

P.E.R.C. NO. 79-75

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

Docket No. SN-79-54

-and-

RUTGERS COUNCIL OF AMERICAN ASSOCIATION
OF UNIVERSITY PROFESSORS CHAPTERS,

Petitioner.

SYNOPSIS

In a scope of negotiations proceeding, the Commission reiterates that promotional procedures are mandatorily negotiable, while promotional criteria are not. The Commission found the method of selection for promotions not to be mandatorily negotiable. However, the Commission did find that a unit member may file a grievance, if otherwise grievable under the parties' collective negotiations agreement, with respect to this dispute, but only to the extent that the matter may not be subject to binding arbitration. The Commission cited the recent Supreme Court decision in Bernards Township for this expansion of the scope of grievability.

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Appearances:

For the Petitioner, Sterns, Herbert & Weinroth, P.C.
(John M. Donnelly, of Counsel)

For the Respondent, Pitney, Hardin & Kipp, Esqs.
(Nancy A. Adams, of Counsel)

DECISION

On January 8, 1979, a Petition for Scope of Negotiations Determination was filed with the Public Employment Relations Commission by the Rutgers Council of American Association of University Professors Chapters (the "AAUP") seeking a determination as to whether a matter in dispute between Rutgers, The State University (the "University") and the AAUP is within the scope of collective negotiations.

The dispute arose when the University refused to process a grievance filed by a unit member regarding the consideration of said unit member for promotion to the title of Professor II, a distinguished professor position. Briefs were filed by both parties by February 16, 1979.

During the course of a recent evaluation process for promotion to the title of Professor II, one of the faculty members

represented by the AAUP was aggrieved with respect to the procedure followed in the processing of his nomination for that promotion. In an attempt to resolve this matter, the aggrieved faculty member filed grievances pursuant to the two grievance procedures in the collective negotiations agreement between the parties covering the period from July 1, 1975 through June 30, 1977. One of these procedures relates to claimed violations of University regulations and procedures or provisions regarding the failure to award tenure, promotion or reappointment. The other concerns alleged violations of the agreement or regulations regarding terms and conditions of employment.

In refusing to accept and process both grievances, it was the position of the University that movement to the title of Professor II does not come within the scope of those matters which affect terms and conditions of employment and, therefore, is not grievable.

The method of consideration for promotion to the title of Professor II, as gleaned from a memorandum dated September 11, 1978 from the Vice President for Academic Affairs entitled "Movement to Professor II Salary Category", is as follows:

(1) A faculty member may be recommended for Professor II status by one of several individuals.

(2) The faculty member is reviewed and evaluated by the Committee on Academic Credentials, a seven member committee of University faculty holding the status of Professor II.

(3) Based on the advice of the Academic Credentials Committee, the Vice President for Academic Affairs makes the final

recommendations to the Executive Vice President and President.

(4) The Board of Governors makes the final decision based on the report of the President.

The AAUP avers that procedural aspects of the promotion to Professor II are terms and conditions of employment, citing In re Cape May City Board of Education, P.E.R.C. No. 78-86, 4 NJPER 254 (1978). As such, the AAUP alleges that those procedural aspects must be subject to a grievance procedure, citing Township of West Windsor v. PERC, 78 N.J. 98 (1978).

The position of the University is simply that movement to the title of Professor II is an academic policy, and not an employment term. Therefore, this matter is not within the scope of negotiations and is not grievable.

The Commission has consistently held that promotional procedures are mandatorily negotiable and that promotional criteria are not mandatorily negotiable.^{1/} We hereby reaffirm that position. The demarcation of whether a subject is a procedure or a criteria, however, is more difficult than the pronouncement that some issues are negotiable while others are not. The Association in this case protests that procedures are negotiable, but fails to state what procedures it claims were violated.

^{1/} In re Borough of Roselle, P.E.R.C. No. 76-29, 2 NJPER 142 (1976); In re Byram Township Board of Education, P.E.R.C. No. 76-27, 2 NJPER 143 (1976); In re City of Plainfield, P.E.R.C. No. 76-42, 2 NJPER 168 (1976). See also Byram Township Board of Education v. Byram Township Education Association, 152 N.J. Super. 12 (1977) and North Bergen Township Board of Education v. North Bergen Federation of Teachers, 141 N.J. Super. 97 (1976).

