

H.E. NO. 2002-4

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and-

Docket No. CO-H-92-419

RUTGERS COUNCIL OF AAUP CHAPTERS,

Charging Party.

Appearances:

For the Respondent,
Carpenter, Bennett & Morrissey, attorneys
(John J. Peirano, of counsel and
George P. Barbatsuly, on the brief)

For the Charging Party,
Reinhardt & Schachter, P.C., attorneys
(Denise Reinhardt, of counsel)

HEARING EXAMINER'S DECISION ON
MOTION FOR SUMMARY JUDGMENT

On June 30 and October 30, 1992, the Rutgers Council of AAUP Chapters (AAUP) filed an unfair practice charge and amended charge against Rutgers, The State University (Rutgers or the University) alleging violations of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1), (3) and (5),^{1/} when its president created and adopted, in

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

Footnote Continued on Next Page

part, the recommendations of a Special Review Committee (SRC) that investigated a dispute involving faculty in biochemistry programs. AAUP contends the creation of the SRC and partial adoption of its recommendations changed employment conditions without negotiations. Rutgers contends inter alia, that the establishment of the SRC and the partial adoption of its recommendations was a valid exercise of managerial prerogative.

On September 22, 1992, a complaint and notice of hearing issued. On October 20, 1992, Rutgers filed its answer. On September 30, 1992, the SRC completed its investigation and made certain recommendations which were adopted, in part, by Rutgers' President Francis L. Lawrence on October 13, 1992. AAUP's amended charge followed.

A hearing was conducted on October 26 and 28, November 4, 1993 and June 3, 1994.^{2/}

1/ Footnote Continued From Previous Page

restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ References to the hearing transcripts shall be 1T, 2T, 3T, 4T respectively.

Subsequently, the parties exchanged subpoenas duces tecum. Rutgers sought delivery of all documents related to the AAUP's national affiliate's investigation of faculty governance issues (the Bergquist Report). AAUP also served a subpoena duces tecum on Rutgers seeking various documents. Both parties petitioned to quash the other's subpoenas.

On March 15, 1995, I issued a letter decision quashing most paragraphs of the AAUP's subpoena, finding that they were in the nature of discovery and, therefore, untimely. I denied AAUP's motion to quash Rutgers' subpoena, rejecting its claims that the material was irrelevant, hearsay and privileged and rejecting its contention that enforcement of Rutgers' subpoena was premature.

AAUP's request for special permission to appeal my ruling on the subpoena's was filed on April 25, 1995, and was subsequently granted by the Commission. The Commission ordered that I conduct an in camera review of the information sought by Rutgers, and that material related to the credibility of AAUP's witnesses on factual issues or information provided by administration officials be released. The Commission remanded the motion to quash the AAUP's subpoena to me for consideration of other objections. Rutgers University, P.E.R.C. No. 96-88, 22 NJPER 247 (¶27130 1996). On September 9, 1997, I declined to order the production of other documentation.

On January 27 and March 13, 1998, the parties met for settlement discussions. Thereafter, I assisted the parties in their

continued efforts to explore settlement and on July 10, 2000, I sent a letter memorializing what appeared to be reflective of a successful conclusion to months of settlement negotiations. On August 9, 2000, Rutgers rejected the settlement proposal and urged that the unfair practice charge be withdrawn. The AAUP requested time to consider the manner in which it would proceed.

On December 18, 2000, after several time extensions, the AAUP filed a motion for summary judgment on its claim that Rutgers violated 5.4a(5) of the Act by establishing the SRC, which it contends is a procedure to evaluate or discipline AAUP unit members, and refusing to negotiate over same. In its brief, at p.3, the AAUP advised that it "does not pursue any other allegations made in the amended unfair practice charge." I construe this statement to mean that the AAUP withdraws its 5.4a(1) and (3) claims.

