core competencies and experiential learning opportunities in preparation for successful management careers and leadership roles in the resort and hospitality industry. The program prepares students for successful careers throughout the global marketplace in resorts, private clubs, restaurants, events, catering, association management, sports management, wine and spirits retailing and distribution, human resources and many more specialized areas of hospitality business operations. With a tourism-oriented climate and economy, Southwest Florida provides the perfect backdrop to gain perspective and experience in the real world as an undergraduate.

The program offered concentrations in Event Management, Restaurant and Club Management, and Spa Management. Its curriculum has focused on the skills needed to manage the operations of multimillion-dollar resort and private club properties, while internship and field experiences

offered an important bridge between the classroom setting and a career in the industry. The University has maintained strong relationships with over 300 of the area's finest resorts, hotels, private clubs, events, spas, food and beverage businesses and other industry-related contacts so as to obtain real-world feedback on the outcomes of its program.

PROGRAM REVIEW REVEALS A NEED FOR CHANGE:

At its inception, the RHM program proved to be a popular choice of students. In the fall of 2014, the RHM program had 679 students, 19% of the enrollment of the University's College of Business. However, in recent years, the University began noticing significant year over year declines in student interest so that by the fall of 2018, enrollment had dropped to 484 students, only 12.4% of College of Business enrollment. In that same time, the University's data showed that the percentages of RHM program graduates who had gained employment in the field had dropped. The University felt this may be a sign of a marketplace telling it the program lacked the academic rigor and industry relevance demanded by prospective students and potential employers of program graduates. Additionally, the then leadership of the program failed to successfully complete a re-accreditation process with the program's current accrediting body ACPHA. Finally, the University's leadership, including its Provost who had only recently taken on that role, had become aware of internal discord between instructional staff within the program.

As a result of these factors, at the beginning of 2019, the University retained a consultant who is nationally recognized for his expertise in resort and hospitality programs at the university level. He was charged with performing a detailed academic program review of the RHM program. The consultant performed his work during February and early March of 2019, and on March 11th 2019 he delivered his final report and recommendation to the University.

In his detailed report (**Exhibit 1**), the consultant made numerous observations including the following:

> My overall impression is that, while the School's boutique strategy facilitated early growth, the narrowness of the strategy now significantly limits that growth. While I heard many positive comments regarding program content and its relevance toward student careers in specific areas, students and faculty expressed concerns regarding the rigor of the program as well as the consistency of that rigor from instructor to instructor. Given the needs of the 21st century hospitality industry, multiple stakeholders expressed the need for a more rigorous skill set to prepare students for their careers. Examples of these skill sets include data analytics, technology management, including social media and online marketing. While certain SRHM faculty members are fully capable of providing a rigorous yet practical education, I came to question the ability of some faculty to do so.
>
> In the course of my visit I quickly became aware of additional and significant issues facing the School. One is the ongoing academic accreditation, which has been delayed and is a point of concern for the College and University administration and some members of the SHRM faculty. The School is currently accredited by ACPHA…, which is common for hospitality programs. The Lutgert College o Business is accredited by AACSB, which is a stronger standard under which the SRHM could be included as a specialty school. My

visit suggested that the last ACPHA accreditation showed weaknesses, that limited progress has been made, and that there is a current lack of cooperation within SRHM surrounding the process. As a result, the School may be "at risk" of not being accredited. However, other faculty members including the Director and an outside consultant believe that the accreditation is quite achievable. While the accreditation issue should be taken very seriously, I had concerns that is issue is a "red herring" being used by some SHRM faculty to undermine the School's director. The question remains as to what is the best accrediting body for the School moving forward.

The second issue is the clear need to address the dysfunctional state of the current faculty culture. The dysfunction is apparent to all stakeholders and has reached a point where it is directly impacting the student experience and preventing the faculty rom moving forward with any agreed upon vision or strategic plan. Students in my interviews witnessed firsthand heated arguments amongst faculty members in Sugden Hall.

In addition to these introductory comments, the consultant, when discussing his interviews with faculty, concluded that the interviews, "reinforced the need to increase the rigor of the program and consistency across instruction." The consultant noted that "faculty found it difficult not to delve quickly into their own fractured culture" when being interviewed, and that, "this is a small faculty where there is an individual who currently is the director, an individual who was the director, and an individual who clearly wants to be the director." Overall, the consultant found the state of faculty skills and relations to be "untenable."

In his recommendations, the consultant recommended aligning the program more tightly with the College of Business, discontinuing the spa management component of the program, elimination of other concentrations, adoption of new concentrations, substantial improvement of academic rigor, greater emphasis on finance, accounting, real estate, revenue and asset management, data analytics, technology and social media. The consultant noted that "the current state of the faculty is unlikely to accomplish much" since "too many faculty remain wedded to an old model…"

THE UNIVERSITY'S RESPONSE TO THE RHM REPORT:

Based on both its own assessments gleaned over months of internal study, along with the independent report of the consultant and the results of the unsuccessful reaccreditation effort, the University's administration came to the conclusion that many of the consultant's recommendations were advisable and should be implemented. Obviously, with the consultant's discussions surrounding the skillset mismatch of the current faculty of the Program, staffing changes would be a part of the necessary changes. Therefore, on May 21st 2019, the College of Business's Interim Dean issued letters not renewing contracts[1] to the nine faculty members of the RHM program. These letters (**Exhibit 2**)[2] provided:

[1] Copies of the initial employment offer letters of the various impacted faculty which incorporate the terms of the CBA as part of the faculty's terms and conditions of employment are provided in **Exhibit 25**.

[2] As the University finalized its draft of the program's new curriculum and then assessed the faculty skillsets necessary to carry the curriculum forward, it was determined that three faculty members possessed the skills and credentials necessary to be a part of the staffing of the new program. Therefore, they received letters on July 26th 2019 rescinding their non-renewal letters. **Exhibit 27**.

> Due to structural changes to the School of Resort and Hospitality Management to be implemented over the next two months, including the reallocation of resources, reorganization of degree or curriculum requirements, reorganization of academic programs, and curtailment or abolition of at least one concentration, I am writing to advise you that your full time faculty appointment will not be renewed beyond May 21, 2020. These changes are grounded in Article 12.4 of the current collective bargaining agreement of the University.

UNION REACTION:

On Monday, May 20th 2019, local UFF-FGCU union president, Edwin Everham, (Everham) sent the following email (**Exhibit 3**) to the non-renewed faculty members:

> Colleagues,
>
> The Provost shared with FGCU UFF (sic) the changes to your program and employment. We are working to ensure that your rights under the collective bargaining agreement are honored.
>
> This type of administrative action is covered under the CBA Article 12. The administration *does have the right* to "non-reappointment" due to "adverse financial circumstances, reallocation of resources, reorganization of degree or curriculum offerings or requirements, reorganization of academic or administrative structures, programs, or functions, and/or curtailment or abolition of one or more programs or functions" (Article 12.4). They are obligated to inform you in writing (Article 12.2 A). You have the right to request a written statement on the basis of the decision (12.2 E). They are expected to "Make a reasonable effort to locate appropriate alternative or equivalent employment within the University" (12.4 A).
>
> We are consulting with the State UFF office for advice. We will contact you again following that consultation.

On Sunday, May 26th 2019, local union president Everham sent Provost and Vice President for Academic Affairs James Llorens (Llorens) an email (**Exhibit 4**) stating:

> We talked to the State UFF office on Friday and have scheduled a FGCU-UFF Executive Committee meeting on Tuesday afternoon. We hope we could meet with you again possibly on Thursday, May 30. By then we should have a clearer sense of where we are as a Chapter.

The email asked the Provost to send a copy of the consultant's report, enrollment data, and a copy of one of the letters sent to the impacted staff, which information the University readily provided.

On Tuesday, May 28th 2019, the union president emailed the Provost (**Exhibit 5**) that the Executive Committee had met, and had "clarified talking points" for the meeting he had requested with the Provost on the coming Thursday.

On June 14th 2019, Provost Jim Llorens sent a four-page detailed email to the University's Board of Trustees. That email (**Exhibit 6**) reviewed the history of the RHM program, the problems and challenges it has faced in recent years, and the administration's efforts to analyze the matter, including the work performed by the consultant. The Provost emphasized that the program was not being eliminated, but rather was being substantially overhauled in a manner consistent with the consultant's recommendations so as to strengthen it and thus increase enrollment and student success upon graduation.

