

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNCIL OF NEW JERSEY STATE
COLLEGE LOCALS, NJSFT-AFT/
AFL-CIO,

Petitioner,

Docket No. SN-11

-and-

STATE OF NEW JERSEY (STOCKTON
STATE COLLEGE),

Respondent.

SYNOPSIS

In a scope of negotiations proceeding initiated by the majority representative of faculty members at the State Colleges, the Commission rules on the negotiability of a ten-year faculty staffing/tenure plan dealing with the proportion of tenured to non-tenured faculty at Stockton State College, adopted by the College pursuant to a resolution of the State Board of Higher Education directing each college to prepare such a plan in accordance with stated policy guidelines and recommendations. The majority representative seeks to negotiate with the public employer with respect to the adoption and implementation of the Stockton plan. The Commission rules that the college's decision to regulate the proportion of tenured to non-tenured faculty members is a permissive, but not a mandatory, subject for negotiations, as it relates to the exercise of educational responsibilities in furtherance of the valid statutory authority of the Board of Higher Education to determine those tenure limits which will encourage maximum flexibility in educational programs and maximum utilization of pedagogical skills, having profound implications for the equality of the college's educational program. As to this permissive subject, the majority representative is ordered to refrain from insisting to the point of impasse upon the inclusion of such matters in an agreement. The Commission also rules that the impact of the adoption and implementation of the Stockton plan upon faculty terms and conditions of employment, relates to mandatory subjects for negotiations and orders the public employer to negotiate in good faith with respect thereto upon demand of the majority representative.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNCIL OF NEW JERSEY STATE
COLLEGE LOCALS, NJSFT-AFT/
AFL-CIO,

Petitioner,

Docket No. SN-11

-and-

STATE OF NEW JERSEY (STOCKTON
STATE COLLEGE),
Respondent.

Appearances:

For the Petitioner:
Sauer, Boyle, Dwyer & Canellis, Esqs.
(Mr. William A. Cambria, of Counsel)

For the Respondent:
Hon. William F. Hyland, Attorney General of New Jersey
(Melvin E. Mounts, Deputy Attorney General, of Counsel)

DECISION AND ORDER

A Petition for Scope of Negotiations Determination (the "Petition") was filed jointly by the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO (the "Council") and the State of New Jersey (the "State") on May 12, 1975, requesting a determination by the Public Employment Relations Commission (the "Commission") as to whether a certain matter in dispute is within the scope of collective negotiations pursuant to N.J.S.A.
34:13A-5.4(d).^{1/}

1/ N.J.S.A. 34:13A-5.4(d) provides: "The commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The commission shall serve the parties with its findings of fact and conclusions of law. Any determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court."

The statement of the dispute, as jointly submitted by the parties, follows:

The Council of New Jersey State College Locals, NJSFT/AFT AFL-CIO (the Union) is the certified representative of full-time faculty and certain other professional employees at the eight New Jersey State Colleges, including Stockton State College. On February 22, 1974, the Union entered into an Agreement with the State of New Jersey, for employees it represents, covering the period from February 22, 1974 to June 30, 1976.

On January 21, 1975, Stockton State College's Board of Trustees, adopted a Ten-Year Faculty Staffing/Tenure Plan, pursuant to Regulations promulgated by the New Jersey Board of Higher Education, entitled Tenure Policies in the State Colleges of New Jersey, N.J.A.C. 9:209.1 et seq. These regulations of the Board of Higher Education and the action of the Board of Trustees of Stockton State College taken in pursuance thereof, deal with the issue of the proportion of the tenured to non-tenured faculty. The Union seeks to negotiate with the State as to the subject of limitations on the proportions of tenured to non-tenured faculty. The State contends that such matter is not a required subject for collective negotiations.

The parties Council and the State hereby agree to the joint submission of this dispute to the Public Employment Relations Commission pursuant to N.J.S.A. 34:13A-5.4(d).

