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In the Matter of the Arbitration :

- Between - : Re: Governance

NASSAU COMMUNITY COLLEGE :

"College" or "Employer" :

- and - :

NASSAU COMMUNITY COLLEGE :

FEDERATION OF TEACHERS :

"NCCFT" or "Union" :

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APPEARANCES

For the College

INGERMAN SMITH, LLP - Outside counsel to the College

John H. Gross, Esq., Counsel

Rose Nankervis, Esq., Counsel

Donna H. Haugen, Esq., General Counsel, NCC

Dr. W. Hubert Keen, President, NCC

For the NCCFT

Judy Sandler, Esq., NYSUT Labor Relations Specialist

Frank Frisenda, President, NCCFT

Donna Hope, Vice-President, NCCFT

BEFORE: HOWARD C. EDELMAN, ESQ., ARBITRATOR

BACKGROUND

This matter involves the bylaws to be utilized by the Nassau Community College Academic Senate to effectuate its role in College governance required by 8 NYCRR 605.1 and Section 20 of the labor contract between the College and the Nassau Community College Federation of Teachers (NCCFT). The College and the Nassau Community College Federation of Teachers (NCCFT) have appealed to me to render a binding determination with respect to bylaws dated August 11, 2017 developed through a collaborative process between the President of the College and representatives of the various constituencies that make up the College community.

Given the complexities of this dispute, a review of its procedural history is in order. The Union, which represents full-time faculty members, and the College have a long-standing collective bargaining relationship. A significant component of that relationship involves matters of governance at the School. The Academic Senate is the key mechanism through which faculty and other constituencies participate in governance of the College. Its purpose, authority and composition are set forth in

Section 20 of the Collective Bargaining Agreement between the parties.

Over the years the Academic Senate has independently established and, from time to time, modified its bylaws. The bylaws constitute the roadmap which it functions.

In 2016, the Middle States Commission, as the College's accrediting agency, began a lengthy evaluation of the programs and procedures of the College in advance of reaccrediting the institution. After an exhaustive review it decided to place the College on probation because it concluded, among other areas of concern, that the College does not meet its standards for accreditation in the area of leadership and governance. 8 NYCRR Section 605.1. ("Section 605.1")

To comply with Middle States Commission standards and to remove the College from probation, the President of the College, Dr. Hubert Keen, in collaboration with various representatives of the College community, began in August 2016 an exhaustive review of its bylaws. This review consisted of well over thirty meetings in 2016 and 2017. Led by the President, the participants in the Governance Review

Task Force included members of the Administration, the elected leadership of the NCCFT and the Academic Senate, Chair of the Academic Department Chairs, the leadership of the part time faculty union, and a representative of the College's students.

During the Spring of 2017, the Academic Senate concurred in a redraft of the bylaws developed through the above referenced process. It adopted a draft of a revision of its bylaws which, it believed, was in conformity with 8 NYCRR 600, et. seq. and Middle States Commission's standards and findings. Following its then applicable bylaws, the revised bylaws were presented for a vote to the full faculty and administration, the two groups represented by the Academic Senate. While obtaining a positive vote well over 50%, it did not reach the two-thirds vote required by the then bylaws for adoption.

As a result, the then bylaws - non-compliant with the Middle States Commission standards on governance - remained in effect and the Board of Trustees and President of the College were faced with the prospect of continued violation of Middle States Commission standards on governance and leadership; and the likelihood that the College would remain on probation,

disastrous for the well-being of the institution. As a result of the imperative to reform the bylaws, the Board of Trustees ("Board") adopted a resolution at its June 27, 2017 meeting that it was not legally nor contractually bound to the then extant Academic Senate bylaws with respect to the governance at the College. The resolution directed the College President to prepare bylaws that were compliant with law, regulation, Section 20 of the labor contract between the College and the NCCFT, and most importantly with the Middle States Commission's governance standards.

During the course of collective negotiations between the College and the NCCFT for a successor agreement to their labor contract that will expire on August 31, 2017, the College informed the NCCFT that the Board of Trustees would adopt a resolution on June 27, 2017 directing the President to develop and implement a new set of bylaws compliant with law, regulation and Article 20 of the labor agreement. The College provided the NCCFT with a copy of the resolution intended to be adopted at the June 27, 2017 Board meeting.

The NCCFT questioned the underlying authority asserted by the College that the bylaws of the

Academic Senate could be replaced through the process to be invoked by the Board in its June 27, 2017 resolution. The NCCFT threatened to litigate the matter. To avoid the time involved, and with particular reference to the interest of all parties to resolve the outstanding issues prior to the commencement of the 2017-18 academic year and impending Middle States Commission's continuing review of the College's compliance with its governance standards, the parties agreed to select an arbitrator to issue a binding award which would resolve any items not agreed upon. The parties entered into an "Agreement to Arbitrate" on June 23, 2017. In pertinent part, the Agreement provides:

- ". . . the parties have agreed to resort to arbitration to resolve their differences motivated by the mutual desire and need to resolve the subject issues prior to the commencement of the ensuing academic year to ensure compliance with pending Middle States Commission directives respecting the COLLEGE'S accreditation. . . "

- “. . . the NCCFT has acknowledged that the bylaws of the Nassau Community College Academic Senate are not part of the labor agreement between the parties and exist sui generis.”
- “The determination of the arbitrator shall be final and binding subject to the following Section 2, below.”
- Section 2 of the Agreement to Arbitrate states, “The arbitrator shall be without power or authority to issue an award that violates or is in derogation of the MSC Standards for accreditation in the areas of Leadership and Governance (Standard 4) and Administration (Standard 5), or violates or is derogation of law or regulation, or in violation of the labor contract between the parties.’