On June 17th 2019, the union president signed and delivered to the Academic Affairs Office a document entitled *Florida Gulf Coast University/United Faculty of Florida Grievance*. The completed form (**Exhibit 7**) is labeled "Appendix C", which all parties acknowledge is the grievance form appended to the CBA.

The form identifies the Grievant as "UFF-FGCU Chapter (Dr. Edwin Everham III, UFF-FGCU President, on behalf of the Chapter", and indicates: "I am filing a Step 1 grievance." As to which articles of the CBA the grievance alleges are being violated, the form states: "Article 1, Article 8, Article 12, Article 13, Article 15, Article 16, Article 29, Article 31, and other articles as may be appropriate."

In the Statement of Grievance, the union asserted:

> By issuing letters of non-reappointment on May 21, 2019 to Sugden Resort & Hospitality Management faculty, FGCU violated the…CBA…Articles 1, 8, 12, 13, 15, 16, 29, 31, and others may be applicable. With this action, FGCU is effectively terminating employment of these faculty effective May 21, 2020 and dismissing the 3-year continuing multi-year appointment which automatically renews after receipt of an overall satisfactory annual evaluation. The UFF-FGCU was informed of the University's intent to go forward with this action via a meeting between UFF-FGCU's co-presidents elect and the Provost on May 17, 2019.

For the "Remedy Sought" section of the form, the union stated:

1. FGCU shall rescind the letters of non-reappointment issued on May 21, 2019.
2. FGCU shall honor the continuing multi-year appointment by maintaining employment for the affected faculty through May 2022.
3. Any future letters of non-reappointment shall honor all articles of the CBA.
4. FGCU shall enforce Article 20.4 which states "No reprisal of any kind will be made by the University, or UFF-FGCU against any grievant, any witnesses, any UFF-FGCU representative, or any other participant in the grievance procedure by reason of such participation."
5. FGCU shall make affected faculty whole.
6. Any and all such relief as is just and appropriate.

In responding to Section III of the grievance form's need for a description of the informal resolution efforts, the union represented:

> UFF-FGCU officers met with the Provost and Associate Provost on June 5, 2019 to attempt informal resolution by requesting remedies 1 and 2 listed [above].

As for the University's part, when the grievance form was examined, the University concluded that it did not state a valid grievance under the terms of the CBA in that: 1) its topic and remedy request did not address topics for which the union, in its own name, could grieve, 2) even if it did, the union failed to adhere to the time lines set forth in the CBA for processing of grievances by the union in its own name, 3) it sought to remedy specific personnel actions it had not been signed and filed by the impacted employees as required by the CBA, and that even if it had, 4) the CBA expressly removed such a topic from the grievance process.

On June 20th 2019, the union president emailed (**Exhibit 8**) Provost Llorens and Associate Provost/Associate Vice President for Academic Affairs Dr. Tony Barringer (the University's chief union negotiator):

> It is my understanding that you are concerned UFF did not follow CBA procedures regarding the informal resolution of the non-reappointment of SRHM faculty. We view the email on May 28 as a request for informal resolution and that the meeting on June 5 fulfilled that step in the process. We filed the grievance on June 17 to preserve the rights of our members to grieve, as we indicated at our quick courtesy meeting with you on June 14th. The CBA does indicate that following the filing of a grievance, within 14 days the "designated university representative and the grievant, and or the grievant's representation, shall schedule a step one meeting." It was our intent and hope that this future meeting could be an avenue for union leadership and management to discuss remedies. We still have eleven days in that window and we would be willing to extend that timeline for a meeting if you need it. None of the above is intended to waive our right to go forward with the grievance and arbitration if needed.

On Wednesday June 26th 2019 union president Everham sent an email (**Exhibit 9**) to Provost Llorens and Chief Negotiator Barringer that he had not seen any response to the above-email, that he was leaving the Country between June 29th and July 10th, and asked if a meeting could occur on the 27th or 28th or, alternatively, "extending the time for a meeting beyond the window defined in the CBA, or with a meeting in my absence that includes" other union officials.

On June 28th 2019 at 6:50 a.m., Chief Negotiator Barringer responded to the union president (**Exhibit 10**) that, while he would defer to the Provost, he recommended "extending the time in order to discuss any updates and/or next steps. Having a meeting upon your return…would be good."

On June 28th 2019 at 8:30 a.m., the union president emailed (**Exhibit 11**) Provost Llorens and Chief Negotiator Barringer the following:

> It is always my hope and intent that we can work things out internally. I do not know the windows or deadlines regarding the move to arbitration. We need to protect our options in the process, but if possible extending the timeline into July so we can meet seems prudent.

On June 28th 2019 at 12:23 p.m., the union president sent the following email (**Exhibit 12**) to Provost Llorens and Chief Negotiator Barringer:

> It appears the CBA allows us to extend these deadlines by mutual consent. WE [emphasis in original] would consent to an extension – we would like to work this out. Maybe until the end of July? Let us know what will work for you guys. The more we talk to faculty the more we hear concerns about the impact of this action on the perception of our 3-year rolling contracts. We need a strong alternative to Tenure, if we want to attract and retain the best colleagues. So the above extension is not intended to abdicate the opportunity to go to arbitration if needed.

On Thursday, July 11th 2019, union president Everham emailed (**Exhibit 13**) the Provost and Dr. Barringer that he was back from his academic visit to Puerto Rico, and wanted to meet to discuss "informally resolving this." On Friday, July 12th 2019, the Provost's Executive Assistant notified union president Everham and Chief Negotiator Barringer that the Provost would be available to meet on July 19th 2019. **Exhibit 17**.

On Monday, July 22nd 2019, the union president emailed (**Exhibit 18**) Provost Llorens and Chief Negotiator Barringer:

> Thanks for taking time and trying to work toward a resolution on the non-reappointment of faculty from Sugden Resort and Hospitality. It appears we will not be able to find common ground. We understand the need for administration to make these kind of decisions for the institution but we disagree that the action is allowed under the current CBA language for faculty on Continuing Multi-year Contracts. As we stated, we are also concerned if (sic) the impact this will have on recruitment and retention. I will be contacting our Executive Committee to determine how we go forward.

On July 31st 2019 the union president re-transmitted his July 22nd email (**Exhibit 19**) to Provost Llorens and Chief Negotiator Barringer, and added a note that "The Executive Committee decided to go forward with a request for arbitration. We are filing that request for the State UFF to review."

On August 7th 2019, union official Dr. Scott Michael emailed Dr. Barringer asking if "impacted faculty [can] be able to continue working, if they choose, without waiving their right or the union's right to arbitrate the matter that was grieved." Dr. Barringer responded that we would "discuss as warranted." **Exhibit 20**.

On August 12th 2019, the union submitted to the Office of Academic Affairs a *Notice of Intent to Arbitration* form (**Exhibit 21**). The form stated that the following issues required arbitration:

> Did the University violate articles 1, 8, 12, 13, 15, 16, 29, and/or 31 when it issued non-reappointment letters on May 21, 2019 to Sugden Resort & Hospitality Management program faculty? If so, what shall be the remedy?

The form has a space for the University to sign as an acknowledgement of its receiving the form, and University Chief Negotiator Dr. Barringer did sign for the form's receipt, making clear in a note that the acknowledgement of the form's submission was not a concession that the CBA's grievance steps had been properly followed.

On August 26th 2019, Chief Negotiator Barringer emailed (**Exhibit 23**) union officers as follows:

> I am following up on our conversation we had when you came to my office to pick up the notice of intent to arbitration form that you left with the secretary on 8/12/19. On that day, I informed you to (sic) that I still assert that we have not followed proper protocol in terms of distinct steps of attempted informal resolution, grievance filing, potential arbitration. My concern is still there as we have no record of the grievance phase as we have not had a grievance hearing, decision, etc. Again, I stress the fact that my signing of the document on 8/16/19 was only to acknowledge that the form had been delivered on 8/12/19 to the Office of Academic Affairs but in no way is it to suggest an agreement to arbitration as I still contend that proper protocol has not occurred.

