P.E.R.C. NO. 91-88

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Petitioner,

-and- Docket No. SN-90-87

RUTGERS COUNCIL OF AAUP CHAPTERS,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance pressed by Rutgers Council of AAUP Chapters against Rutgers, the State University to the extent the grievance seeks a faculty member's appointment to a new one-year term or a year's salary. Although a clause granting grievants a twelve-month extension of employment is mandatorily negotiable, it may not be applied to this faculty member who was terminated before the contract provision was negotiated.

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Appearances:

For the Petitioner, Frances E. Loren, Employment and Labor Counsel

For the Respondent, Reinhardt and Schachter, attorneys (Paul Schachter, on the brief)

DECISION AND ORDER

On June 29, 1990, Rutgers, the State University petitioned for a scope of negotiations determination. The University seeks a restraint of binding arbitration of a grievance pressed by Rutgers Council of AAUP Chapters. The grievance asserts that a faculty member who was terminated in 1982 should have received a one-year appointment after he learned in 1989 that a remanded evaluation had resulted in a denial of promotion and tenure.

The parties filed affidavits, exhibits and briefs. These facts appear.

The AAUP represents the employer's faculty members, teaching assistants and graduate assistants. The parties entered

into a collective negotiations agreement effective July 1, 1986 to June 30, 1989. The contract provides for binding arbitration of grievances alleging contractual violations which affect terms and conditions of employment of negotiations unit members. It provides for advisory arbitration of grievances alleging violations of University policies or regulations which affect terms and conditions of employment. Article 10 sets forth elaborate procedures for contesting denials of reappointments, promotions or tenure. Its sole and exclusive remedy is a remand for a new evaluation process. Section 6, Subsection C provides, in part:

* * *

> If a remanded evaluation results in a negative personnel action, the grievant shall receive a twelve-month [footnote omitted] extension of employment, dating from the date the grievant is informed of the negative decision. However, such employment will be extended to the end of the academic semester in which the twelve-month extension concludes. Extension of employment of a grievant shall be governed by the terms of the procedure under which the original grievance was brought. Members of the bargaining unit shall be entitled to extensions of employment pursuant to this Agreement only for grievances originally** brought under this procedure, subject only to renegotiation of this provision in a successor agreement.
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> * * *
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> **By original grievance is meant that grievance, including one resolved informally, which has led to subsequent instructions to remand an evaluation.

This provision was also in the 1983-86 contract.

Stephen Procuniar was hired as a part-time faculty member on July 1, 1970 and made a full-time instructor for academic year 1971-72. In July 1972, he was appointed to a three-year term as assistant professor in Livingston College's art department. In July 1975, he was appointed to a second three-year term, to expire on June 30, 1978.

In the fall of 1978, Procuniar's department and the University's Appointments and Promotions Committee recommended that he be promoted to associate professor and granted tenure. But on April 25, 1978, Procuniar was notified that promotion and tenure had been denied. He was given a terminal appointment as a lecturer for academic year 1978-79.

On June 23, 1978, Procuniar filed a grievance. A grievance committee found that the evaluation process had been flawed and directed a remanded evaluation. Rutgers' president reappointed Procuniar as a lecturer for an additional year (1979-80) so that the evaluation procedure could be rerun.[1/] Procuniar was reappointed for another year (1980-81) in settlement of an unfair practice charge.

During the 1980-81 academic year, Procuniar was reevaluated and again denied promotion and tenure. He was granted a one-year extension of employment (1981-82) pursuant to the parties' contract

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1/ The grievance procedure in effect then was imposed by the University and had no provision for an extension of employment.

which then permitted only one extension of employment to successful grievants who received negative remanded evaluations.[2/] On June 30, 1982, while a new grievance contesting the evaluation process was pending, Procuniar's employment at Rutgers terminated.[3/] He has not been employed there since.

Rutgers and AAUP have interpreted Article 10 to permit a grievant to process an Article 10 grievance to completion, even if the individual's employment has ceased. Procuniar's grievance thus survived. He won again and was given a remanded evaluation again. This sequence of denials, grievances, and remanded evaluations continued from 1982 to 1989. During that period, the parties removed the one-time limit on employment extensions from their 1983-86 and 1986-89 contracts.