I was selected as arbitrator to decide any issues. Notwithstanding the Agreement to Arbitrate, to the credit of the parties during the summer of 2017 the President invited the Governance Review Task Force, consisting of representatives of the Administration, the elected leadership of the Academic Senate, the elected leadership of the NCCFT, Chair of the Academic Department Chairs, the leadership of the part time

faculty union, and a representative of the College's students to meet. Many meetings of the Governance Review Task Force were held during which the Task Force reviewed and modified a draft set of bylaws prepared by the President. This group worked diligently during the summer, meeting many times with the goal of reaching consensus on a complete set of bylaws acceptable to all for subsequent submission to the Board of Trustees for its approval at its September meeting. To the credit of both sides, in nearly all respects except for the issue of the mechanism of future amendment of the newly drafted bylaws and the issue of inclusion of non-managerial/confidential administrators as Senators on the Academic Senate, the parties agreed. This has reduced the scope of issues presented to me for resolution.

A hearing was held before me on August 24, 2017. Both sides were heard and witnesses testified. The following documents were admitted into evidence:

- the 2013-17 Collective Bargaining Agreement between the College and the NCCFT;
- the June 21, 2017, Memorandum of Agreement concerning new terms and conditions of employment between the parties;
- the Agreement to submit this dispute to Arbitration;
- the Academic Senate Agenda which included the draft of revised bylaws dated the Spring of 2017;
- the Board's resolution of the June 27, 2017, regarding governance and the bylaws;
- the new bylaws proposed by the President and the Governance Review Task Force dated August 11, 2017;
- 8 NYCRR 600, et., seq. ;

At the end of the hearing, I closed the record.

My Opinion and Award follows.

DISCUSSION AND FINDINGS¹

Several introductory comments are appropriate. It is worth stressing that the successful process of arriving at a new set of bylaws was exhaustive, analytical, professional and collegial. Three

¹Since my Award is due on September 1, 2017 (eight days after the hearing) my analysis includes, in truncated form, a summary of the parties' positions.

witnesses who appeared on behalf of the NCCFT testified to this effect. Lynn Mazzola, Chair of the Accounting and Business Administration Department and former Chair of the Academic Chairs; Noreen Lowey, Chair of the Administrative Business Technology and Health Information Technology Department and current Chair of Academic Department Chairs; and Anissa Moore, former Chair of the Communications Department and current Chair of the Academic Senate, all attested to the cooperative spirit which produced agreement on, with two exceptions, the revised bylaws. All three also recounted the numerous meetings and the involvement of different segments of the College community. Their results are to be commended in this regard.

Equally important is the right of NCCFT to address these issues. It is true that the Academic Senate and the Union are different entities, with different composition and, at times, different interests. However the labor contract between the College and the NCCFT, specifically Section 20, is the result of bilateral agreement between the parties. That provision sets forth the composition of the Senate and its purpose and goals. Even if the

Academic Senate predated the inclusion of Section 20 into the Collective Bargaining Agreement, it now, and has for many years drawn its existence and authority from that document. Consequently, the NCCFT and College were and are empowered to vest with me the authority to adopt reasonable procedures to be incorporated into the bylaws. In addition, it must be noted that with respect to the bylaws adopted by the Senate over the years, the NCCFT agreed in the Agreement to Arbitrate that: " . . . the NCCFT has acknowledged that the bylaws of Nassau Community College Academic Senate are not part of the labor agreement between the parties and exist *sui generis*. . ."

Also, my findings are in the nature of an Interest Arbitration. That is, my role is not simply to decide who is "right" or "wrong" with respect to the outstanding issues. Rather, it is to fashion reasonable procedures, which are consistent with the Middle States Commission standards, 8 NYCRR 600 et. seq., and the legitimate rights and needs of all concerned to function in a truly collaborative system of governance. It is with these principles in mind that I turn to the outstanding issues before me.

The main area of disagreement involves the prerogatives of the Board and the President and the necessity of affording the Academic Senate an opportunity to adopt substantive bylaws without interference. In this context, it is important to cite the language of 605.1. It states,

The faculty shall participate in the formulation of the policy relating the student health, scholarship, standards of admission, attendance and discharge of students, curriculum and other study programs, the granting of degrees, student activities, extra-curricular and student discipline. The faculty shall also present recommendations to the president regarding (a) the instructional budget, and (b) appointments, reappointments, tenure, special salary increments, promotion and leave of absence of members of the instructional staff.