On August 27th 2019, United Faculty of Florida's Tallahassee-based agent Mr. Graham Picklesimer responded (**Exhibit 24**) to Chief Negotiator Barringer on behalf of the local union as follows:

> I am in receipt of your email of…yesterday afternoon…to the co-presidents of UFF-FGCU in which you assert that "proper protocol" in the grievance process up to this point has not been followed. Please direct all future communication regarding the grievance filed in response to the University's non-reappointment of Resort & Hospitality Management faculty to me. Regarding the dispute over the "proper protocol," I have been advised of the following timeline regarding the grievance process:
>
> - May 28, 2019 – UFF-FGCU representatives notified you by email of the Union's desire to meet to achieve an informal resolution of the issues.
> - June 5, 2019 – UFF-FGCU representatives met with you and University Provost Llorens to discuss the issues.
> - June 17, 2019 – UFF-FGCU filed a Step 1 Grievance with the Office of Academic Affairs.
> - June 19, 2019 – UFF-FGCU representatives met with you and [the Provost] at your request, in which you indicated the University's position that the grievance was improperly filed because informal resolution was not sought. UFF-FGCU representatives offered to seek informal resolution, which you declined, and further asked if backing up a step to informally resolve the issue would be fruitful, to which you replied "no." [The local union president] then followed up via email and offered to extend the timeline to hold a Step 1 meeting, to which no response was received.

- July 19, 2019 – UFF-FGCU representatives again met with you and [the Provost] to discuss the issues at Step 1. You asserted that the University would not agree to the union's proposed remedies and further indicated that the University would not be responding in writing.

Article 20.6.A.(1) o the parties' CBA permits a grievant to proceed through the grievance process "following 21 days of informal resolution effort." From May 28 to June 19, 22 days elapsed, during which you declined to resolve the issue informally and indicated that informal resolution would not be fruitful. Following the Step 1 meeting on July 19, you indicated that the University would not be responding in writing to the grievance. Because the Step 1 meeting was held with a representative of the Office of Academic Affairs…Article 20.6.F.(1).b of the parties' CBA permits the grievant to proceed directly to Step 3, as the union did on August 12, 2019.

If the University wishes to dispute the arbitrability of this grievance in any way, the proper forum is a hearing before an arbitrator pursuant to Article 20.6.F.(4). The Federal Mediation and Conciliation Service has furnished us with a panel from which to select an arbitrator. Please advise me of a date and time you would be available to select an arbitrator from the panel. Continued delay in the processing of this grievance…may result in a charge of Unfair Labor Practice.

Having now set forth the factual background relevant to the matter, it will also be helpful to review the various provisions of the CBA which address themselves to the dispute resolution process agreed to between the union and University.

Argument as to Arbitrability

As noted earlier, the University believes the ultimate arbitrability issue[3] to be decided by the Arbitrator in this case is best framed by the following questions:

- Was the June 17th 2019 grievance filed by a party with the contractual right to file a grievance concerning faculty non-renewal notices? If yes,

- Were the grievance procedure requirements complied with? If yes,

- Did the grievance filed on June 17th 2019 address a grievable/arbitral issue?

Each question will now be addressed in *seriatim*:

[3] The parties to the CBA must stipulate to the issues to be arbitrated and if they cannot agree as to issues to be arbitrated, they submit that dispute to the arbitrator as an issue of "arbitrability". Section 20.6(F)(1)(e). In turn, § 20.6(F)(4) of the CBA provides that the arbitrator must hear arbitrability disputes first, and rule on them within 10 days, prior to proceeding to substantive issues.

I. WAS THE JUNE 17TH 2019 GRIEVANCE FILED BY A PARTY WITH THE CONTRACTUAL RIGHT TO FILE A GRIEVANCE CONCERNING FACULTY NON-RENEWAL NOTICES?

Unlike other more traditional universities, Florida Gulf Coast University does not offer tenure to faculty.[4] Therefore, the CBA reserves to the University the right, with certain conditions, to non-renew faculty. This process is generally described in § 12 of the CBA. Section 12.3 of the CBA provides as follows:

> Grievability. *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*. Such grievance process must be filed with the Office of the Provost within thirty (30) days of receipt of the statement of the basis for the decision not to reappoint pursuant to Section 12.2 E above or receipt of the notice of non-reappointment if no statement is requested.

Emphasis added.

Unlike estoppel and waiver, lack of standing is not an affirmative defense and therefore it need not be pled and proven by the respondent. It is the party initiating the action which has the burden of establishing its standing. See ***United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1383 (D.C. Cir. 1984)**; ***Broward NEA and Philip Van Pelt, Charging Parties, v. School District of Broward County, Florida, Respondent,* 12 FPER ¶ 17231, 1986 WL 1236034 (1986)**.

The issue of the union's standing to institute the grievance process with respect to an individual personnel decision such as the non-renewal letters in this case is a central point of contention in this arbitrability proceeding. The University fully acknowledges that, *as a general matter*, "labor organizations do have standing to seek the enforcement of rights conferred upon employees by reason of their employment relationship, by bringing suit on behalf of their members." ***Fredericks v. School Board of Monroe County*, 307 So.2d 463, 465 (Fla. 3rd DCA 1975)**. And a union, through the grievance procedure, may police the collective bargaining agreement which it has negotiated. Thus the certified bargaining agent is generally permitted to file and process grievances involving the interpretation or application of a collective bargaining agreement in its own name. ***Duval County School Bd. v. Duval Teachers United, FEA/United, AFT, AFL-CIO, Local No. 3326*, 393 So.2d 1151 (Fla. 1st DCA 1981)**.

However, parties are free in their CBAs to agree to modifications or limitations concerning the grievability of certain issues, who has standing to pursue certain grievances, and the procedures to be followed in pursuing grievances. And Florida law is clear that an arbiter or other neutral does

[4] It is understood that certain faculty who have been with the University since it was a part of the University of South Florida have a legacy tenure which the CBA continues to recognize. However, the University's action with respect to the RHM Program did not implicate any of those faculty members.

not have the power to add to, subtract from, modify, or alter the terms of a collective bargaining agreement. See, Florida Statutes § 447.401.[5]

It is the University's position that based simply upon this provision, and setting aside its additional arguments to follow, the University's issuance of non-renewal letters to the faculty of the RHM Program did not create an event *the union* had standing to grieve *in its own name*. First, Florida law provides that the Public Employees Relations Commission "must look to the contract to determine if the grievances are arguably arbitrable. The *precise language of the contract is the cornerstone of that analysis*." ***Juan Eguino, Daisy Spira, and Rafael Chang-Muy, Charging Parties, v. City of Miami, Respondent*, 40 FPER ¶ 23 (2013) Florida Public Employees Relations Commission November 7, 2013**. Clear and unambiguous terms must be given their meaning, which means that arbitrators are not free to alter terms to remedy inequities. ***City of Greenacres, Florida and Grievant*, 12-2 ARB ¶ 5654**.

Under the plain language of § 12.3, only "an employee" retains the right to file a grievance with respect to a decision to not renew a faculty member, and even then, the faculty member's grievance would have to address specific matters including allegations of constitutional rights violations. Article 20 of the CBA addresses the informal resolution/grievance/arbitration process to be used by the parties. Consistent with § 12.3's "an employee" language, § 20.2(E)(2) and (3) of the CBA expressly and clearly set forth that a Member (*but not union*) may file a grievance after 21 days if no resolution or if parties agree the informal resolution process is not possible.

Providing further clarity to the parties' intent with respect to the fact that there is a distinction in their agreement between the rights of the union (in its own name) and individual Members, to file grievances depending on subject matter, § 20.3(B) expressly provides that the union may only file a grievance "in a dispute over application of a provision of this Agreement which confers rights upon the [union]."[6]

The rules of statutory construction are equally applicable and of assistance when interpreting the terms of a collective bargaining agreement. Various such rules bear upon the question of the union's standing to file a grievance related to individual personnel actions as to specific Members. First, the "harmonious reading" rule provides that the provisions of a text should be interpreted in a way that renders them compatible, not contradictory. In this case, reading out the distinction in Article 20 with respect to the union's rights to file a grievance in its own name as opposed to the right of individual Members to file grievances for themselves would create an incompatibility with the provision in § 12.3 that "an employee" is entitled in limited circumstances to grieve a non-renewal.