On April 27, 1989, Procuniar was denied promotion and tenure for the sixth time. On October 4, 1989, he filed a grievance asserting that the University had violated Article 10 of the 1983-86 and 1986-89 contracts when it did not offer him a twelve-month extension of employment after the remanded evaluation

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2/ The 1979-81 and 1981-83 contracts provided: "It is understood that only one such extension of employment per Grievant as a result of utilization of the grievance procedure will be granted."

3/ Procuniar filed a grievance asserting that he had not received the written notice of his termination required by University regulation 3.56. The grievance was denied. Procuniar did not assert his termination was disciplinary.

ended in a denial of promotion and tenure. The grievance noted that previous contracts had permitted only one extension, but asserted that the limit did not apply to Procuniar because his grievance was an "original grievance" under Article 10. As a remedy, it asked that Procuniar be granted a twelve-month extension or a year's salary.[4/]

On December 8, 1989, the Assistant Vice President for Faculty Affairs denied this grievance. She asserted that Procuniar was not a member of the negotiations unit during the 1983-86 and 1986-89 contracts and thus did not have standing to claim benefits. She also denied the grievance on the merits since his "original grievance" arose under the 1978 faculty personnel grievance procedure and that procedure had no provision for an employment extension.

On February 12, 1990, the AAUP demanded binding arbitration.[5/]

Rutgers contends that Article 10, Section 6, Subsection C is not mandatorily negotiable because it requires the hiring or reappointment of faculty members and that even if it is mandatorily

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4/ Procuniar has also grieved the evaluation process leading to the latest denial of promotion and tenure.

5/ The AAUP seeks advisory arbitration with respect to a portion of the grievance asserting a violation of University regulation 3.56. This claim is not in issue in this scope proceeding.

negotiable in the abstract, it cannot legally be applied to grant an appointment to an individual who has not been employed during the life of the contract. AAUP contends that the subsection is a mandatorily negotiable notice provision and that a terminated employee who retains contractual rights may submit a grievance to binding arbitration.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

We cannot decide whether Procuniar has contractual standing to invoke Article 10; whether Article 10 affords him any rights; or whether the parties have contractually authorized the remedy he seeks.

Under Local 195, IFPTE v. State, 88 N.J. 393 (1982), a subject is mandatorily negotiable if:

> (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance

> the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

No one contends that a statute or regulation preempts negotiation of Article 10 or binding arbitration of this grievance. We will therefore focus on balancing the interests of the employees and the employer.

We first address the abstract negotiability of the parties' agreement that "[i]f a remanded evaluation results in a negative personnel action, the grievant shall receive a twelve-month extension of employment, dating from the date the grievant is informed of the negative decision." This agreement is mandatorily negotiable.

University regulation 3.56 requires that faculty members receive advance notice before they are terminated. Under this regulation, an assistant professor with six years of service (that is, in the same position as Procuniar was in 1978) is entitled to notice of at least one year before termination. Under University regulation 60.1, a professor receiving such notice continues to teach during a "terminal" year. These regulations accord with a statute requiring that professors with multi-year contracts at state educational institutions be notified at least one year before their contracts expire that they will be terminated. N.J.S.A. 18A:60-14. The regulations and the statute both accord with the realities of

the academic marketplace: faculty positions are usually filled long before the teacher starts working and do not often open up unexpectedly. Adequate notice helps a professor avoid interim unemployment.

The parties' agreement takes the logic of a year-long notice and termination period a step further. A professor who shows that the evaluation process was flawed has a compelling interest in having that process rerun without a presumption that promotion and tenure will be denied at the end of it. The invalid evaluation process may be seen as invalidating the initial notice of termination and requiring a new notice if the remanded evaluation also results in a denial of promotion and tenure. This is true whether the evaluation process has been found invalid once or often. The employee has an interest in not being disadvantaged because of the employer's procedural mistakes.