On February 20, 2001, Rutgers filed a cross-motion for summary judgment along with its response to the AAUP's motion. The motion and cross-motion were referred to me for disposition. N.J.A.C. 19:14-1.8. Based upon the parties' submissions to date, I make the following:

Findings of Fact

1. AAUP represents faculty members, teaching assistants and graduate assistants at the University. Rutgers and AAUP have been parties to a series of successive collective negotiations agreements. The operative agreement for purposes of this matter covered the term July 1, 1989 through June 30, 1992 (Agreement).

2. Article IX of the parties Agreement sets forth the grievance procedure which is comprised of three categories of grievances. Categories One and Two are limited to allegations of violations affecting mandatorily negotiable terms and conditions of employment and are subject to binding and advisory arbitration, respectively. Category Two grievances specifically include "grievances concerning allegations of unjust discipline." Category Three grievances are not arbitrable, and may include matters that are not mandatorily negotiable but which may "intimately, directly and negatively [affect] the work and welfare of members of the bargaining unit." Article X of the Agreement provides faculty members the opportunity to challenge "an evaluation that resulted in failure to award reappointment, promotion, and/or tenure."

3. On June 17, 1992, President Lawrence issued a memorandum appointing six senior faculty members to comprise the SRC. Its directive was to advise the president on an academic dispute within the Department of Molecular Biology and Biochemistry (MBB) in the Faculty of Arts and Sciences-New Brunswick and the Department of Biochemistry and Microbiology at Cook College. In the memorandum, Lawrence explained his reasons for creating the SRC as follows:

During the past academic year, a disrupting and debilitating debate has occurred among various faculty members associated with the undergraduate and graduate programs in biochemistry. The debate has been conducted in the most public of arenas, including the student press. Numerous issues are in contention, ranging from program and departmental administration, to university

recruitment and appointment procedures, to curricular revisions. Regular collegial governance processes have clearly proven inadequate to resolve the numerous issues in dispute or to lessen the intensity of the antagonisms. Several administrative officers, including the deans of Cook College, the Faculty of Arts and Sciences, and the Graduate School, and the New Brunswick Provost, have met with the faculty members in an attempt to resolve the dispute in a manner satisfactory to all parties but these efforts have been unsuccessful.

The situation is having a deleterious effect on the faculty, on the students enrolled in the program, and on the development of programs in molecular biology and biochemistry. Younger faculty are finding the controversy disruptive to the development of their careers, and even the tenured faculty are experiencing difficulty in concentrating appropriately on their research and instructional responsibilities. Students have become embroiled in a dispute which should be addressed within the normal collegial governance processes. Clearly this situation must be resolved.

Because there are no appropriate structures within our regular governance bodies, such as the New Brunswick Faculty Council, or the academic units in which the faculty members reside, designed to conduct the type of wide-ranging investigation which this situation requires, I am asking you to constitute a Special Review Committee. Your charge is to conduct a comprehensive review of the issues in contention, the manner in which the participants have conducted themselves throughout the debate and the appropriateness of their behavior, the reasons for the failure of collegial governance processes, and the truthfulness of the numerous allegations that university procedures and regulations have been violated. Finally, and most importantly, I am asking you to recommend specific actions to resolve the dispute. Throughout this process, you should base your recommendations on what is in the best interest of the university.

4. The dispute in the biochemistry program dated back to 1980. Prior to academic year 1980-1981, separate biochemistry programs existed within Rutgers College and Cook College. During an academic reorganization of the New Brunswick faculty and departments in 1980-81, the biochemists of Cook College remained affiliated with Cook and the faculty of the Rutgers College Department of Biochemistry were transferred into the Faculty of Arts and Sciences-New Brunswick (FAS). Faculty members in FAS provide instructional and academic services to the students enrolled in the undergraduate colleges on the New Brunswick campuses and conduct research and perform professional services within the various academic disciplines. The Cook College faculty were not transferred to the FAS. However, a joint Department of Biochemistry was established within the FAS which included certain faculty from the Cook College department and from the former Rutgers College department. This joint Department of Biochemistry offered a single undergraduate program.