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[5] "A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. * * *" Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv.L.Rev. 999, 1016.

[6] While the union may attempt to argue that it has rights in the entire CBA, clearly it possesses rights unto itself apart from its Members such as those set forth in Article 1 (concerning recognition of the union and its rights at Trustee meetings, maintenance of its website, etc.), Article 2 (which affords local union officers with the right to have informal consultations with the University's administration, and Article 3, affording union officers certain privileges to utilize paid time to conduct union business.

Then, there is the General/Specific Canon (*generalia specialibus non derogant*). This cannon provides that if there is a conflict between a general provision and a specific provision, the specific provision prevails. Again, since the parties to the CBA made clear distinctions in Article 20 with respect to the definition of "Grievant" between "a member of the bargaining unit or group of members" and "the UFF-FGCU", that distinction (mirrored in § 12.3) should be given its intended effect by the Arbitrator.

Finally, the doctrine of *in pari materia* provides that passages within an entire cohesive body of law (such as the CBA at issue) are to be interpreted together, as though they were one law. Failing to give effect to the requirement of § 12.3 that only Members (and not the union) have any standing to challenge non-renewal notices would be a failure to read it in conjunction with Article 20's clear distinction between issues the union, in its own name, may grieve vs. those which individual employee Members may grieve.

When, in May of 2019, the University's long examination of the RHM Program was drawing to a close and it began to solidify and communicate its management decisions with respect to re-positioning the Program, the union may have had the option to pursue some general elements of the University's plans or implementation procedures within the context of its rights under the dispute resolution article were it able to show that one or more terms of the contract which "conferred rights upon it", that is not what occurred. Rather, the union, in its own name, filed a grievance document which generically invoked a host of article numbers, then specified that it was directed at the University's "issu[ance of] non-reappointment letters on May 21, 2019 to Sugden Resort & Hospitality Management program faculty" and sought as relief that the University "shall rescind the letters of non-reappointment issued on May 21, 2019", that the University "shall honor the continuing multi-year appointment by maintaining employment for the affected faculty through May 2022", that the University shall not engage in reprisals, and that the University "shall make affected faculty whole."

In ***Spokane School Dist. No. 81 v. Spokane Educ. Ass'n*, 182 Wash. App. 291, 331 P.3d 60, 307 Ed. Law Rep. 444 (Div. 3 2014)**, the court had for consideration a school counselor's attempt to challenge her non-renewal (a matter which under the CBA was also not arbitrable) by challenging the school district's evaluation and discipline procedures. However, the court ruled that the school counselor's claims of progressive discipline, retaliation, and procedural violations under the CBA, brought after her non-renewal by the district, were not arbitrable as distinct grievances from a challenge to evaluation and non-renewal decisions, given *the remedy she sought was* an arbitrator-ordered *additional year of provisional status*, where by express terms of the CBA, evaluation and non-renewal decisions were not arbitrable.

In sum, the Arbitrator should find that the union does not have the standing under the CBA to challenge individual notices of non-renewal, and that if a member of the faculty should receive such a notice, it would be up to her or him to follow the grievance resolution process of Article 20, as required by § 12.3, to the extent the faculty member feels she or he has a grievable issue under the limited provisions of that section. Since the union did not have standing to file a grievance over the non-renewal letters, the University respectfully urges the Arbitrator to find that the grievance the union had filed is not arbitrable.

II. WERE THE GRIEVANCE PROCEDURE REQUIREMENTS COMPLIED WITH?

The second reason why the grievance form filed by the union is not subject to processing is that even if its content had addressed an issue grievable by the union, the procedures within the CBA were not complied with. It is a well settled principal that a party, when bound by a collective bargaining agreement, must exhaust any administrative remedy prior to litigating in court. See, ***Kantor v. Sch. Bd. of Monroe County*, 648 So.2d 1266 (Fla. 3rd DCA 1995)** ("To the extent that appellant contends there was a violation of a provision of the collective bargaining agreement, appellant was obliged to resort to the grievance procedure specified therein.").

According to § 20.2(A) of the CBA, a grievance cannot be filed until the member "has timely requested an informal resolution." Informal resolution requests must be made "within 30 days of the act…giving rise to the dispute." Sec. 20.2(B). Informal resolution requests not filed within 30 days of the disputed act cannot be formally grieved. Sec. 20.2(C) and Sec. 20.14(B). Accepting that the non-renewal letters of May 21st 2019 constitute the "act giving rise to the dispute", then the members of the union who were given non-renewal letters would have had to have requested informal resolution by June 21st 2019. None of those members[7] have done so.

While it is true that the union's officers may assist and represent individual members in the dispute resolution process, the union itself cannot step into the shoes of a member and assert a right that only a member has.[8] Rather, where the CBA grants a dispute resolution right to individual employees but removes that right from the union itself, then, to the extent that an employee covered by the CBA contended there was a violation of a provision thereof, the employee will be obliged to resort to the grievance procedures specified therein. ***Kantor v. School Bd. of Monroe County*, 648 So. 2d 1266, 97 Ed. Law Rep. 598 (Fla. 3rd DCA 1995)**. In this case, none of the members who received non-renewal letters took any steps to request informal resolution or to file a signed grievance in their own names. In ***Public Health Trust v. Hernandez*, 751 So.2d 124 (Fla. 3rd DCA 2000)**, a terminated public employee was informed that he had the right to appeal his termination using a four-step grievance procedure outlined in the parties' collective bargaining agreement. Rather than follow those steps, the employee filed a circuit court petition seeking an order to arbitrate. However, the appellate court ruled:

> Hernandez was contractually obligated to exhaust his administrative remedies by following the four-step grievance process prior to litigating in court. He failed to do so, and thus the petition to compel arbitration should have been denied.

***Public Health Trust*, at 125**. As a result of the inaction of the individual RHM Program faculty members in this case, the non-renewal letters they received are not now able to be challenged. See,

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[7] Pursuant to §20.3(B), if a dispute impacts several members, these members may agree in writing to consolidate their grievances, but *each member must sign the grievance form*.

[8] Indeed, under § 20.6(F)(1)(a), if a grievance is not resolved, it is the right of the Member to request the union to seek arbitration.

***Jeff Yonce and Mary Anderson, Charging Parties, v. Big Bend Police Denevolent Assn., Inc., Respondent,* 22 FPER ¶ 27026, 22 Florida Pub. Employee Rep. ¶ 27026, 1995 WL 17944977 (December 6, 1995)** (Where specific employees were allegedly negatively impacted by the resolution of a grievance did not, themselves, file a grievance, the did not have standing to challenge the employer's decision.).[9]

Next, informal resolution requests must be in writing and "contain a brief, general description of the facts relating to the dispute [and] identify the relevant provisions of the Agreement that are at issue." Sec. 20.2(D). In this case, the May 28th email from the local president did not contain "a brief, general description of the facts relating to the dispute and identify the relevant provisions of the CBA at issue." Rather, it amounted to nothing more than a request for consultation with the union on a broader generalized topic of concern surrounding the general process of non-renewal. Since the University's administration is always open to consultation with the union's officials when such is requested, such consultations (conducted pursuant to Article 2, not Article 20) are not transmuted into grievances simply because the union desires to characterize them as such.[10]

Next, the CBA very explicitly prohibits the union from having the right to file a grievance unless that grievance addresses a specific provision of the CBA which "*confers rights upon it*." The form submitted by the union president merely listed a host of CBA chapters, and made no attempt to list specific provisions of those chapters which conferred rights upon the union which were alleged to have been violated.

The next procedural flaw is that even if the union had the right to file the grievance at issue, and even if that grievance contained a grievable topic, the union failed to wait for the requisite time period. To be sure, the University does not consider the union to even have standing to have pursued the non-renewal letters matter on its own, does not consider the topic of non-renewal to be generally grievable (except for the circumstances set out in § 12.3), and thus does not believe any of the procedures in Article 20 were in play as it engaged with the union on the issue.

