

P.E.R.C. NO. 99-44

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Petitioner,

-and-

Docket No. SN-98-95

RUTGERS COUNCIL OF AAUP CHAPTERS,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of Rutgers, the State University to have a permanent referee restrained from ruling on an objection made by Rutgers Council of AAUP Chapters during the processing of a grievance alleging procedural flaws in the non-reappointment of a non-tenured faculty member. The AAUP seeks to have the faculty member's dean disqualified from representing the employer before a Grievance Committee made up of tenured faculty members. Rutgers asserts that disqualifying the dean violates its right to select its representatives for purposes of adjustment of grievances. The Commission has treated the scope petition as if it were an unfair practice charge, but defers the dispute to the pending proceeding before the referee. The Commission retains jurisdiction for the purpose of entertaining an application for further consideration if the referee reaches a result which the employer believes is repugnant to the Act.

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.

P.E.R.C. NO. 99-44

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Petitioner,

-and-

Docket No. SN-98-95

RUTGERS COUNCIL OF AAUP CHAPTERS,

Respondent.

Appearances:

For the Petitioner, Wayne M. Richardson, Employment &
Labor Counsel

For the Respondent, Reinhardt & Schachter, attorneys
(Denise Reinhardt, of counsel)

DECISION

On June 10, 1998, Rutgers, the State University, petitioned for a scope of negotiations determination. The employer seeks to have a permanent referee restrained from ruling on an objection made by Rutgers Council of AAUP Chapters during the processing of a grievance alleging procedural flaws in the non-reappointment of a non-tenured faculty member. The AAUP seeks to have the faculty member's dean disqualified from representing the employer before a Grievance Committee made up of tenured faculty members. Rutgers asserts that disqualifying the dean would violate its right under N.J.S.A. 34:13A-5.4b(2) to select its representatives for purposes of adjustment of grievances.

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

AAUP is the majority representative of Rutgers faculty members, teaching assistants and graduate assistants. The parties entered into a collective negotiations agreement effective from July 1, 1992 through June 30, 1995.

Article X allows procedural challenges to original evaluations of faculty members who have been denied reappointment, promotion or tenure. The procedure ends with a decision by a Grievance Committee made up of three tenured faculty members who have been randomly selected. The Grievance Committee may order that an original evaluation be remanded. It has no power to bind the University to reappoint, promote, or grant tenure to a faculty member. Procedural disputes during Article X hearings can be referred to a permanent referee, who is a neutral arbitrator appointed jointly by Rutgers and the AAUP for a 12 month term. Article X provides, in part:

FACULTY PERSONNEL GRIEVANCE PROCEDURE

The purpose of this Article is to help ensure the integrity of the reappointment, promotion, and tenure procedures; to provide a process for determining whether evaluations resulting in negative personnel actions were flawed (as defined in A.1) and to provide remedies in cases where defects are found.

A. Definitions of a Grievance and Grievant

- A. 1. A grievance under Article X is an allegation that, in the course of an evaluation which resulted in failure to award reappointment, promotion, and/or tenure:
 - A. 1. a. there occurred a material procedural violation of (i) the Academic Reappointment/Promotion Instructions and/or

their appendices applicable in the year in which the grievant was evaluated, and/or (ii) Article XIV of this Agreement, and/or (iii) a University regulation or an established practice of the University related to reappointment or promotion. An established practice within the meaning of this Article is one which is not inconsistent with either a University Regulation or a provision of this Agreement. A violation is material if it has an important influence or effect upon the evaluation.

or

- A. 1. b. the evaluation was based on (i) discrimination by an evaluator against the grievant because of race, creed, color, sex, religion, national origin, marital status, age, disability, status as a Vietnam-era or disabled veteran, sexual orientation, membership or non-membership in or activity on behalf of or in opposition to the AAUP, or (ii) enmity by an evaluator against the grievant.

or

- A. 1. c. the narrative of an evaluator or evaluative body that recommends against reappointment, promotion and/or tenure contains a material factual inconsistency with the record as presented in the candidate's reappointment/promotion packet. A factual inconsistency, as defined herein, does not encompass disagreement by one level of evaluation with the academic judgment of any other evaluator or evaluative body.

or

- A. 1. d. the evaluation was arbitrary and capricious, that is, not an academic judgment as defined below:

* * *

- A. 2. A grievant within the meaning of this Article is a faculty member in the bargaining unit who files a grievance under this Article. A grievant shall retain the right to process a grievance to completion regardless of his/her employment status.