Simultaneous with the filing of the Petition and by agreement of the parties, the Council withdrew, with the Commission's approval, an unfair practice charge filed on January 29, 1975 (Docket No. CO-6). In that charge, the Council alleged that during negotiations then in progress pursuant to a reopener provision of the current agreement, it had, inter alia, made a demand

that no employee be denied reappointment or tenure by reason of any quotas imposed on positions by any rule or regulation of the State or Department of Higher Education. The adoption on January 21, 1975 by the Stockton State College Board of Trustees of the Ten-Year Faculty Staffing/Tenure Plan, in effect imposing quotas, in response to a request from the Department of Higher Education, and in the face of the Council's demand, was alleged to have violated the State's negotiating duty under N.J.S.A. 34:13A-5.4(a)(5).

An Appendix to the current agreement between the parties recites a Letter of Agreement #VIII which provides as follows:

Nothing contained herein shall be construed to prejudice the positions of the parties as to the Board of Higher Education's September, 1972 Policies on Tenure in the State Colleges or the implementation of these policies by the State Colleges or the proposed guidelines, rules and regulations under consideration by the Board of Higher Education concerning implementation of A-328 (18A:60-6).

In view of the foregoing, it is apparent that the Council is not claiming a breach of the agreement by the State in the adoption of the tenure plan. Rather, the instant dispute relates to the State's adoption of a tenure plan without negotiations, during the term of the agreement, affecting terms and conditions of employment.

Both parties have filed briefs in accordance with an agreed schedule for the filing of briefs. We have considered

the Petition and the briefs in reaching this determination.

On January 23, 1976, the Commission, in a scope of negotiations determination in In re Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13, issued a Decision and Order concluding, inter alia, that the subject matter of quotas on tenure is a basic educational policy determination not subject to the duty to negotiate but that the impact of such a decision as it affects terms and conditions of employment is a required subject for negotiations. The Commission also noted that the decision regarding tenure limits appears to be a permissive subject for negotiations.

On February 3, 1976, the Commission solicited the positions of the parties to determine whether they would agree to be bound for purposes of the instant dispute by the Rutgers determination or whether they desired an opportunity to file supplemental submissions in light of the Rutgers decision. By letter dated February 24, 1976, the attorneys for the Council advised the Commission that as the Rutgers decision did not relate to the facts and circumstances which exist at Stockton State College, the Commission's determination there failed to provide sufficient guidance to the Council to govern its relations with the State and the Council continues to seek a decision herein. While the State did not formally reply, it also continues to seek a determination on the instant Petition.

The Commission has noted in past decisions that in scope proceedings it is addressing the abstract issue as to

whether the subject matter in dispute is within the scope of collective negotiations. The Commission, however, also recognizes that the context in which a dispute arises in a particular scope proceeding may determine how the Commission's decision will affect the parties' relationship, particularly with respect to the subject matter in dispute. Furthermore, the Commission acknowledges that its discussion of the employee organization's demand relating to quotas on tenure in its Rutgers decision was somewhat limited, given the rather complex scope proceeding there, in which fifteen separate negotiating disputes were presented for determination. Accordingly, while our Rutgers determination on this issue is dispositive of the dispute in the instant proceeding, we will proceed to a discussion of the setting in which the dispute arose, including its statutory and regulatory ramifications, and an analysis of the manner in which the State's tenure plan may relate to the scope of collective negotiations under N.J.S.A. 34:13A-5.4(d).

The context of this dispute, as gleaned from the submissions of the parties, follows. On September 15, 1972, the Board of Higher Education adopted a resolution establishing general guidelines for the granting of tenure to faculty members in the State Colleges and for the periodic evaluation of tenured faculty members. This resolution had been preceded by a comprehensive study on the proportion of tenured and nontenured faculty at State Colleges conducted by the Office of the Chancellor, Department of Higher Education, embodied in a June, 1972 report, entitled Faculty Tenure, A Report and Recommendation by the

Commission on Academic Tenure in Higher Education (The Jossey-Boss Series in Higher Education, 1973). The Chancellor's Report expressed concern as to the increase, from 63% in 1971 to 71% in January, 1972, of tenured faculty in the State Colleges.