However, the union's position is that Article 20 *did* apply and that the University is violating it by not treating its grievance form as arbitrable. The only problem with that for the union is that it can't have its cake and eat it too. If the union intended for its efforts to be in compliance with the informal resolution process set forth in Article 20 (a required precursor to formal grievance), then it was required to comply with the timeframes set out in Article 20 as to that process. Under §

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[9] "A limitations period for filing a grievance is primarily for the employer's benefit since it extinguishes any claim against the employer for a particular action on the employer's part. Consequently a unilateral action on the part of the Union cannot cause a waiver on the Employer's part of strict enforcement of the time limit for filing a grievance." ***UIC United Faculty Local 6456, IFT-AFT, AAUP (Non-Tenure Track System Faculty) and University of Illinois at Chicago*, Lab. Arb. Awards 18-1 ARB P 7090** (finding employee who did not comply with the clear time limits set forth in the CBA resulted in the grievance not being procedurally arbitrable).

[10] As the records submitted in this matter reveal, University officials engaged on numerous occasions with the UFF-FGCU's officers and its impacted Members both prior to the formal changes being announced and specifically as to the non-renewal letters and how they fit into the larger changes the University is implementing in the Resort & Hospitality Management program. In spite of this proceeding and the fact that it cannot lead to the relief the union's grievance form sought, the University will continue to engage in consultations with the union as the process of reforming the RHM Program proceeds.

20.2(E), if an informal resolution request is timely filed, the Office of Academic Affairs (OAA) and the Member have 30 days (plus agreed extensions) to attempt resolution. Under § 20.6(A)(1), a grievance must be filed "no later than 7 days *after the end of the [30-day] informal resolution period*."

Even if the union's subsequent attempt to file a grievance form, taking May 28th 2019 as the beginning of the informal resolution process (this is the date the union's Tallahassee representative's August 27th email asserts to be the date on which the union initiated the process), then by the union's own date, it would not have been able to submit a grievance form until June 29th.[11] Since the union submitted a grievance form on June 17th 2019, even if it had been valid, the submission was premature and thus did not have to be processed by the OAA.[12]

Next, pursuant to § 20.3(A) , "*Grievance*" is defined as a "dispute…concerning the interpretation or application of a specific term or provision of the CBA." Even if the union had the right to submit a grievance on behalf of one or more members without naming them or having them sign the grievance, and even if the union had waited the requisite 30 days during what it feels was its informal resolution process, the grievance was still deficient. The form filed by the union president simply called out a series of CBA chapter numbers, then throwing in catch-all "and others that may also apply" language. This form of grievance is inconsistent with the CBA's mandate that a grievance invoke *specific terms or provisions* over which a dispute exists. It is fundamentally unfair to ask the employer to comb through a host of CBA chapters to attempt to divine which exact provisions a grievant is really wanting to focus on, and the law will not mandate such effort.

Finally, § 20.6(F)(1)(d) of the CBA requires that all arbitration requests "*shall* be signed by the grievant[s]." Emphasis added. The arbitration form submitted to the University which is of record in this matter clearly shows that it was not signed by any of the non-renewed faculty members.

For all of the foregoing procedural reasons, the Arbitrator must rule that the grievance form submitted by the union is not arbitrable.

III. DID THE GRIEVANCE FILED ON JUNE 17TH 2019 ADDRESS A GRIEVABLE/ARBITRAL ISSUE?

The mere existence of a dispute between an employee and an employer does not make the disputed matter subject to the arbitration procedures of a collective bargaining agreement. ***Board of Educ. of City of Chicago v. Illinois Educational Labor Relations Bd*., 14 N.E.3d 1092, 307 Ed. Law Rep. 1038 (App. Ct. 1st Dist. 2014), judgment aff'd, 69 N.E.3d 809, 340 Ed. Law Rep. 463, 205 L.R.R.M. (BNA) 3093, 166 Lab. Cas. (CCH) P 61678 (Ill. 2015)**. As no less an authority

[11] The CBA does allow a *Member* to submit a grievance after 21 days, but does not afford the *union* that same right.

[12] Grievances not submitted following the Article 20 process will not be considered by the University. Sec. 20.14(B). To the extent the union's position is that its own grievance form satisfied the requirement that aggrieved members file, that would not be a valid position. The grievance form did not even name the members who had received the letters. Rather, the name of the grievant written on the form was the local Chapter itself. The CBA is very clear that if more than one member with a similar grievance seeks to file a joint grievance, they all may do so, but only after each sign the grievance form. The form the union submitted was only signed by the union president.

than the United States Supreme Court has observed: "If a contract specifically excludes an issue from arbitration, it should not be arbitrable." ***Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 581, 80 S.Ct. 1347, 1352, 4 L.Ed.2d 1409 (1960)**.

The question of whether a given dispute is within the scope of a specific arbitration clause presents a problem which is in no sense peculiar either to arbitration or to collective bargaining contracts. It is merely that of interpreting a written agreement. The court[13] searches for the intent of the parties, found at times in its plain language, and at others in the surrounding circumstances and in those factors which the court commonly calls to its aid in the process. The intent so found is either that clearly expressed, or that ascertained from the language read in the light of these aids. ***Texoma Natural Gas Co. v. Oil Workers International Union*, 58 F Supp 132 (D.C. Tex. 1943), aff'd on other grounds, 146 F2d 62 (5th Cir.), cert. den., 324 U.S. 872, 65 S.Ct. 1017, 89 L.Ed. 1426, reh den, 325 U.S. 893, 65 S.Ct. 1183, 89 L.Ed 2004**.

After generations of the development of labor law in this country, it is now 'black letter law' that an agreement in a CBA to arbitrate may either embrace "any" or "all" disputes between the parties, or may be limited to specific disputes designated therein. **24 A.L.R.2d 752**. In determining the arbitrability of a dispute between parties to a collective labor contract the main factor to be considered is the scope of the arbitration agreement contained therein. The power and authority of the arbitrators is derived from and limited by the terms of this agreement. **Id., at § 3(a)**. Since arbitration is creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute, and in this sense, the question of whether a dispute is arbitrable is inescapably for a court to consider. ***International Longshoremen's Ass'n, AFL-CIO v. New York Shipping Ass'n*, 403 F.2d 807, 69 L.R.R.M. (BNA) 2738, 59 Lab. Cas. (CCH) P 13072, 1968 A.M.C. 2572 (2nd Cir. 1968)**. Parties to a collective bargaining agreement (CBA) can only be compelled to arbitrate matters to which they have agreed in the CBA, and *matters specifically excluded* by the parties from arbitration *need not be arbitrated*. ***Bakery Confectionery Tobacco Workers and Grain Millers Intern. Union, Local 116, AFL-CIO, CLC v. Wegmans Food Markets, Inc*., 66 F. Supp. 3d 333 (W.D. N.Y. 2014)**. "…[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." ***Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960)**. Therefore, the inquiry of a court or arbitrator considering the question of arbitrability "must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made." **Id**.

In deciding whether a labor dispute is subject to arbitration, a court must be guided by four principles:

> (1) *a party cannot be forced to arbitrate any dispute that it has not obligated itself by contract to submit to arbitration*;

[13] While most caselaw speaks to the court as being the entity to decide whether a given contractual dispute is arbitrable, it is undisputed that parties can agree to delegate arbitrability, or "gateway" issues concerning the scope and enforceability of the arbitration agreement and whether the dispute should go to arbitration at all, to the arbitrator. ***SanDisk Corporation v. SK Hynix Inc*., 84 F. Supp. 3d 1021 (N.D. Cal. 2015)**.

(2) unless parties clearly and unmistakably provide otherwise, whether a collective bargaining agreement creates duty for parties to arbitrate a particular grievance is a question for judicial determination;

(3) in making this determination, a court is not to consider the underlying claim's merits; and

(4) where the agreement contains an arbitration clause, a court should apply a presumption of arbitrability, resolve any doubts in favor of arbitration, and should not deny an order to arbitrate unless it may be said with positive assurance that the arbitration clause is not susceptible of interpretation that covers the asserted dispute.

***Fletcher v. Honeywell International, Inc*., 207 F. Supp. 3d 793, 62 Employee Benefits Cas. (BNA) 2453, 2016 L.R.R.M. (BNA) 300368 (S.D. Ohio 2016)**. Emphasis added. See also, ***International Union v. Cummins, Inc*., 434 F.3d 478, 37 Employee Benefits Cas. (BNA) 1362, 152 Lab. Cas. (CCH) P 10598, 2006 FED App. 0022P (6th Cir. 2006)** (Party to a collective bargaining agreement cannot be forced to arbitrate any dispute that it has not obligated itself by contract to submit to arbitration.).