* * *

- A. 5. Grievances concerning original evaluations shall be brought before Grievance Committees as specified in B. below. Grievances concerning remanded evaluations shall be brought before the Faculty Appeals Board as specified in E. below.

B. Grievances Concerning Original Evaluations

* * *

- B. 2. c. The University Representative shall be the person designated by the University to present its case. The University Representative shall be identified in the University's response. If the University changes its Representative, it will notify the AAUP. The University Representative may be assisted by two advisors who shall also be identified in the University's response.
- B. 2. d. The grievant may be represented and assisted by two advisors. The grievant's advisors shall be named in the grievance statement. If the grievant changes his/her advisors, the grievant will notify the University Representative.
- B. 2. e. The University Representative, the University Representative's advisors, and the grievant's advisors shall be employees of the University or of the AAUP, unless the parties agree to waive this requirement in individual instances.

- B. 2. f. If the grievant, the grievant's adviser(s), the University Representative or the University Representative's advisors offer(s) testimony, he/she may be questioned by the other party or by the Grievance Committee.

* * *

- B. 2. j. If the Grievance Committee sustains the grievance, it shall order a remand, which is the sole and exclusive remedy under this procedure.

* * *

- B. 2. p. Any individual or any representative of a body against whom allegations are brought may be present at the hearing, unless the grievant objects. If, however, the grievant is represented or assisted by a member of his/her own department, he/she may not object to the presence of a department member or any other member of the bargaining unit against whom an allegation has been made. In addition, other observers of the hearing are permitted with the consent of the grievant and the University representative.

* * *

C. Confidentiality

The University and the AAUP have a vital interest in confidentiality in order to preserve the impartiality of the process, the reputation of the institution, and the peace of the academic environment. Therefore, all participants in a grievance proceeding have an obligation to maintain strictly the confidentiality of that proceeding.

- C. 1. The grievance statement, University response, associated documents, identities of witnesses, and evidence presented at the hearing shall be kept confidential by all concerned, except that the grievant or the University may make disclosure only to the extent necessary and

only to potential witnesses and/or persons against whom allegations have been made and/or persons the party has reason to believe may be able to assist in the preparation and/or presentation of that party's case. Such disclosure shall be limited in scope to those aspects of the case the party has reason to believe are relevant to discloser's potential testimony or other assistance. The form and content of such disclosure shall be sensitive to the concerns outlined above, and shall in no case include providing tape recordings or transcripts of the proceedings to persons other than the Grievance Committee members, grievant, counselor, co-counselor, university representative, and his/her designated assistant.

Each witness to whom disclosure is made shall be identified to the other party before that witness's testimony is given.

Each person to whom disclosure is made shall be provided, prior to disclosure, a copy of this confidentiality provision and the no reprisals provision (G.2.), and shall not use the information about the grievance for any other purpose.

- C. 2. The grievance proceeding shall be conducted in confidence, including only those participants in the process specified in the procedures set forth in this Article and such observers as may be mutually agreed to by the grievant and the University Representative.
- C. 3. During the course of the grievance (from the filing of the letter of intent through the Appeals Board decision) there shall not be exerted or caused to be exerted, pressure on any individuals involved in the grievance.

An allegation of a violation of confidentiality shall be made to the Grievance Committee which shall render a binding decision concerning the propriety of the breach and continuing participation of any participant, except the grievant, who, in the judgment of the committee, has violated confidentiality.

D. Settlement of Procedural Questions Arising During a Grievance Committee Hearing

D. 1. A question arising during the processing of a grievance under this procedure concerning the interpretation and/or application of this procedure may be raised by the grievant or the University Representative as a matter for determination by the Grievance Committee.

D. 1. a. In the event the Grievance Committee declines to determine the matter or the grievant or the University Representative is not satisfied with the soundness of its interpretation and/or application, that procedural issue shall be referred to the Permanent Referee, in accordance with Section D.3. below.

* * *

D. 3. The Permanent Referee shall have the authority to make binding decisions on the interpretation and/or the application of provisions of this procedure where such issues are referred to it under the provision of D.1. Matters so referred shall be handled as follows:

* * *

D. 3. a. The grievant and/or University Representative shall submit their respective claims in writing to the parties to the Agreement (AAUP and the University) within two working days of the date the issue arose. The parties shall prepare a written position on the issue to be forwarded to the Permanent Referee, with each party copying the other, within five working days of receipt of the statement of claim.