The Report dealt comprehensively with the dual and conflicting institutional needs of both flexibility and stability in faculty staffing. It concluded, inter alia, with a recommendation "...that each institution develop policies relating to the proportion of tenured and nontenured faculty that will be compatible with the composition of its present staff, its resources and projected enrollment, and its future objectives." ^{2/} The Report further concluded that a faculty tenure ratio of more than one half to two thirds of the total full-time faculty during the next decade "will probably be dangerous for most institutions." It recommended that each of the State Colleges establish an institutional master plan forecasting its personnel requirements, involving faculty, administration, students, and trustees, as appropriate in its formulation, and that individual recommendations for tenure be consistent with the master plan.

The resolution of the Board of Higher Education directed each college to prepare a ten-year plan indicating the steps it plans to take to achieve a future balance of faculty

^{2/} Report at 50-51.

in which no more than a reasonable proportion are ultimately tenured.^{3/}

By resolution of January 21, 1975, the Board of Trustees of Stockton State College adopted a Ten-Year Faculty Staffing/Tenure Plan pursuant to the Board of Higher Education's policy guidelines and recommendation. The resolution preceding the plan, provides, in part:

...the New Jersey Board of Higher Education has directed each college Board of Trustees to prepare a ten-year faculty staffing plan, and...the Board of Trustees recognizes the need to allow for the continuing appointment of a significant and reasonable proportion of the faculty, and...the Board of Trustees also recognizes the need to retain flexibility in faculty, staffing and institutional planning.

The Plan itself comprises two separate series of projections over a ten-year period, showing for each year, by rank and by faculty hired in the same year (Cohort), anticipated hirings, attritions, and planned and projected tenure by number and percentage of total faculty. Each series in turn contains two separate projections, one based upon an assumption of growth in student body from 3,000 in 1974-75 to 7,500 in 1983-84, and

^{3/} The resolution of the Board of Higher Education is attached hereto and made a part hereof, as appendix "A". On October 20, 1972, the Board of Higher Education adopted a similar resolution embodying its tenure ratio policy in the Community Colleges. Originally filed on November 29, 1972 with the Secretary of State as emergency rules within N.J.S.A. 52:14B-4(c) on July 27, 1973, the Board refiled its tenure policies as administrative rules with the Division of Administrative Procedure (5 N.J.R. 265 (a) and (b)). They appear in the Administrative Code, N.J.A.C. 9:2-9.1 et seq. and 9:4-6.1 et seq.

the other based upon an assumption of a leveling off in student body at 4,000 in 1976-77. The tenure projections by rank also contain budget guidelines for each plan year showing projected number of faculty in each rank in accordance with a certain percentage - 32% - which the number of faculty in each rank shall bear to the total number of full-time faculty. Each series of projections shows for the two years of 1977-78 and 1978-79 projected non-renewals of tenured teachers due to the quotas imposed by the projections.

The State argues that the subject matter of proportion of tenured to non-tenured faculty is primarily a matter of educational policy and therefore not mandatorily negotiable. It submits that the Board of Higher Education's resolution establishing guidelines for the granting of tenure and periodic evaluations of tenured faculty members and directing the State Colleges to prepare ten year staffing plans, was adopted pursuant to the Board's authority to establish general policies, guidelines and procedures to govern the discretionary power of the Board of Trustees to appoint teaching staff. N.J.S.A. 18A:3-14(h), 64-6(h), 64A-7(b)(5), 64A-12(f).