5. In November 1985, an External Review Committee conducted a review of the biological and biochemical sciences of the University's Busch campus. Professor Keddie, then immediate past president of AAUP, described "External Review" as a process by which the University brings in scholars from outside the University to examine an academic department's curriculum, administrative structure, and research accomplishments to measure how well the department is delivering its educational message compared to other

institutions (4T13, 4T14). He acknowledged that such reviews had been taking place at Rutgers since he began his employment there in September 1972. Further, he acknowledged that when such reviews were conducted they were not negotiated with the AAUP, despite the fact that the external reviewers inevitably made some type of evaluation of faculty members.

6. The External Review Committee that reviewed the biological and biochemical sciences at the Busch campus observed that the Biochemistry Department was "too small and weak on its own to provide the strength needed in a first-rate state university." The External Review Committee recommended that the Department of Biochemistry, in conjunction with faculty members in the field of molecular biology, join to create a single Department of Molecular Biology and Biochemistry (MBB).

7. Based on the recommendations of the External Review Committee, the Board of Governors of the University created the MBB Department within the FAS in 1987, effectively dissolving the joint Department of Biochemistry. However, the undergraduate biochemistry curriculum continued to be offered jointly by the faculties of both the FAS and Cook College. Concurrent with the Board of Governors' creation of the MBB, the biochemists at Cook College were to develop a plan for their integration into the Cook College structure. The Cook biochemists were assimilated into the Cook College Department of Applied Microbiology in or about 1990.

8. As the External Review Committee had recommended, a search committee was appointed to identify and recruit a prominent and outstanding individual in the discipline to serve as chair of the MBB Department.

9. Based on the search committee's efforts, Dr. Robert Krug was offered an appointment as a member of the Rutgers faculty. Thereafter, Dr. Krug was appointed by the Dean of the FAS, with the concurrence of the Provost, to serve as chair of the MBB Department. In addition, several other junior faculty members were recruited and appointed to the MBB Department.

10. While the foregoing changes occurred, there were continuing differences among the biochemists concerning, among other issues, undergraduate and graduate curricula, content of courses, organization of academic programs, assignment of faculty to academic departments and programs, and the appointment of Dr. Krug as chair for the MBB Department.

11. The SRC was directed to complete its work no later than September 30, 1992. The Committee was advisory to President Lawrence, it had no authority to act independently. In a letter dated June 25, 1992 from President Lawrence to AAUP President Keddie, Lawrence made it clear that, in "the historical tradition of faculty governance," the SRC's purpose was to advise him directly on "matters of curriculum and academic organization," that the SRC had no authority to impose discipline; that faculty could continue to file grievances and the grievances would be processed "to

completion"; and that if the SRC proposed, and the President wished to accept, measures that would need to be negotiated, the President or his representatives would negotiate such matters.

12. On September 30, 1992, the SRC completed its investigation and submitted its report. In assessing the tensions that had been caused by the academic dispute, the SRC focused its analysis on "administrative ineptitude and temporizing." The Committee noted that

[t]he failure on the part of Dean Edelstein to notify Professor van Es of the impending change in the position of chair, the protracted inaction of Dean Kleinschuster in failing to provide a permanent departmental home for the four Cook biochemists, and the apparent failure of Dean McCormick to describe the nature of the joint curriculum to Dr. Krug at the time of his recruitment created a situation in which the subsequent escalation of tensions destroyed any hope of collegial resolution.

The SRC concluded that the tensions caused by the differences "are of such nature as to threaten [the] very existence [of the Department of Molecular Biology and Biochemistry]. The consequences for both teaching and research, to say nothing about faculty retention, can be dramatic if the conflict is permitted to continue."

