

D.U.P. NO. 93-36

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

STATE OF NEW JERSEY,
(STOCKTON STATE COLLEGE),

Respondent,

-and-

Docket No. CO-92-335

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

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by a majority representative alleging that the employer violated subsection 5.4(a)(3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. by "denying reappointment" of various faculty members.

The Director refused to issue a complaint. Applying the standard in In re Bridgewater Tp., 95 N.J. 234 (1984), he found that the majority representative alleged insufficient facts establishing a nexus between the "protected activity" and the alleged "reprisal." The charge was dismissed.

D.U.P. NO. 93-36

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

STATE OF NEW JERSEY,
(STOCKTON STATE COLLEGE),

Respondent,

-and-

Docket No. CO-92-335

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

Charging Party.

Appearances:

For the Respondent,
Robert J. DelTufo, Attorney General
(Melvin E. Mounts, Deputy Attorney General)

For the Charging Party,
Council of NJ State College Locals
(Bennett Muraskin, Staff Rep.)

REFUSAL TO ISSUE COMPLAINT

On April 10, 1992, the Council of New Jersey State College Locals, NJSFT-AFL/CIO ("Council") filed an unfair practice charge against the State of New Jersey (Stockton State College) ("College"). The Council alleges that the College discriminated against 15 faculty members on or about February 21, 1992 when its College president denied their reappointment to the 1992-93 academic year. The Council alleges that the College relied on a "personnel policy" regarding requirement for rank and a recent judicial decision in refusing to reappoint certain faculty.

The Council concedes that 14 of the 15 were reappointed after they complied with the president's February 21, 1992 letter but that the 15th, a part-time instructor, was not reappointed because she failed to comply with "the policy." The Council alleges that the College's actions were a reprisal for "a legal action..." and violates subsection 5.4(a)(3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").

On August 14, 1992, the State filed a response denying that it engaged in unfair practices. The State asserts that in 1992, the president wrote to 11 of the 32 full-time faculty and to 5 of the 9 part-time faculty, informing them that they could not be reappointed "at this time." The letter also states that recommendations for reappointment would be made if "appropriate verification and evidence pertinent to your work" was filed. The president provided 15 working days for faculty who did not possess a doctorate to file "requisite evidence", i.e., either a statement that one was enrolled in a graduate program or that one intended to enroll.

The College also asserts that it acted pursuant to a January 30, 1992 decision by the Chancellor of Higher Education in Penelope Dugan v. Stockton State College, Docket No. 89-4 (1992). It denies that the "timing" of its act is "suspicious" and that it

^{1/} This subsection prohibits public employers, their representatives or agents from: "(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."

knew of the Council's participation in the Dugan case. It specifically asserts that Dugan was represented by independent counsel; that the Union never met with it concerning the tenure appeal; that the Union never participated in the Step II grievance hearing and that it never grieved the case.

The College also denies that charging party has alleged any "protected activity" and that the Dugan case is not "protected" because she was represented by private counsel. Finally, it asserts that verification of rank is not a term and condition of employment.

On August 24, 1992, the Council filed a response.

On December 2, 1992, I issued a letter tentatively dismissing the charge.

On December 16, the Council filed an amended unfair practice charge, documents and statement of position.

On January 25, 1993, the College filed a response.

The amended charge asserts that the College has no policy concerning requirements for rank for part-time faculty. It asserts the "policy" is based upon N.J.A.C. 9:6-3.5 and 9:6-3.4(b), which concerns only full-time faculty, i.e., those eligible for tenure. It alleges that in practice, the College has not relied on the statute to deny reappointments to full-time faculty seeking reappointment to their second or third year. It asserts that the College failed to notify it of the policy changes (i.e., verification of enrollment or intent to enroll in a graduate program), "notwithstanding" a portion of Article XIII J of the

agreement stating, "...current and applicable procedures including a statement of such criteria shall be provided in written form...."

The amended charge repeats the allegation that the College's policy is a "reprisal for legal action undertaken by Penelope Dugan..., with support of the charging party." It asserts that the "support" was payment of legal expenses, and "favorable reports in union literature."

It also alleges that the College knew about its efforts on behalf of Dugan. It has filed several documents purportedly demonstrating such knowledge and emphasizes one especially: a December 5, 1991 legal brief filed by a deputy attorney general appealing the ALJ's decision to the Chancellor. The brief identifies "the Union [Council], not Dugan who paid a substantial portion of counsel's fees...."

N.J.S.A. 18A:60-7 defines "faculty member" as "any full-time member of the teaching staff appointed with academic rank". It also includes other "full-time professional persons" if they "concurrently hold academic rank." Academic rank is defined as instructor, assistant professor, associate professor and professor.

