

P.E.R.C. NO. 2003-6

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX COUNTY COLLEGE,

Petitioner,

-and-

Docket No. SN-2002-40

MIDDLESEX COUNTY COLLEGE
FACULTY UNION, LOCAL 1940,
AFT, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of Middlesex County College for a restraint of binding arbitration of a grievance filed by Middlesex County College Faculty Union, Local 1940, AFT, AFL-CIO. The grievance contests the denial of a promotion to the rank of associate professor and asserts, in particular, that the College failed to adhere to its promulgated promotion criteria and changed the criteria without advance notice. The Commission concludes that decisions of public employers to promote employees are not mandatorily negotiable or reviewable in binding arbitration. Promotional procedures, however, including the requirement that an employer announce in advance promotional criteria, are mandatorily negotiable. Arbitration is restrained to the extent the grievance seeks to challenge the employer's right to set promotional criteria or to apply those criteria. The request for a restraint is otherwise denied.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Respondent.

Appearances:

For the Petitioner, Jackson, Lewis, Schnitzler & Krupman,
attorneys (James J. Gillespie, on the brief)

For the Respondent, Dwyer, Canellis & Adams, P.A.,
attorneys (Brian Miller Adams, on the brief)

DECISION

On February 28, 2002, Middlesex County College petitioned for a scope of negotiations. The College seeks a restraint of binding arbitration of a grievance filed by Middlesex County College Faculty Union, Local 1940, AFT, AFL-CIO. The grievance contests the denial of a promotion to the rank of associate professor. The AFT asserts, in particular, that the College failed to adhere to its promulgated promotion criteria and changed the criteria without advance notice.

The parties have filed briefs and exhibits. These facts appear.

The AFT represents all full-time faculty. The parties' collective negotiations agreement is effective from July 1, 2000

through June 30, 2004. The grievance procedure ends in binding arbitration.

Article IV, Conditions of Employment, sets forth the requirements for academic ranks. Section A(1)c. provides:

Associate Professor: Master's Degree; plus additional graduate credits to equal a total of seventy-five (75); plus seven (7) years of collegiate teaching, or fourteen (14) years of secondary school teaching, or fourteen (14) years business or industrial experience. Graduate work or business or industrial experience must be in areas relevant to teaching responsibility.

OR

Doctorate: plus four (4) years collegiate teaching experience, or eight (8) years secondary school experience, or eight (8) years business or industrial experience. Graduate work or business or industrial experience must be in areas relevant to teaching responsibility.

A footnote states that two years of high school teaching or two years of relevant business or industrial experience may be considered equivalent to one year of college teaching. Section B sets forth the procedures for promotion.

The Faculty Handbook for 2000-2001 sets forth criteria for evaluation, tenure and promotion. The criteria include: versatility; special efforts for providing tutoring and advisement; community commitment; ability to communicate ideas; and professional growth.

Article IX(S) (3) of the parties' contract provides that in order to receive tuition reimbursement, graduate courses must be relevant to the member's field.

Agnes Azzolino is an assistant professor. In the spring of 2001, her name was submitted for consideration for promotion to the rank of associate professor.

On June 26, 2001, the Dean of the Science, Mathematics & Health Technologies Division, Reginald Luke, informed Azzolino that her application for promotion was not approved because she was 18 graduate credits short of the required 75 for the associate professor rank. While acknowledging that she had been highly recommended by the Math Promotion Committee and the chair of the department gave a positive appraisal of her work, Luke noted that Azzolino's involvement in the community had been limited and she had not met a minimum promotional requirement of becoming a member of a college-wide committee, ad hoc or standing committee, task force or board.

On September 18, 2001, the Association filed a grievance concerning the denial of the promotion. On October 4, Luke denied the grievance. Although a review of her records had disclosed 14 more graduate credits, he found that she was still four credits short of the 75 required and her participation in college affairs was still insufficient for associate professor rank.

According to the AFT, all of Azzolino's graduate courses were reimbursed by the College, and, in the past, the College has informed employees in writing when reimbursement would be allowed, but not considered relevant for promotional purposes. No such notice was given to Azzolino.