An analysis of the method of selection for promotions to the title of Professor II reveals that the method used is a screening process and recommendations which ends in a final decision by the Board of Governors. The University has delegated to a committee and to various individuals the authority to assist the Board of Governors in making promotional decisions. But, as we stated in In re Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976), the fact that a matter has been the subject of employee involvement does not elevate such a matter to the status of a negotiable grievance or term or condition of employment if it is not otherwise negotiable. 2 NJPER at 15.^{2/}

The gravamen of the instant grievance is that the grievant was not promoted to Professor II. Although his terms and conditions of employment -- most obviously salary -- are affected by this decision, we nevertheless conclude that the decision to promote or not to promote an individual is an inherent managerial prerogative which is not negotiable. That is our scope determination. However, this case requires further discussion.

Although the matter herein is not mandatorily negotiable, the dispute between the parties appears to center on the ability of an individual employee to file a grievance concerning this management decision. On March 15, 1979, the Supreme Court in Board of Education of the Township of Bernards v. Bernards Township Education Association, ___ N.J. ___ (1979) held that the application of managerial decisions may be grievable. Initially, the court reiterated its holding in Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144 (1978) that there are only two

^{2/} See In re Middlesex County College, P.E.R.C. No. 78-13, 4 NJPER (14023 1977).

categories of subjects in public employment negotiations. Then the court explained its decision in Township of West Windsor v. P.E.R.C., 78 N.J. 98 (1978) that only mandatory subjects of negotiations must be subject to a grievance procedure which could include submission of disputes to binding arbitration.

Finally, the court held:

We did not, however, express an opinion as to the validity of advisory arbitration as an intermediate procedural step in the resolution of disputes concerning the applicability of those managerial decisions to a particular employee. We today hold that such an agreement is permissible." ___ N.J. at ___ (slip opinion at 19).

The court, therefore, has expanded its holding in West Windsor, supra. In that decision, the court found that "the scope of mandatory grievability was substantially equivalent to the scope of mandatory negotiability" 78 N.J. at p. 115. In Bernards, supra, the court has expanded upon that holding by adding that a grievance procedure may, if the parties so agree, provide for a definition of grievance which goes beyond the scope of mandatory grievances and encompasses disputes over managerial prerogatives. The court further held that a proposal for such a broader grievance procedure is a mandatorily negotiable term and condition of employment. Slip opinion, p. 20. The court did carefully limit its decision by holding that grievances concerning management decisions may only be subject to advisory arbitration and not to binding arbitration.

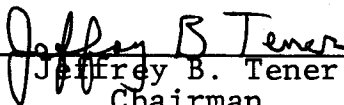
Hence, a public employee, if the parties to a collective negotiations contract so agree, can have the right to file a

grievance, and have such grievance submitted to advisory arbitration, regarding the applicability of a managerial decision to said employee. Here, the aggrieved faculty member may file a grievance, if otherwise grievable under the parties' collective negotiations agreement, with respect to the dispute herein, but only to the extent that the matter may not be subject to binding arbitration. In the scope determination, we are not passing upon the question of whether the parties' have provided for any type of arbitration: advisory or binding. That is beyond our purview in this type of proceeding.^{2/}

ORDER

Based upon the above discussion, it is hereby determined that the matter herein is a management prerogative which may be grieved, if otherwise grievable under the parties' collective negotiations agreement.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener and Commissioners Hartnett, Hipp, Graves, Newbaker and Parcells voted for this decision. None opposed.

DATED: Trenton, New Jersey
April 26, 1979
ISSUED: April 27, 1979

^{2/} The Commission notes that there are currently pending two unfair practice charges docketed as CO-78-250 and CO-78-241 between those same parties. At issue in these matters is the grievance procedures of their agreement. The Commission considers it outside the ambit of this decision to designate which grievance procedure, if either, could be utilized to grieve the matter of this scope determination. The Commission does emphasize that whatever grievance procedure is used, a grievance concerning a management prerogative cannot be submitted to binding arbitration.