To overcome the presumption of arbitrability that arises when a CBA contains a generally applicable arbitration clause, a party must show either an *express provision excluding the grievance from arbitration* or the most forceful evidence of a purpose to exclude the claim from arbitration. ***Karl Schmidt Unisia, Inc. v. International Union, United Auto., Aerospace, and Agr. Implement Workers of America, UAW Local 2357*, 628 F.3d 909, 50 Employee Benefits Cas. (BNA) 2052, 189 L.R.R.M. (BNA) 2999, 160 Lab. Cas. (CCH) P 10326 (7th Cir. 2010)**. See also, ***Paper, Allied-Industrial Chemical and Energy Workers Intern. Union, Local 4-12 v. Exxon Mobil Corp*., 657 F.3d 272, 191 L.R.R.M. (BNA) 2705, 161 Lab. Cas. (CCH) P 10408 (5th Cir. 2011)** (To determine whether labor union's grievances were arbitrable, court had to examine scope of parties' agreement, as reflected in arbitration clause.); ***Exelon Generation Company, LLC v. Local 15, International Brotherhood of Electrical Workers, AFL-CIO*, 140 F. Supp. 3d 751, 2015 L.R.R.M. (BNA) 192466 (N.D. Ill. 2015)** (To determine whether parties to a CBA have committed a given dispute to arbitration, a court must foremost look to whether the dispute is, on its face, governed by the CBA's arbitration provision.).

The subject of contract interpretation and application has been addressed by Arbitrator Jay Grenig who identified several relevant principles which apply to the present case. He wrote:

> "It is frequently stated that arbitrators are required to give effect to the literal meaning of the contract's language without consulting other indicia of intent or meaning when the language is "plain" or "clear and unambiguous." An arbitrator's failure to follow language that is found to be clear and unambiguous may result in the award being vacated. Language is ambiguous if it is reasonably susceptible to more than one meaning. Language is not ambiguous if an arbitrator can determine its meaning without any other guide because the words of the agreement are plain and clearly convey a distinct idea." pgs. 9-5 to 9-6.

> "Initially one must look at the language of the collective bargaining agreement itself for evidence of what the parties intended. Since the words in the contract are chosen by the parties to express their meaning, the words are the most important single factor in ascertaining the parties' intent. When experienced negotiators have drafted a collective bargaining agreement, the presumption is that they understood what they were doing… ." p. 9-7.

"*Contract Interpretation and Respect for Prior Proceedings*," Labor and Employment Arbitration, Eds. Tim Bornstein, Marc Greenbaum, and Ann Gosline, New York: Matthew Bender, 1997.

While the University and Union in this case have agreed on a dispute resolution policy which encompasses many elements of their CBA, they have agreed to certain limitations. Relevant to this case, and as noted earlier, § 12.3 of the CBA provides as follows:

> Grievability. *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*. Such grievance process must be filed with the Office of the Provost within thirty (30) days of receipt of the statement of the basis for the decision not to reappoint pursuant to Section 12.2 E above or receipt of the notice of non-reappointment if no statement is requested.

Emphasis added. While the non-renewal letters may have been subject to the invocation of the informal resolution process and grievance process *by any of the individual faculty members who received them* (assuming they properly invoked one or more of the reasons set forth in § 12.3 as allowing such an action to be grieved), such issues were clearly and expressly carved out of the purview of the union to file on its own. Therefore, the grievance form did not address a grievable issue, and thus the resulting dispute the union wishes to proceed to arbitration is not arbitrable and the Arbitrator should so rule.

The relief the University requests (a ruling that the issuance of a non-renewal letter is not arbitrable absent the employee who received the letter directly invoking his or her right to dispute it under the limited reasons provided for in § 12.3 of the CBA), is not novel. Many other courts, arbitrators and labor bodies have upheld the right of parties to exclude from arbitration certain topics. For instance, in ***Frederick Meiswinkel, Inc. v. Laborers' Union Local 261*, 744 F.2d 1374, 117 L.R.R.M. (BNA) 2649, 102 Lab. Cas. (CCH) P 11217 (9th Cir. 1984)**, the appellate court ruled that while arbitrator in a labor dispute arising out of a collective bargaining agreement could properly determine the arbitrability of the dispute, arbitrator erred in concluding that he had jurisdiction over union's jurisdictional dispute, where the collective bargaining agreement's arbitration clause specifically excluded union jurisdictional disputes from the arbitration process.

And, in ***Superintending School Committee of City of Portland v. Portland Teachers' Ass'n*, 338 A.2d 155, 90 L.R.R.M. (BNA) 2597 (Me. 1975)**, the court ruled that a dispute concerning school class size was not arbitrable, where the article of the agreement dealing with class size specifically provided that nothing therein was to be construed as a contractual obligation on part of the school

committee, and that the class size topic was not subject to the grievance procedure. See also, ***Carmel Central School Dist. v. Carmel Teachers Ass'n*, 76 Misc. 2d 63, 348 N.Y.S.2d 665, 74 Lab. Cas. (CCH) P 53353 (Sup 1973)** (Dispute between board and teachers' association involving elimination of 5 positions by board was not arbitrable under arbitration provisions of contract.); ***Stillings v. Franklin Twp. Bd. of Trustees*, 97 Ohio App. 3d 504, 646 N.E.2d 1184 (9th Dist. Summit County 1994)** (Police officer's grievance that he was terminated without just cause was not arbitrable where provisions of collective bargaining agreement's management rights and grievance clauses clearly and unambiguously established that employee discipline was matter that had been reserved to township board of trustees and was not covered by terms of collective bargaining agreement.); ***Marlboro Tp. Bd. of Educ. v. Marlboro Tp. Educ. Ass'n*, 299 N.J. Super. 283, 690 A.2d 1092 (App. Div. 1997)** (Township board of education's decision not to renew bus driver's contract was not arbitrable under collective bargaining agreement; agreement and board policy expressly incorporated by agreement indicated that bus driver's employment could be ended without cause, board merely exercised its clearly enunciated contractual right not to renews her contract, and board did not purport to discipline driver.); ***Waterford Association of Educational Secretaries v. Waterford School District*, 95 Mich App 107, 110 (1980)** (Arbitration is a matter of contract. It is well established that a party cannot be required to arbitrate a dispute, where it has not agreed, contractually, to do so.); ***Port Huron Area School District v. Part Huron Education Association*, 426 Mich 143, 151-152 (1986)** (Article XI (12) evidences the undisputed intent to ensure that the Grievance procedure would not be applicable to any dispute related to the failure "to employ or re-employ a teacher in an extra-duty assignment." The Grievance is an obvious attempt to circumvent this clear contractual language and to defy reality.).

Additionally, arbitrators uniformly have rejected attempts by unions and employees to circumvent contractual language, excluding disputes from the grievance procedure or the arbitration level of the grievance procedure, such as in (1) a non-renewal case (***Centerville Public Schools and Centerville Education Association*, AAA 54 39 0551 74, Howlett, 1974**); (2) a case of two probationary teachers (***Flint Board of Education and United Teachers of Flint*, AAA 54 39 0941 80/54 39 2909 80, Roumell, 1981**); (3) the failure of a school district to re-employ any teacher to a position on the extra-curricular schedule (***Schwartz Creek Schools and Swartz Creek Education Association*, AAA 54 39 2198 81, Roumell, 1981**); and (4) a case involving one teacher's evaluation and her placement within a performance improvement plan (***East Jackson Community Schools and Jackson County Education Association*, AAA 54 39 1491 91, Patton, 1992**).