The State further argues that the Stockton State College Board's ten year plan was adopted in order to effectuate its responsibility to maintain the efficiency of operations entrusted to it pursuant to its power in the area of tenure appointments under N.J.S.A. 18A:3-13, 3-15, and 3-16. In its view, confirmed by the Chancellor's 1972 Report, the high

proportion of tenured faculty presented an obstacle to the proper administration of the public system of higher education, seriously limiting flexibility to initiate new programs, hire newly trained, specially skilled faculty in new subject areas, adjust faculty to reflect changes in programs and enrollment, and to assure innovation and creativity. The State then asserts that the Stockton Board's plan was designed to overcome this obstacle.

Finally, the State relies on Association of N.J. State College Faculties, Inc. v. Dungan, 64 N.J. 338 (1974) in which the Supreme Court sustained as valid the September 15, 1972 resolution of the Board of Higher Education, specifically rejecting the employee organization's claim that the unilateral adoption of the Tenure Rules violated the negotiations duty of a public employer mandated under N.J.S.A. 34:13A-5.3.^{4/} In Dungan the Court concluded that the tenure resolutions "...represent major educational policy pronouncements entrusted to the Board's educational expertise and objective judgment..." and thus do not constitute terms and conditions of employment.

The Council submits that C.123 significantly broadened

^{4/} That section requires that the majority representative of public employees in an appropriate unit and the designated representatives of the public employer shall meet at reasonable times and "negotiate in good faith" with respect to grievances and "terms and conditions of employment". It also provides that proposed new rules or modifications of existing rules governing "working conditions" shall be negotiated with the majority representative before they are established.

the scope of negotiations by virtue of Section 6,^{5/} among other provisions, relying in part for this contention upon language in Association of State College Faculties v. New Jersey Board of Higher Education, 66 N.J. 72 (1974) wherein the Supreme Court noted that C.123 materially amended and supplemented the New Jersey Employer-Employee Relations Act. Applying the claimed substantially broadened scope of negotiations resulting from the passage of C.123 to the Stockton Tenure Plan, the Council concludes that since January 20, 1975 (the effective date of C.123), if not earlier, the Stockton Plan quotas on the number of tenured faculty positions has a direct and substantial impact on teachers employed and is mandatorily negotiable.

The State responds that the modification to the Act contained in Section 6 of C.123 does not render negotiable subjects barred by existing statutes. It notes that the C.123 amendments to the Act did not change the definition of "terms and conditions of employment" subject to negotiation and that nothing in the Act manifests a legislative intent to delegate its legislative powers to public employers and employee representatives acting in concert. The State concludes that a general balancing test should apply and that under the Dungan decision, application of this balancing test resulted in a holding that

^{5/} N.J.S.A. 34:13A-8.1, as amended by Section 6 of C. 123, changed the pre-existing phrase "...nor shall any provision hereof /Of the Act/ annul or modify any statute or statutes of this State" to read "...nor shall any provision hereof annul or modify any pension statute or statutes of this State." (Emphasis added)

tenure ratios and policy are matters not subject to the obligation to negotiate. Finally, the State urges that the parties' Letter of Agreement #VIII, supra, makes any scope determination academic as applied to current negotiations and must be prospective only.

The Council counters that notwithstanding Dungan, even a cursory examination of the effect and impact of the Stockton Tenure Plan reveals its significant consequences for faculty members. The Council notes that tenure as a concept was originally created to provide job security - an aspect of the job which intimately affects the public employee. The Stockton Tenure Plan, however, by imposing quotas on tenure, is a means of denying job security. The Council concludes that as the Plan constitutes a prior determination as to job security, it affects the terms and conditions of employment and should be a required subject for negotiations.