13. The SRC made two substantive recommendations. The first was that three faculty members of the Department of Molecular Biology and Biochemistry, Professors Theodorus van Es, Ronald Poretz, and George Pieczenik, be transferred to the Cook Department of Applied Microbiology and Plant Physiology. The SRC based its recommendation on the fact that the academic interests of these

professors were more closely aligned with the faculty at the Cook Department of Applied Microbiology and Plant Physiology, and on the fact that the alienation of these members from MBB, as a result of their differences over curriculum and the governance of the MBB Department, appeared to be total and irreconcilable. The SRC stated that its recommendation of transfer "was categorically not a form of discipline, but a way to resolve a dispute that has become an impediment to research, teaching and other institutional activities." The second substantive recommendation was that President Lawrence make further inquiry, through appropriate University procedures, into the actions of Professor Pieczenik in order to determine if disciplinary action was warranted by his conduct. The SRC acknowledged that it "was not charged with determining whether a particular faculty member should be disciplined, and we have not addressed that specific question." Further, in making this recommendation, the SRC "[did] not presume to judge the outcome" of the inquiry. The SRC also made several recommendations on curriculum.

The SRC also made several recommendations on Rutgers' procedures. The SRC concluded that "all university administrators should be held accountable for their actions and/or inaction, as well as ensuing consequences" pointing to "the failures of Deans Edelstein and Kleinschuster to carry out the responsibilities of their offices."

14. In a memorandum dated October 13, 1992, President Lawrence adopted the SRC's recommendation that Professors van Es, Poretz and Pieczenik be transferred to the Cook Department of Applied Microbiology and Plant Physiology. He agreed with the SRC that the affected faculty members appeared more closely aligned academically with the biochemists at Cook College. Specifically, the President stated:

I am implementing this recommendation because I agree with your [SRC] analysis that this transfer does not constitute discipline but will enable me to resolve a dispute that, as you say, has become an impediment to research, teaching and other institutional activities. You based your recommendation on clear academic grounds: that the affected faculty members appear closer to the biochemists at Cook College in their orientation to the discipline of biochemistry with regard to undergraduate education than they are to their colleagues in the FAS department. (Emphasis in original).

However, President Lawrence expressly rejected the recommendation that further inquiry be made into the behavior of Professor Pieczenik, stating only that such inquiry might be contemplated in the future "if...there continues to be disruption to the educational and research programs of the Department of Molecular Biology and Biochemistry."

15. President Lawrence also adopted a number of the SRC's curriculum and procedural recommendations. With respect to the recommendation that all Rutgers administrators be held accountable for their actions and/or inactions, the President simply noted, "I am sure that your findings on this point and your

recommendations will sound a cautionary note to my administrative colleagues."

16. The transfers of Professors van Es, Poretz, and Pieczenik to the Cook College Department became effective October 13, 1992, but the three professors were informed by memorandum from the acting provost that their actual physical relocations to the Cook College campus were not expected to be completed until the beginning of 1993. Further, while informing the three professors of their relocations, the acting provost reiterated that "the Review Committee did not advance this recommendation within the context of disciplinary action, nor am I implementing it within such a context." In addition, the acting provost specifically requested that the three professors advise of their requirements with regard to office and laboratory space and facilities. At the time the transfers were communicated, Rutgers planned to identify appropriate laboratory space for the three faculty members, and there were no plans for Rutgers to move them until the space was ready to receive them. The three faculty members were further advised that the acting provost would attempt to meet their needs and ensure that they were provided appropriate support for their instructional research programs.

17. At the time the transfers were communicated, there was no expectation that the transfers would result in any interruption of academic services provided to students or access to research facilities. The Acting Provost specifically directed that:

...FAS will relinquish entirely to Cook the three faculty lines on which Professors Pieczenik, Poretz and van Es are budgeted; any portion of the indirect costs which it receives from grants of which the faculty members are principal investors; a pro-rated share of the operating budget of the Department of Molecular Biology and Biochemistry; and those patent funds to which Professor van Es is entitled.