This section makes clear the Academic Senate's role as a recommending body. As the drafters of the revised bylaws realized, the Academic Senate may not override the appropriate policies promulgated by the President or the Board of Trustees.

On the other hand, the roles of the Board and President are not unfettered. Their actions may not be arbitrary, capricious nor unreasonable. Also, while the Board has ultimate authority to accept or reject the bylaws recommended by the President, it may

not "cherry pick;" i.e., it may not select a specific bylaw to overturn. Rather, it retains authority to approve or reject the proposed bylaws as a whole.

Moreover, the context of this process is significant. Middle States has placed the College on probation. Extensive input, as noted above, has been received from all constituent groups. These factors give the Board the latitude to review the President's recommendations and, in a reasoned manner, approve or disapprove them.

Finally, on this issue, the Academic Senate has the right to expeditious response by the President of proposed bylaw revisions and amendments once this new set of bylaws take effect following Board approval. It also has the right to know the reasons for any Board rejection of a bylaw amendment or modification or, if the Board believes they do not comport with the letter or spirit of true governance, the best interests of the College, the law, regulations, Middle States Commission standards, or Section 20 of the NCCFT labor contract, and the right to appeal such recommendations to a neutral arbitrator for a binding determination. By this process there will exist a fair equilibrium; that is the Academic Senate and

President will, in collegial fashion, meet and discuss bylaw revisions and amendments and, where disagreement exists, a protocol will be established for third party determination.

Given these observations and conclusions, I issue the following Award with respect to governance procedures:

Section XIV(c) (p. 46) of the proposed bylaws proposed on August 11, 2017 (Amendments) shall be modified by adding to Section XIV(c) (p. 46) the following:

The President's determination will be based upon his/her finding(s) that the Amendment violates, or does not violate a Middle States Commission standard(s), the Regulations contained in 8 NYCRR 600, et. seq., law; or that the Amendment is or is not in the best interest of the College. The President shall render his determination by the next following session of the Academic Senate, or within 30 days of the date he/she received the proposed amendment, whichever occurs later.

The Senate shall have the right to appeal to an arbitrator the determination of the President upon the grounds that his/her determination is arbitrary, capricious, or unreasonable.

The parties (Senate and College) shall select an arbitrator to hear and decide this matter. Should the parties (Senate and College) fail to agree upon an arbitrator, he/she shall be selected pursuant to the procedures of the American Arbitration Association Rules for Voluntary Labor Arbitration.

The determination of the arbitrator shall be final and binding.

Of course, this review process will be applicable only prospectively to future amendments to the collegially developed bylaws to be submitted to the Board of Trustees in September.

The remaining issue involves the membership of the Nassau County Administrators Association in the Senate. The recently negotiated Memorandum of Agreement ("MOA") between the College and the NCCFT (Section 20-1.3) provides that membership in the Academic Senate shall include, "10% professional administrators from the NCC Administrators Association elected by the members." The record reveals, however, that the NCC Administrators Association has disavowed any interest in selecting individuals to Academic Senate membership. This provision, then, is simply unenforceable.

Nonetheless, there is no doubt the NCCFT and the President strongly believe in the active involvement of non-managerial/confidential administrators in the Academic Senate. Only when all interested groups participate will the Academic Senate effectively function to promote the needs and interests of

students, faculty and other personnel. In view of the foregoing, the parties agreed that the President will appoint non-managerial/confidential administrators to ten percent (10%) of the Academic Senate Senator positions.

Thus, I find, the Academic Senate's bylaws shall be amended to provide, regarding membership composition, that:

ten per cent (10%) of the Academic Senate shall be administrators appointed by the President.

In sum, I conclude that the proposed bylaws prepared by the President and the Governance Review Task Force dated August 11, 2017 are to be implemented except that Item XIV(c) (page 46) and item III(2), page 6, shall be modified as indicated in this Opinion. It is so ordered.

AWARD

The ByLaws prepared by the President and the Governance Review Task Force dated August 11, 2017 shall be proposed to the Board of Trustees except that Paragraph XIV(c), p. 46 shall be modified as follows:

Section XIV(c) (p. 46) of the proposed bylaws adopted on August 11, 2017 (Amendments) shall be modified by adding this paragraph at the end of Section XIV(c):

The President's determination will be based upon his/her finding(s) that the Amendment violates, or does not violate a Middle States Commission standard(s), the Regulations contained in 8 NYCRR 600, et. seq., law; or that the Amendment is or is not in the best interest of the College. The President shall render his determination by the next following session of the Academic Senate, or within 30 days of the date he/she received the proposed amendment, whichever occurs later.

The Academic Senate shall have the right to appeal to an arbitrator the determination of the President upon the grounds that his/her determination is arbitrary, capricious, or unreasonable.

The parties (Academic Senate and College) shall select an arbitrator to hear and decide this matter. Should the parties (Academic Senate and College) fail to agree upon an arbitrator, he/she shall be selected pursuant to the procedures of the American Arbitration Association Rules for Voluntary Labor Arbitration.

The determination of the arbitrator shall be final and binding.