In the Commission's view, regardless of the effect the C.123 amendments may have had upon the scope of negotiations, the instant decision regulating the proportion of tenured to non-tenured faculty members in the State Colleges cannot be found to be a matter subject to the Act's negotiating duty. We conclude that Stockton State College should be free, in the exercise of its educational responsibilities, taken in furtherance of the valid statutory authority of the Board of Higher Education, to determine those tenure limits which will encourage maximum flexibility in educational programs and maximum utilization

of pedagogical skills. The extent to which tenure and the unique protections accorded its recipients is regulated by the instant tenure ratio policy has profound implications for the quality of the Stockton State College educational program. Such decisions should not be subject to the mandatory negotiations process and we so find. Noteworthy here is the fact that the Legislature, while authorizing reductions in the five year probationary period prescribed for granting tenure in the State and County Colleges, has specifically provided that reductions in the probationary period - a subject matter akin to tenure ratios in its educational implications - shall not be mandatorily negotiable under the Act. The express statutory removal of the subject of length of probationary period from the mandatory negotiating process was commented upon by the Supreme Court in Dungan in the following language at pp. 355-356 of its opinion:

The Legislature has not indicated any disagreement with the Dunellen principles (64 N.J. 17) or their application to date. Nor has it expressed itself on tenure in relation to negotiation except in Section 4 of Chapter 163 of the Laws of 1973. That section provides in effect that notwithstanding the prescribed five-year probationary period, the board of trustees of the college may "as an exceptional action", and by a two-thirds majority of all of its members, grant tenure to "an individual faculty member" after employment for two consecutive academic years. Section 4 then concludes with the following: "The provisions of this section shall not be negotiable as a term and condition of employment under the 'New Jersey Employer-Employee Relations Act'." It is noteworthy that in this single statutory mention of tenure in relation to

negotiation, mandatory negotiation is specifically excluded. It appears evident to us, particularly in the light of the continuing effect of section 10 of the Employer-Employee Relations Act (N.J.S.A. 34:13A-8.1), that the legislative silence elsewhere may not fairly or sensibly be construed as impairing the Board of Higher Education's exclusive statutory power under the Education Law to promulgate tenure guidelines which are reasonable in nature and which are not in conflict with any specific statutory provision dealing with tenure.

This expression of legislative intent removing length of probation, as a predicate to the grant of tenure, as a mandatory subject for negotiations, coupled with the manifest educational policy underlying the regulations adopted by the Board of Higher Education directing the adoption by the State and County Colleges of tenure ratio plans, convinces us that the C.123 amendments to the Act, and in particular, the Section 6 amendment previously discussed, have not made the Board of Higher Education's authority to promulgate tenure guidelines, or the Stockton Board of Trustees adoption of its tenure plan pursuant thereto, subject to the Act's negotiating obligations. What we have said here should not be construed as removing from the negotiating sphere the adoption or implementation of the Stockton College Tenure Plan as it may impact upon the terms and conditions of employment of the affected faculty members.

The nature of the Council's negotiating demands, the alleged rejection of which by the State formed the basis for its earlier unfair practice charge, since withdrawn, as well

as the main thrust of its brief submitted herein, support the conclusion that the Council's main concern all along has been the impact of the Plan upon the teaching force.^{6/}

The Tenure Plan may impact upon faculty terms and conditions of employment in various ways. As attrition may not reduce faculty in sufficient numbers to avoid the necessity for termination of faculty under the Plan, the Council may wish to negotiate the following matters, among others: The procedure for selection of teachers to be eliminated in future years under the Plan;^{7/} provision for notice and hearing for those faculty members selected for termination;^{8/} placement on a preferential hiring list for reemployment of those faculty members who are terminated pursuant to the Plan; and severance pay or other benefits, including continued coverage in various fringe benefit programs for a period of time coextensive with their placement on a preferential hiring list, for faculty terminated pursuant to the Plan.

In accordance with the result we reached on this subject matter in the Rutgers decision, supra, we also con-

^{6/} Contrary to the position of the State, we do not construe the Letter of Agreement #VIII, incorporated in the parties' current agreement, as a bar to Council demand for negotiations as to the impact of the Stockton Plan. The understanding contained in that letter appears to have merely preserved each party's position with respect to the Plan. So far as we are aware, the Council has consistently sought to negotiate with respect to the impact of the Plan as it affects the terms and conditions of employment of tenured faculty employed by the State Colleges in the negotiating unit.