Various analogous arbitrability decisions exist which confirm the University's position as to arbitrability in this matter. First, in ***Bridgman Public School District and Bridgman 5-C Education Association (MEA/NEA)*, Lab. Arb. Awards 94-1 ARB P 4041 (March 16, 1993)**, the arbitrator addressed a grievance protesting a teacher's removal from certain coaching positions. The CBA provided that "Failure to employ or re-employ a teacher in an extra-duty assignment… shall not be the basis of any grievance filed under the procedures outlined in this Article…" While the union argued that the arbitrator needed to examine the entire CBA "as a whole" where other general language could be argued to address the employer's action, the arbitrator concluded the specific exclusion clause must control:

> In conclusion, while the Association indicated that it was not challenging the nonrenewal clause within the contract, its challenge to the District's exercise of its management rights

> in decisions about the renewal of such contracts, in effect, to the detriment of the Grievant's contractual due process rights, cannot be given arbitral consideration, concomitantly, within arbitral consideration of the "whole" contract, as the Association itself requested. While the Association made very vigorous and tempting due process arguments for this Arbitrator to consider, he has been prevented here from considering such arguments or even commenting, generally, upon their impact. Within the very clear and mutual intent of the Parties within this collective bargaining Agreement, to keep all extra duty employment matters external to the very grievance procedure from which arbitral authority is to be exercised properly, this Arbitrator has no discretion whatsoever. Even though the Association is correct, that nothing within the specific due process language of Article 4 excluded such rights to those who also possess extra duty contracts, its attempt, to move this dispute into the contractual grievance procedure itself, is prohibited. The basic, exclusionary language within Article 11 (12-c) for those with such extra duty assignments, exists in a determinatively significant and binding manner, to prevent any such relief or enforcement of due process rights from being administered by an arbitrator in the matters of employment or re-employment of teachers in extra duty assignments within this formalized employment relationship.

See also, ***Michigan Professional Employees Society and Michigan Department of Environmental Quality*, Lab. Arb. Awards 99-1 ARB P 5528 (January 20, 1998)** (Because the parties' agreement excluded the matter from review, an arbitrator lacked jurisdiction to entertain a grievance alleging that an employer had exercised its contractual management rights to 'arbitrarily and capriciously' deny a grievant's request for hardship leave. In this instance, the parties' agreement expressly provided that grievances concerning hardship transfers could proceed no further than 'Step 3' of the grievance procedure—Step 4 being arbitration); and ***Teamsters Local Union No. 117 and Washington State Department of Corrections*, Lab. Arb. Awards 16-2 ARB P 6704 (June 07, 2016)** (grievance not grievable where the CBA gave the employer the right, with proper notice, to revert an employee who did not perform satisfactorily, and the CBA clearly stated that reversions were not subject to grievances.).

This case is most closely analogous to the arbitration case of ***University of South Florida and United Faculty of Florida, USF Chapter*, Lab. Arb. Awards 16-2 ARB P 6697 (January 13, 2016)**. In that case, the grievant was an instructor at the USF Manatee Campus' College of Hospitality and Technology Leadership. His complaint stemmed from a letter of non-reappointment he received from the University dated August 6, 2014, informing him of his non-reappointment to his position as an Instructor. In a manner very similar to that which occurred in this case, the USF administration informed the instructor that "The university has decided to move in a different direction and wants to appoint tenure track faculty to the college."

The instructor (not his union) filed a grievance asserting that he was entitled to be placed into a different open faculty position. However, USF's CBA contained the following provision:

> **Grievability**. 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. Such grievances must be filed within thirty (30) days of receipt of the statement of the basis for the decision not to reappoint pursuant to Section E above or receipt of the notice of non-reappointment if no statement is requested.

Non-Reappointment Considerations. If the decision not to reappoint was based solely upon adverse financial circumstances, reallocation of resources, reorganization of degree or curriculum offerings or requirements, reorganization of academic or administrative structures, programs, or functions, and/or curtailment or abolition of one or more programs or functions, the University shall take the following actions:

A. Make a reasonable effort to locate appropriate alternative or equivalent employment within the University; and

B. Offer such employee, who is not otherwise employed in an equivalent full-time position, re-employment in the same or similar position at the University for a period of two years following the initial notice of non-reappointment, should an opportunity for such re-appointment arise. For this purpose, it shall be the employee's responsibility to keep the University advised of the employee's current address. Any offer of re-employment pursuant to this section must be accepted within fifteen (15) days after the date of the offer, such acceptance to take effect not later than the beginning of the semester immediately following the date the offer was made. In the event such offer of re-employment is not accepted, the employee shall receive no further consideration pursuant to this Article.

Based on this provision, USF argued that its decision to not renew the instructor was a reserved management right which was not grievable. In assessing the case, the arbitrator wrote:

> It is clear that the parties do not intend for an arbitrator to serve as an appellate court to a judgment made by an administrator in a discretionary matter. This limitation on arbitral authority is critical to the analysis of the Grievant's claim because non-reappointment is undoubtedly an exercise of a managerial judgment that a particular employment relationship is not in the best interests of the University and a different direction is needed. Non-reappointment decisions are distinct from discipline as contained in Article 16 of the CBA; hence there is no requirement that the University make a case for incompetence or misconduct. Rather, non-reappointment is simply an exercise of managerial prerogative to end an employment relationship with proper notice given. Whether the University's judgment was flawed is immaterial to the ultimate outcome of this case as the discretionary judgments of management are not within the jurisdiction of the arbitrator, absent some other violation of the CBA.
>
> In that regard, the specific contract provision which the Union claims the University has violated by failing to provide alternate employment to the Grievant following his non-reappointment is Article 12.4. When applicable, Article 12.4 places two responsibilities on the University:

> A. Make a reasonable effort to locate appropriate alternative or equivalent employment within the University.
>
> B. Offer such employee, who is not otherwise employed in an equivalent fulltime position, re-employment in the same or similar position at the University for a period of two years following the initial notice of non-reappointment, should an opportunity for such re-employment arise.…

The catalyst for these requirements lies in the preceding paragraph of 12.4 which mandates that this obligation to seek and offer alternative employment is required only if the decision not to reappoint was based solely on certain enumerated considerations. Article 12.4 reads:

> Non-Reappointment Considerations. If the decision not to reappoint was based solely upon financial circumstances, reallocation of resources, reorganization of degree or curriculum offerings or requirements, reorganization of academic or administrative structures, programs or functions, and/or curtailment or abolition of one or more programs or functions, the University shall take the following actions… (emphasis supplied)

It is the Union's position that the University's decision not to reappoint the Grievant triggered a duty for the University to find suitable alternative employment for him pursuant to 12.4 A and 12.4 B because the sole reason for his non-reappointment was in fact one of the considerations listed in 12.4, specifically, a "reallocation of resources." As support for its contention, the Union points out that in response to the Grievant's request for a written explanation of the basis for the decision not to reappoint, Dr. [B] stated that the University had "decided to move in a different direction and wants to appoint tenure track faculty to the college." Although the University has maintained that the decision to move in a different direction is a distinct and separate reason from appointing tenure track faculty to the college, the Union insists that the University's interpretation is inconsistent with the plain language of the sentence in question. Simply stated, in the Union's view the University's desire to appoint tenure track faculty was precisely how it was moving in a different direction. The decision to appoint tenure-track faculty is another way of stating that the funding that paid the Grievant's salary was being redirected to hire tenure-track faculty and this can only be considered as a "reallocation of resources." Because the University had decided not to reappoint the Grievant solely as a measure to reallocate resources, Article 12.4 is triggered and the University is obligated to take action under 12.4 A and 12.4 B to locate and offer other suitable employment.

On the other hand, it is the University's position that the Union cannot meet its burden of proving a contractual violation because Article 12.4 does not apply where there is at least one reason for the non-reappointment outside of Article 12.4, which is the case here. There were two distinct reasons for the Grievant's non-reappointment which were based on the University's determination that: (1) more tenure track positions should be created and (2) instructors in the College should have Ph D,'s. Because the latter reason does not fall within the considerations contemplated under 12.4, the decision cannot be said to have been based solely on the reasons set forth in that provision, and therefore Article 12.4 simply is not

applicable. Furthermore, because Article 12.4 does not apply to the Grievant's non-reappointment, the question of a remedy is not reached. However, even assuming arguendo that the Grievant's non-reappointment should have addressed the considerations of Article 12.4, the Grievant still has no remedy because USF's actions to locate alternate employment were consistent with Article 12.4 A and the Grievant was not qualified for any open positions identified under 12.4 B.