D. 3. b. Either the AAUP or the University may request a hearing on the matter before the Permanent Referee.

* * *

- D. 3. d. The Permanent Referee shall render his/her decision on the matter within seven working days of the receipt of the parties' submissions. A ruling by the Permanent Referee on the interpretation and/or application of this Agreement shall be binding on the grievant, the University and the AAUP.
- D. 3. e. The decision of the Permanent Referee shall be rendered in accordance with law and shall be within the scope of his or her authority as provided in this procedure.

Dr. Katherine Kraft was appointed to a three-year term as a probationary, tenure-track faculty member in the School of Social Work. The University did not reappoint her. She filed an Article X grievance contesting the procedure followed in denying reappointment. In her grievance, Kraft alleged that the Dean of the School of Social Work, Mary Davidson, had committed eight violations. One of the allegations was that the dean's evaluation was based on enmity against the grievant.

Before the Grievance Committee hearing, the employer named Davidson as its representative. Rutgers asserts that Davidson, as Kraft's immediate supervisor, is the person best qualified to present its case. The AAUP objected to Davidson serving as Rutgers's representative because Kraft's grievance alleges that Davidson was hostile towards Kraft and other faculty members; her recommendation to deny Kraft reappointment was allegedly based on enmity; and she allegedly retaliates against faculty members whom she deems to be

unsupportive of her or who differ with her.^{1/} The Grievance Committee declined to rule on the objection and the AAUP sought a ruling from the permanent referee. This petition ensued. The proceeding before the referee has been held in abeyance pending disposition of this petition.

Our scope of negotiations 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.

Thus, we cannot consider the contractual merits of the procedural objection made by the AAUP during the processing of this grievance.

^{1/} The AAUP has provided copies of Category 2 grievances filed by several other faculty members under Article IX. The grievances accuse the dean of creating an atmosphere of fear and of retaliating against anyone who openly opposes her. The AAUP has also submitted copies of correspondence and other documents which the AAUP contends establish the Dean's hostility toward faculty members in her department in both professional activities and during grievance proceedings.

This case requires us to consider competing concerns. The first involves the importance of the procedures that these parties have negotiated to guarantee fairness in the reappointment process. The second involves the right of each party to select its representatives for purposes of negotiations and the adjustment of grievances.

Our Supreme Court addressed the reappointment procedures negotiated by these parties in Snitow v. Rutgers Univ., 103 N.J. 116 (1986). Snitow involved a challenge to a tenure decision and the role of the Grievance Committee in resolving a claim of prejudice on the part of a member of the University's Promotion Review Committee. The Grievance Committee had remanded the tenure case for a fresh promotion review process and the professor that had been identified by the Grievance Committee as having demonstrated prejudice in the initial tenure deliberations participated in the deliberations on remand and opposed granting tenure. The Supreme Court reversed an Appellate Division judgment ordering a new process before an ad hoc committee. The Court recognized:

the understandable grievance of a scholar who has worked as long and hard as this professor in a chosen field of study, asserting that she has been encouraged by the university to engage actively in the very field of study that is now said to impede her scholarly acceptance. This is precisely, however, the kind of dispute that courts should hesitate to resolve when the parties themselves have established procedures to aid in its resolution. It is difficult to conceive of a collective-negotiations agreement in which the parties bring more sophisticated skills to the table.

The Court reiterated that the substantive criteria for determining professorial tenure are not negotiable, but that the parties may negotiate the process to be followed in making such a decision. Id. at 124. Rather than have the courts intervene, the case was remanded to the Article X Grievance Committee to entertain the argument that the remedy fashioned by Rutgers after the first remand did not correct the defect.

The second concern involves each party's right to choose its own representative for purposes of adjusting grievances. N.J.S.A. 34:13A-5.4b(2) expressly prohibits an employee organization from interfering with, restraining, or coercing a public employer's selection of its representatives for negotiations or grievance adjustments while N.J.S.A. 34:13A-5.4a(1) and (5) implicitly prohibit a public employer from interfering with, restraining, or coercing an employee organization's selection of its representatives. See, e.g., Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-46, 22 NJPER 35 (¶27017 1995) (grievances contesting the number and identity of Board representatives at grievance hearings not arbitrable); Boqota Bd. of Ed., P.E.R.C. No. 91-105, 17 NJPER 304 (¶22134 1991); Bergen Pines Cty. Hosp., P.E.R.C. No. 91-98, 17 NJPER 254 (¶22117 1991); Salem Cty., P.E.R.C. No. 87-122, 13 NJPER 294 (¶18124 1987). Contrast Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985) (no interference with board's right to select its