^{7/} See In re The Board of Education of the Borough of Tenafly, P.E.R.C. No. 76-24, 2 NJPER 75 (1976).

^{8/} See In re The Board of Education of the City of Englewood, P.E.R.C. No. 76-23, 2 NJPER 72 (1976).

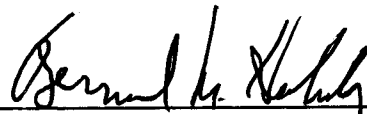
clude that nothing in the Act precludes the State from discussing or negotiating with the Council with regard to tenure quotas on a voluntary basis.^{9/} Accordingly, aside from any demands as to impact which it may wish to pursue, the Council may seek to negotiate the adoption and implementation of the Stockton Tenure Plan, so long as it does not insist, to the point of impasse, upon agreement as to the Plan itself.^{10/}

ORDER

To the extent that the Council's demand relates to impact on terms and conditions of employment as aforesaid, the State is hereby ordered to negotiate in good faith, upon demand of the Council, with respect thereto.

To the extent that the Council's demand relates to the State's decision to adopt and implement the Stockton Plan as aforesaid, the Council is hereby ordered to refrain from insisting, to the point of impasse, upon the inclusion of such matters in a collective negotiations agreement with the State.

BY ORDER OF THE COMMISSION



Bernard M. Hartnett, Jr.
Acting Chairman

DATED: Trenton, New Jersey
April 27, 1976
Issued: April 29, 1976

^{9/} See also Dungan, supra, where the Supreme Court noted at p. 356 of the opinion that its conclusion that tenure guidelines were not mandatorily negotiable, was "...not to be taken as support for any notion that such guidelines or alterations therein should be promulgated without full and timely prior consultation with accredited faculty representatives and others interested".

^{10/} See In re Borough of Roselle, P.E.R.C. No. 76-29, 2 NJPER ____ (April 27, 1976).

APPENDIX "A"

RESOLUTION OF

THE BOARD OF HIGHER EDUCATION

Adopted September 15, 1972

1. Each college Board of Trustees shall prepare a ten-year plan for its institution indicating the steps it plans to take to achieve a future balance of faculty in which no more than a reasonable proportion are ultimately tenured. The purpose of limiting the proportion of tenured faculty on each campus is to retain flexibility to enable the institution to respond to changing educational needs in the future. The plan established by each board shall include the proportion of tenured faculty projected each year during the ten-year period. The college trustees shall report their plan to the Board of Higher Education and shall inform the Board each year of the progress being made in achieving their goals.
2. Each State College Board of Trustees shall establish internal policies which indicate either that it will impose specific restrictions or more intensive and rigorous review procedures for any reappointment conferring tenure which brings the proportion of individuals in a department (or other major academic sub-unit) or in the college as a whole above its present level. Reappointments conferring tenure which raise the tenure rate above that level shall be made only as an unusual action when judged by the college Board of Trustees as being in the best interests of the college.
3. A reappointment conferring tenure may be offered only to faculty members who possess an appropriate terminal degree or its equivalent, except under unusual circumstances when the granting of tenure to an individual not having these qualifications is judged by a college Board of Trustees as being in the best interests of the institution.
4. Tenure should be awarded only to individuals whose performance during their probationary period gives clear evidence of the ability and willingness to make a significant and continuing contribution to the growth and development of the institution.
5. Tenure should be awarded after presentation of positive evidence of excellence in teaching, scholarly achievement, contribution to college and community, and fulfillment of professional responsibilities, and not solely because negative evidence to the contrary is not presented.
6. Each college Board of Trustees should establish a procedure

which the college will employ to regularly evaluate the performance of tenured faculty members. Such evaluation should occur not less frequently than every five years. These evaluations, which should include student input, should comprehend such factors as continued teaching competence, professional preparation and attainments which are directly related to teaching or administrative assignments, contributions to campus life beyond formal, assigned instructional activity and significant research, scholarly or community activity.