N.J.A.C. 9:6-3.3 provides that faculty in a New Jersey State College are appointed by the board of trustees, based upon nomination by the president. N.J.A.C. 9:6-3.4(b) states, "Reappointments shall be for one year until the faculty member attains tenure." N.J.A.C. 9:6-3.5 states that "academic attainment level and professional experience requirements for "instructors"

include a "master's degree or its equivalent...and active[] pursui[t][of] an accredited terminal degree...."

Vera King Farris was appointed president of the College in 1983.

In 1988, the College adopted a rule (set forth in the "Manual of Procedures") stating that "instructors" are expected to be "actively engaged in graduate study beyond the master's degree. He/she should be able to present evidence of progress toward a doctorate or other appropriate degree..."

On November 4, 1991, an Administrative Law Judge issued Dugan v. Stockton State College, OAL Dkt. No. HED 3110-91. The issue was whether the College unlawfully failed to reappoint Dugan to an assistant professorship in the 1988-89 term. Farris was college president during the period in which tenure "rights" were accumulated.

The judge wrote that Dugan was entitled to tenure as an "instructor." She declined to "find that [Dugan] was not actually pursuing a doctorate. The College should have verified the alleged progress each year..." She also wrote that the "lack of verification by the College is improper or negligent..." Dugan at p. 14. The "initial" decision was then filed with the Chancellor, pursuant to N.J.S.A. 52:148.

On January 30, 1992, the Chancellor issued a final decision in Dugan. (The decision notes that the petitioner was represented by private counsel.) The Chancellor found that Dugan should be

tenured as an assistant professor. The Chancellor wrote that, "tenure should NEVER be the result of longevity in employment, or mere inadvertence.... The decision by the previous administration to retain [Dugan] as a teacher...while placing her in a staff title, resulted in a clear exploitation of Professor Dugan." The Chancellor advised that "[A]ll boards of trustees should take immediate steps to insure that the institutions for which they are responsible have in place and strictly adhere to appropriate policies for the review of tenure candidates."

On February 21, 1992, College president Farris issued the "non-reappointment" letters to part-time and full-time faculty. One recipient was Alice Gitchell, a part-time instructor. Farris's letter to her advises that except for not meeting the "requirement of rank" (*i.e.*, actively engaged in graduate study beyond the master's degree) she would be recommended for reappointment. Farris provided Gitchell (and all others) three weeks to provide "evidence of other study."

Only Gitchell failed to provide "evidence of other study" and was the only faculty member not reappointed for that reason.

The standard for determining whether adverse personnel activities violate subsections 5.4(a)(3) and (a)(1) of the Act was stated in In re Bridgewater Tp., 95 N.J. 234 (1984). The charging party must prove by a preponderance of evidence on the record that activity protected by the Act was a substantial or motivating factor in the adverse action. See UMDNJ-Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987).

The Council's financial support of Dugan in her litigation and the State's written acknowledgment of that contribution amply suggest (for complaint issuance purposes) that the employee engaged in protected activity and the employer knew about it. Bridgewater.

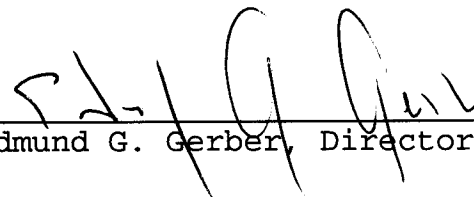
I cannot find a nexus between any alleged protected conduct and the "reprisal", i.e., requiring faculty members either to enroll in terminal degree programs or state their intention to enroll. The timing of President Farris's February 21 letter to the faculty is not evidence of retaliation - it was distributed three weeks after the Chancellor issued a final decision in Dugan. Nothing occurred in the intervening period which suggests that these letters were sent in response to any protected activity. The February 21 letter was certainly prompted by the Chancellor's admonition in the final Dugan decision that institutions "have in place and strictly adhere to appropriate policies for the review of tenure candidates." Furthermore, both code (N.J.A.C. 9:6-3.5) and 1988 College procedures mandate that faculty pursue advanced degrees. That the College "strictly adhered" to that "policy" three weeks after being admonished to do so in a final decision sufficiently breaks, in my view, any supposed nexus between the Council's financial support of Dugan and the alleged unlawful activity.

I am also not persuaded that merely because the College was not "compelled" to verify terminal degree program enrollment in all cases, that its decision to solicit verification is a violation of the Act. One consequence of the Dugan case, (i.e., that Dugan

received tenure despite the College's opposition) is that the College adopted a more stringent reporting policy. Inclusion of positions in the policy arguably outside the scope of the Chancellor's decision, i.e., part-time faculty, is too tenuous, absent more, to find a violation of the Act. The Council has generally conceded that authority to the College. See also, State of N.J. (OER), P.E.R.C. No. 88-89, 14 NJPER 251 (¶19094 1988).

Therefore, the Commission's complaint issuance standard has not been met and I refuse to issue a complaint on the allegations of this charge.^{2/}

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Edmund G. Gerber, Director

DATED: April 21, 1993
Trenton, New Jersey