negotiations representatives where Association opined that employer should not be represented by supervisor and principal who evaluated teachers on the Association's negotiations team; no coercion or refusal to negotiate shown); see also General Electric Co. v. N.L.R.B., 412 F.2d 512, 71 LRRM 2418 (2d Cir. 1969); see generally Hardin, The Developing Labor Law, at 927 (3d ed. 1992). We have therefore held that proposals concerning the composition of a negotiations team are not mandatorily negotiable.

Willingboro Bd. of Ed., P.E.R.C. No. 92-48, 17 NJPER 497 (¶22243 1991); Borough of Bradley Beach, P.E.R.C. No. 89-116, 15 NJPER 284 (¶20125 1989); Matawan Reg. Bd. of Ed., P.E.R.C. No. 80-153, 6 NJPER 325 (¶11161 1980).

There are exceptions to this principle. For example, an employer may refuse to negotiate with a negotiations team purportedly representing supervisors, but in fact illegally dominated by non-supervisors. Borough of Somerville, P.E.R.C. No. 88-77, 14 NJPER 218 (¶19077 1988). And private sector precedent holds that an employer or employee organization need not deal with a particular member of the other side's negotiations team given "persuasive evidence that the presence of the particular individual would create ill will and make good-faith bargaining impossible." KDEN Broadcasting Co., 225 NLRB 25, 35, 93 LRRM 1022 (1976); The Developing Labor Law at 180.

AAUP argues that the parties have committed themselves to an elaborate set of safeguards for the confidentiality of Article X proceedings. It further argues that a university representative for presentation of management's case to a panel of three faculty member-arbitrators is not a "representative for the purposes of negotiations or the adjustment of grievances" and that even if Davidson was such a representative, the disqualification is warranted because she intimidates faculty members who would appear before the Grievance Committee. AAUP argues that if forced to confront Davidson, witnesses will be reluctant to testify or will modify their testimony. This will allegedly undermine the effectiveness of the Article X proceedings and eliminate the safeguards against bias and enmity of evaluators from the evaluation process. Rutgers argues that N.J.S.A. 34:13A-5.4b(2) protects its right to select its representatives for Article X proceedings. It further argues that its statutory right is unqualified and not limited by an intimidation exception.

At this juncture, it is difficult for us to assess how the parties' competing concerns should be accommodated in this case. In part, that is because the types of concerns being raised by the employer usually arise in an unfair practice setting where one party alleges that the other has illegally sought to influence its choice of representative and the facts are found after an evidentiary hearing. Instead, Rutgers is asking us to issue a

prior restraint of an interlocutory ruling of a permanent referee in a court-approved peer review proceeding.

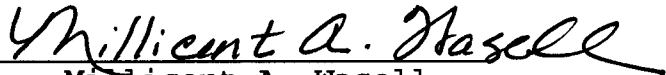
These unusual circumstances warrant unusual treatment. The parties have mutually selected a permanent referee and entrusted her with resolving procedural disputes arising during challenges to original evaluations. Given the unique nature of peer review proceedings and the parties' sophisticated and carefully negotiated procedures, we believe it would be helpful to have that neutral's assessment of what the parties agreed to and why and whether any such agreement was violated before we determine, if necessary, whether there has been improper interference with Rutgers' right to select a representative. We will treat the University's petition as if it were an unfair practice charge, but will defer the dispute to the pending proceeding before the referee. In accordance with the standards outlined in Brookdale Comm. College, P.E.R.C. No. 83-131, 9 NJPER 266 (¶14122 1983), we will permit the referee to consider the AAUP's objection. Should the AAUP prevail, Rutgers may refile its petition and argue that the referee's decision is repugnant to the Act. Should the need arise, we would be able to assess the parties' claims in light of the facts adduced before the referee and the concerns outlined above.

ORDER

The request for a restraint of the proceeding before the permanent referee is denied. The Commission retains jurisdiction

for the purpose of entertaining an application for further consideration if the referee reaches a result which Rutgers believes is repugnant to the Act.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan and Finn voted in favor of this decision. Commissioners Boose and Ricci voted against this decision.

DATED: November 23, 1998
Trenton, New Jersey
ISSUED: November 24, 1998