On October 4, 2001, the grievance was moved to the president's level. On November 14, the presidential designee scheduled a grievance meeting. The AFT framed the issue as:

Whether or not grievant has suffered unfair and arbitrary treatment as a result of her denial of promotion to the rank of Associate Professor.

Whether or not management has erred in not uniformly applying contractual requirements in their overall evaluation of appropriate graduate credits for Professor Azzolino's promotion.

Whether or not management arbitrarily and capriciously applied College policy in their denial of the promotion.

Whether or not the College has violated established past practice in their review and subsequent denial of Professor Azzolino's promotion.

Testimony and exhibits were presented. The designee found no contractual violation. On December 12, 2001, the AFT asked the Board of Trustees to review that decision. On December 19, the Board denied the grievance.

On January 18, 2002, the AFT demanded arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [Id. at 154]

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the employer may have. In particular, we cannot consider whether the grievance documents adequately present the issues AFT seeks to arbitrate.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets the standards for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (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]

The College has not argued that any statute or regulation is preemptive.

The College argues that its denial of this promotion is neither negotiable nor arbitrable given numerous Court and Commission decisions.

The AFT argues that the College failed to follow the established promotional criteria and changed the criteria without notice. It contends that the issue of Azzolino's relevant graduate courses is at the core of this dispute and that her credits earned and reimbursed by the College as part of her master's degree should be considered relevant and included.

The College responds that the AFT is attempting to restate the grievance as alleging the failure to adhere to established criteria. The College also responds that the AFT has not stated how the criteria were changed or what aspects were not adhered to.

Substantive decisions of public employers to promote employees are not mandatorily negotiable or reviewable in binding arbitration. Local 195, IFPTE v. State, 88 N.J. 393 (1982); North Bergen Bd. of Ed. v. North Bergen Fed. of Teachers, 141 N.J. Super. 97 (App. Div. 1976); see also Snitow v. Rutgers Univ., 103 N.J. 116 (1986). Promotional procedures, including the requirement that an employer announce in advance promotional criteria, are mandatorily negotiable. Local 195 at 417; Freehold Reg. H.S. Bd. of Ed., P.E.R.C. No. 95-2, 20 NJPER 315 (125159 1994). Thus, if an employer had a contractual obligation to announce criteria in advance, an arbitrator could review a claim that promotions were based on unannounced criteria. The arbitrator would not be reviewing the employer's assessment of relative qualifications, but rather whether employees were misled as to the requirements for the job. Ibid.

In this case, AFT does not challenge the employer's decision that promotions will be based, in part, on attainment of an advanced degree and a certain number of credits of graduate work in areas relevant to teaching responsibility. Instead it argues that this criterion was changed without proper notice, or that the employer deviated from a practice of informing employees when reimbursable graduate courses were not going to count toward promotion.

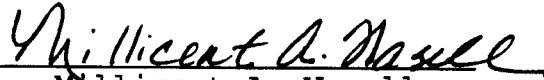
Both of AFT's claims are legally arbitrable. Neither would significantly interfere with the College's right to set promotional criteria or to apply those criteria in making a promotion decision. AFT could have legally negotiated for a right to know the criteria upon which promotion decisions would be based. State of New Jersey, Dept. of Law and Public Safety, Div. of State Police v. State Troopers NCO Ass'n, 179 N.J. Super. 80, 91 (App. Div. 1981). It may therefore arbitrate an alleged breach of such an obligation. The arbitrator may not, of course, second-guess the employer's right to set promotional criteria or to apply those criteria to Azzolino's application for promotion.

ORDER

The request of Middlesex County College for a restraint of binding arbitration is granted to the extent, if any, the AFT

seeks to challenge the employer's right to set promotional criteria or to apply those criteria to Azzolino's application for promotion. The request is otherwise denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Katz, McGlynn, Muscato and Ricci voted in favor of this decisions. None opposed. Commissioner Sandman was not present.

DATED: July 25, 2002
Trenton, New Jersey
ISSUED: July 26, 2002