An employer does not have an absolute non-negotiable right to dismiss employees whenever it wants. Some cases had suggested in dicta that decisions to retain or dismiss public employees are matters of managerial prerogative which can never be bargained away or made subject to review by binding arbitration. Teaneck Bd. of Ed. v. Teaneck Techers Ass'n, 94 N.J. 9, 16 (1983); In re UMDNJ, 223 N.J. Super. 323, 334 (App. Div. 1988), aff'd 115 N.J. 29 (1989); Wayne Tp. v. AFSCME, 220 N.J. Super. 340, 343 (App. Div. 1987). But the Legislature has authorized employers to agree to binding arbitration of a disciplinary discharge if an employee does not have

an alternate statutory appeal procedure. N.J.S.A. 34:13A-5.3; Essex Cty. College, P.E.R.C. No. 88-63, 14 NJPER 123 (¶19046 1988). The Legislature has also overruled Teaneck's holding that employers may not agree to submit non-reappointments of coaches to binding arbitration. N.J.S.A. 34:13A-23; Holmdel Tp. Bd. of Ed., P.E.R.C. No. 91-62, 17 NJPER 84 (¶22038 1991). And our Supreme Court has held that a contractual provision requiring notice of termination may be enforced except to the extent that enforcement would significantly interfere with governmental policy. Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523 (1985).

The parties' agreement does not empower an arbitrator to second-guess a promotion or tenure denial or to grant promotion or tenure as a remedy for a violation of evaluation procedures. Nor does a decision to deny promotion and tenure mean that a professor who has taught for six years is unqualified to continue teaching until a fair evaluation process is completed and adequate notice of termination is given.

In Old Bridge, the Supreme Court invalidated an arbitration award calling for a full year's pay for a teacher who had not received the proper contractual notice of her layoff. The Court reasoned that this remedy significantly interfered with the employer's statutory right to abolish positions when fiscally necessary. But the Court held that a remedy of 61 days pay would accord with Commissioner of Education precedents and would accommodate the teacher's interests in procedurally fair notice with

the employer's right to lay off employees. Here, the negotiated agreement accords with a legislative mandate covering other professors, protects the employees' compelling interest in seeking new positions without interim unemployment, and does not significantly interfere with any statutory right or undo the decision to deny promotion and tenure. On balance, then, we conclude it is mandatorily negotiable.

We now examine the legal arbitrability of Procuniar's grievance. Rutgers contends that even if its general commitment to extend employment under Article 10 is mandatorily negotiable, the particular demand to have Procuniar appointed to a one-year term or paid a year's salary is not mandatorily negotiable. We agree.

Under the parties' 1981-83 contract, a professor could only obtain one extension of employment before being terminated. Procuniar received the extension called for by that agreement and was then terminated. The propriety of this termination has not been questioned. Procuniar has not worked at Rutgers since 1982.

The parties later negotiated an agreement which AAUP claims gave terminated employees the right to be rehired and given new terminal appointments. Such a claim does not predominantly involve a mandatorily negotiable subject. Proposals covering already retired employees are generally not mandatorily negotiable. See, e.g., Ocean Tp., P.E.R.C. No. 81-136, 7 NJPER 338 (¶12152 1981). By analogy, a proposal to grant the new employment extension benefits of the 1983-86 and 1986-89 contracts to employees terminated before

1983 would not have been mandatorily negotiable.[6/] Further, a claim for reemployment after a termination differs from a claim for continued employment until proper notice of termination is afforded. The employee's interests are diminished because the former employment relationship has already been severed and the employee has already received the applicable notice of termination. The employer's interests are greater because it would be called upon to disrupt a new status quo in order to rehire a terminated employee. On balance, then, we do not believe this grievance is legally arbitrable to the extent it seeks Procuniar's appointment to a new one-year term. We also restrain arbitration to the extent the grievance seeks a year's salary since that remedy is the practical equivalent of a new one-year appointment. Old Bridge.

6/ We distinguish Procuniar's continuing claim that the evaluation process has never been fair. The parties have treated that claim as surviving his termination. We agree that its survival is a mandatorily negotiable issue.

ORDER

The request of Rutgers, The State University for a restraint of binding arbitration is granted to the extent the grievance seeks Procuniar's appointment to a new one-year term or a year's salary.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Johnson, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
March 28, 1991
ISSUED: March 28, 1991