18. Informing the three professors of their transfers, the Acting Provost also noted they would maintain their academic rank and salary. Moreover, during the hearing, Professor Keddie acknowledged that the tenure of the three professors was not affected by the SRC's recommendations or the President's partial adoption thereof (3T26, 3T27). Nor did these actions have any impact on the professors' salaries or benefits. None of the professors were suspended or fined as a result of the SRC's recommendations. Furthermore, no letters of reprimand were placed in any of the professors' personnel files and Professor Keddie testified that he had no knowledge of any documentation placed in the personnel files of the three professors as a consequence of the SRC's recommendations or the President's partial adoption thereof. Id. Rutgers' actions with respect to the SRC had no impact on Professors Harry Brown, Theodore Chase, Peter Kahn, and William Ward, the four professors of the Cook Department of Applied Microbiology and Plant Physiology, who, along with Professors Pieczenik, Poretz and van Es, were also actively involved in the academic disputes leading to the creation of the SRC (2T84, 2T87). These professors were not transferred, disciplined or otherwise

adversely affected as a result of the SRC recommendations. Id. Instead, these four professors remained part of the Cook Department to which Professors Pieczenik, Poretz, and van Es were transferred.

ANALYSIS

The AAUP contends the SRC constitutes a new process leading to either discipline or evaluation of unit members. It asserts the SRC process, whether disciplinary or evaluative, is a unilateral change in terms and conditions of employment and that pre-disciplinary and evaluation procedures are negotiable.

Rutgers asserts that the creation of the SRC was a valid delegation of managerial functions. It contends that the SRC's responsibilities extend only to matters of educational policy, not negotiable matters, that neither the SRC's report nor President Lawrence's partial adoption thereof constitutes discipline or evaluation and even if they did constitute discipline or evaluation, negotiations are not required. It also contends the complaint should be dismissed for lack of prosecution.

Summary judgment will be granted "[i]f it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law. . ." N.J.A.C. 19:14-4.8(d). Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995), specifies the standard to be used to determine whether there exists a genuine

issue of material fact which precludes summary judgment. To find that a genuine issue of material fact exists, a hearing examiner must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill at 540. Thus, if a disputed issue can only be resolved in one way, then it is not a "genuine issue" of material fact which would preclude summary judgment. "When the evidence 'is so one-sided that one party must prevail as a matter of law,' then the motion should be granted." Brill at 540, citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 213 (1986). A motion for summary judgment should be granted with caution and may not be used as a substitute for a plenary hearing. See Baer v. Sorbello, 17 N.J.Super. (App. Div. 1981); Essex Cty. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); N.J. Dept. of Human Services, P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988).

I find that the creation of the SRC was a valid delegation of managerial functions to a collegial body. The Commission has recognized that collegial governance is a "historical reality" in the field of public higher education which may continue to exist simultaneously with collective negotiations. Rutgers, The State University, PERC No. 76-13, 2 NJPER 13 (1976). The Commission defined collegiality as:

a system that has developed historically at the University and at many other institutions

throughout the country, whereby certain functions generally performed by management, both public and private, are either shared with, or even entirely delegated to, groups of faculty members.... Through collegiality the University has historically permitted employee participation in the employer's governance of the institution. Through entities such as faculty senates, committees and other such groups, composed entirely of faculty or in some instances a mixture of administration and faculty, the University has consented to the delegation of a broad range of its managerial functions, and to some extent faculty has thereby become a functional part of management. Collective negotiations, on the other hand, contemplates the mandatory negotiation of grievances and terms and conditions of employment with the representative designated by a majority of the employees for that very purpose....

* * *

The fact that employee involvement is a historical reality at the University does not raise a given issue to the level of a "grievance" or a "term and condition of employment" if it is not otherwise so.