Having given due consideration to the positions and arguments of both parties, the only proper conclusion that can be reached in this case is that the University's actions relative to the Grievant's non-reappointment did not violate Article 12.4 because the overwhelming weight of the evidence supports a finding that the decision to non-reappoint was based on considerations outside of Article 12.4. Specifically, with respect to its decision not to reappoint the Grievant, it is clear that University management made a judgment that involved a move in another direction relative to the College of Hospitality and Technology Leadership. The decision was made that instructors in that College should have Ph.D.'s in order to raise the quality of the academic unit; and, as a separate objective, management wished to increase the number of tenure track faculty in the College over-time.

The University's motivation for insisting upon a higher credential is that it recognizes that as a terminal degree (i.e. the highest professional degree), the Ph.D. signifies additional training, education, experience and achievement beyond the undergraduate and master's level. Also, since the Ph.D. is routinely conferred after a research-based dissertation, in the judgment of University management the Ph.D. predicts research productivity that can translate into a better quality of instructional material in the classroom.

The Union nevertheless argues that despite the University's apparent preference for a Ph.D., USF's System Policy 10-115 provides that the minimal qualification for instructors is a Master's degree in an appropriate field of specialization. The Grievant testified without contradiction that he met the requisite qualifications, holding a Master's degree in Computer Science and having served as an Instructor at USF.

However, the fact that the Grievant met the policy's minimum requirements for an instructor position quite frankly misses the point. The fact that an academic unit could, at a minimum, employ instructors who did not possess Ph.D's proves nothing where management has the authority to assist on a higher credential; indeed, the ability to control job requirements and qualifications is a customary and inherent function of management. (CBA Article 4.1). Moreover, USF System Policy 10-115, the very provision relied upon by the Union, says as much: "[d]epartments may develop their own formal credentialing procedures." This clearly translates into a discretionary right of an academic unit to determine what credentials its faculty must possess to meet competency. In the instant case management was well within its rights to decide that the Ph.D. was the appropriate credential to meet the mission and goals of the College.

It is similarly well-established that it is within management's discretion to reallocate resources, subject to any limitations imposed by the CBA. In this case, in addition to insisting upon a Ph.D., USF management also made the decision to increase the number of

tenure track faculty, which given budgetary constraints, meant that resources had to be identified to fund that increase. The additional funds were made available, in part, by reallocating monies designated to support instructors. It is noteworthy, however, that no instructors with Ph.D.'s were laid off or issued notices of non-reappointment, and all current instructors in the program have Ph.D.'s. These facts are of particular importance because they highlight the two separate reasons underlying the decision not to reappoint the Grievant: the University's judgment that (1) instructors in the college should have Ph.D.'s, and (2) more tenure track positions should be created. If the University's objective were solely to reallocate funds to new tenure earning faculty positions, then all instructor positions should have been eliminated, but there is no evidence that this was the case here. The simple fact of the matter is that having instructors with Ph.D's was a legitimate managerial objective. The Grievant could not satisfy this objective because he does not have a Ph.D.

Furthermore, there has been no showing that the requirement for instructors to hold Ph.D.'s was caused by, or in any way related to, adverse financial circumstances or a reallocation of resources. Similarly, there is no evidence that academic structures were changed, that degree offerings were changed in the College, and undeniably the program has not been abolished. As Dr. [I] aptly noted in his Step 2 decision in this matter: "[t]he explanation by the University that it wishes to go in a different direction does not invoke any of the conditions enumerated in Article 12.4. [The Grievant] does not possess a terminal degree."

In sum, having determined that there were two distinct reasons guiding management's judgment not to reappoint the Grievant and that only one of them is contemplated in Article 12.4 (i.e., reallocating funds), 12.4 does not apply since it is only triggered when the decision to non-reappoint is solely on one of the considerations stated in Article 12.4. On this point, the language of Article 12.4 is clear and unambiguous, and is not subject to a different interpretation. Furthermore, [E], the Union's Chief Negotiator, conceded that 12.4 does not apply when there is more than one reason for a non-reappointment, provided of course that the reasons are not entirely contained in section 12.4. Because the University's decision not to reappoint was based upon at least one consideration outside of 12.4 (i.e., the Grievant's lack of a terminal degree), the University is not required to meet the additional requirements of this Article to seek and offer alternative employment.

As a final point on this issue, although the Union has suggested that the two reasons for the Grievant's non-reappointment were thought up after the fact or pure pretext, it has produced no record evidence to refute Dr. [B]'s testimony that he honestly had two reasons in mind when he signed the April 19, 2015, letter. His contention in this regard is further supported by the his use of the word "and" which is commonly used in English grammar as a conjunction to connect words, phrases or clauses. In this regard, 'and' is synonymous with 'together with', 'along with', or 'as well as,' all of which indicate that there is more than one thing being communicated. In the case of Dr. [B]'s letter, the use of the word 'and' connects the two reasons underlying management's judgment that a non-reappointment of the Grievant was in the University's best interest.

> The Union's pretext argument is further discredited by the record evidence which shows that in at least one case where an instructor was not reappointed because a certain program that he taught was eliminated, Dr. [B] issued a non-reappointment letter on behalf of USF which contained a clear statement of the University's reemployment obligations under Article 12.4. This evidence demonstrates that University management in general, and Dr. [B] in particular, are aware of and have complied with the requirements of 12.4 in the past, when it has applied.
>
> Based upon the record as a whole, the Union has simply failed to prove that the University breached the CBA by failing to reinstate the Grievant to one of the two positions listed in his grievance following his non-reappointment. To the contrary, the University has clearly demonstrated that it acted within its managerial discretion in determining that instructors in the College should have Ph.D's, and that more tenure track positions should be created. Because the University's judgment that all instructors should hold a Ph.D. is not an enumerated consideration under 12.4, the requirement for the University to seek reemployment for the Grievant was not triggered and there was no breach of the CBA. Accordingly, his grievance is without merit and must be denied.

In this case, the University had to make a decision to either keep on doing the same thing as it had been with the RHM Program (which clearly wasn't working), eliminate the entire Program (which would negatively impact current and future students and fail to serve South Florida's substantial hospitality industry as a pipeline for future industry leaders), or to overhaul and improve the Program's rigor, accreditation, and faculty qualifications. Even if the University had to litigate the merits of its decision, it believes it had the management right to make these decisions. As in the USF case discussed above, the University's decisions surrounding the need to substantially revise the RHM Program (which included the issuance of the non-renewal letters) was driven in part by factors outside of the "Section 12.4 list" and included the need to attract more and more qualified students, the need to better serve the evolving hospitality industry with the Program, the need to secure different and more rigorous accreditation, the need to align the Program with the School of Business, and the need to obtain faculty with the knowledge, abilities and skills which would enable the newly-designed Program to be effective once the transition is complete. See also, ***Inter Faculty Organization and Minnesota State Colleges and Universities, St. Cloud University*, Lab. Arb. Awards 18-1 ARB P 7145 (April 26, 2018)**, wherein a tenured professor filed a grievance contending that the employer violated the collective bargaining agreement when it failed to hire him after a retrenchment that occurred when his department was closed. The arbitrator denied the grievance. Under the CBA, the employer was required to rehire a retrenched teacher if the teacher has sufficient ability to perform the teaching duties. The employer, however, concluded that the professor lacked the high level of expertise required for the job he sought. In addition, he had never taught classes, nor had he engaged in any research, in the field. The employer had a management right to determine the qualifications. The employer's conclusion that he lacked the necessary qualifications did not violate the CBA.

But in this case, the University strongly believes that it is entitled to receive the benefit of its bargain with the union. The parties contracted with each other in good faith for the language in § 12.3 and in Article 20. These two sources of contractual law compel the conclusion that the parties have agreed that decisions to not renew faculty are not grievable save for certain specified reasons,

and even then, only when grievances are filed by faculty members themselves, within the timeframes set forth for doing so, in the format established to do so, and setting forth the level of specificity required. That didn't occur here. The Arbitrator must therefore rule that the grievance filed by the union in the union's own name and challenging the non-renewals is not arbitrable.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **October 21st 2019**, I filed the foregoing with the Arbitrator via electronic service at mwhelan@ithaca.edu, and provided service of same on Graham Picklesimer, Union Representative, via electronic service at graham.picklesimer@floridaea.org.

/s/ ***Robert Michael Eschenfelder***
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