As viewed by the Commission, therefore, there is no reason why the systems of collegiality and collective negotiations may not function harmoniously. Neither system need impose upon the other, with one exception: terms and conditions of employment including grievances. The University is free to continue to delegate to collegial entities whatever managerial functions it chooses, subject, of course, to applicable law.
[Id. at 14-15.]

See also Snitow v. Rutgers University, 103 N.J. 116, 122-23 (1986).

In this case President Lawrence's June 17, 1992 memorandum establishing the SRC used the process of collegial governance to provide advice on an academic dispute that had been disrupting the functioning of the departments responsible for teaching and research

in the disciplines of molecular biology and biochemistry. It appears that due to the adverse impact the dispute was having on students, faculty, and the development of programs in molecular biology and biochemistry, President Lawrence appointed the SRC to provide recommendations to him concerning the issues. To a degree, Lawrence delegated his managerial function regarding issues of educational policy to the SRC, and the SRC members became a functional part of management, the very essence of collegial governance. Rutgers, The State University, 2 NJPER at 14-15.

Further, Lawrence made clear to the AAUP in his letter of June 25, 1992, that in "the historical tradition of faculty governance," the SRC's purpose was only to **advise** him directly on "matters of curriculum and academic organization." He stated that the SRC had no authority to impose discipline; that faculty could continue to file grievances and that such grievances would be processed "to completion." He also said that if the SRC proposed measures that would need to be negotiated, and such proposals were accepted, the President or his representatives would negotiate such matters. Accordingly, I find that the creation of the SRC did not violate Section 5.4a(5) of the Act.

Even if the SRC Report and Lawrence's actions taken pursuant thereto were disciplinary or evaluative, Rutgers had no negotiations obligation to the AAUP before the report was issued and Rutgers acted thereon. N.J.S.A. 34:13A-5.3, provides that employers must negotiate with majority representatives of their employees

"with respect to grievances, disciplinary disputes, and other terms and conditions of employment." Public employers must negotiate written policies setting forth grievances and disciplinary review procedures by which employees can appeal disciplinary determinations. Rutgers satisfied these requirements. The parties' collective negotiations agreement provided that any allegations of "unjust discipline" may be grieved as a category two grievance in accordance with the grievance procedure recited in Article IX of the collective agreement.

Even if the SRC Report and the President's actions taken in accordance with it constituted "unjust discipline" under the parties' Agreement, the Act imposed no obligation on Rutgers to negotiate with the AAUP before each and every instance in which discipline was imposed. Instead, disputes over whether any arguable discipline was "unjust" should have been submitted to the parties' preexisting grievance procedure set forth in the collective agreement.

The AAUP's contention that the SRC constituted a "[procedure] leading to the imposition of discipline" is incorrect. The SRC was not a "disciplinary review procedure," within the meaning of N.J.S.A. 34:13A-5.3, but rather, a collegial body convened to provide advice to the President.

The AAUP's assertion that "procedures leading to the imposition of discipline are negotiable," is equally erroneous. The decision to impose discipline, in the first instance, is a

managerial prerogative. New Jersey Turnpike Auth., PERC No. 99-49, 25 NJPER 29 (¶30011 1998). Only the procedures used to review and challenge the imposed discipline are negotiable within the meaning of N.J.S.A. 34:13A-5.3. Here, the parties have already negotiated disciplinary review procedures and memorialized them in the collective agreement.

For all of the foregoing reasons, AAUP's motion for summary judgment is denied. Rutgers' cross-motion for summary judgment is granted and the complaint is dismissed.^{3/}

CONCLUSIONS OF LAW

AAUP's motion for summary judgment is denied. Rutgers cross-motion for summary judgment is granted.

RECOMMENDATION

I recommend that the complaint be dismissed.

Stuart Reichman
Hearing Examiner

DATED: October 16, 2001
Trenton, New Jersey

^{3/} I need not reach Rutgers' contention that the complaint should be dismissed for lack of prosecution.