

P.E.R.C. NO. 86-117

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY INSTITUTE OF TECHNOLOGY

Petitioner,

-and-

Docket No. SN-86-27

NEW JERSEY INSTITUTE OF TECHNOLOGY  
PROFESSIONAL STAFF ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, and denies, in part, a request of the New Jersey Institute of Technology to restrain binding arbitration of a grievance that the New Jersey Institute of Technology Professional Staff Association filed against NJIT. The grievance alleged that NJIT violated its agreement with the Association when, in considering whether to promote an employee, it did not consider the correct criteria. The Commission holds that the selection and application of promotional criteria may not be submitted to binding arbitration, but that the question of whether the correct criteria was applied may be submitted to binding arbitration.

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Appearances:

For the Petitioner, DeMaria, Ellis & Hunt, Esqs.  
(Brenda A. Cuba, of Counsel)

For the Respondent, Sterns, Herbert & Weinroth, P.A.  
(Linda K. Stern, of Counsel)

DECISION AND ORDER

On November 6, 1985, the New Jersey Institute of Technology ("NJIT") filed a Petition for Scope of Negotiations Determination. The petition seeks a restraint of binding arbitration of a grievance which New Jersey Institute of Technology Professional Staff Association ("PSA") has filed. The grievance alleges that NJIT violated its collective negotiations agreement with PSA when, in considering whether to promote Bernard T. Kingery to Associate Professor of Physics, it allegedly did not apply a grandfather clause in the staff handbook.

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

PSA is the majority representative of NJIT's full-time teaching staff, including assistant and associate professors. NJIT and PSA have entered a collective negotiations agreement effective from July 1, 1983 through June 30, 1986. The grievance procedure ends in binding arbitration of grievances, among others, alleging procedural violations or capricious or discriminatory treatment pertaining to promotions. An arbitrator, however, may not substitute his academic judgment for that of NJIT officials.

In 1952, NJIT hired Bernard T. Kingery to serve as an instructor in its physics department. In 1957 Kingery was promoted to assistant professor and in 1959 he received tenure.

Several times the physics department has recommended Kingery for promotion to associate professor. This promotion has been repeatedly denied, most recently in 1984. NJIT's Promotion and Tenure Committee, although recognizing Kingery's long record of devoted service, did not recommend him for promotion because of insufficient scholarly activities and insufficient substantiation of the department's claims of teaching excellence.

On October 4, 1984, Kingery filed a grievance. The grievance alleged that his application for promotion should have been judged under the grandfather clause in the staff handbook. That clause states that for promotion to the rank of associate professor, those persons who held the rank of assistant professor on September 1, 1963 will be eligible under the statements for the rank of associate professor then in effect; according to the grievance,

these statements did not weigh research as heavily as later statements. The grievance asked that Kingery be promoted to associate professor retroactive to September 1, 1978, the time Kingery claims he might have reasonably expected a promotion under the grandfather clause.

On February 22, 1985, NJIT's Executive Director for Employee Relations denied the grievance. He asserted, in part, that Kingery's promotional candidacy was considered and denied under the criteria in effect in September 1, 1963.<sup>1/</sup>

On April 4, 1985, NJIT's president sustained the grievance's denial.

On April 26, 1985, PSA demanded binding arbitration. The nature of the grievance is described as "[t]he grandfather clause in the Staff Handbook, Section 201, Part II has not been properly applied in [Kingery's] case." This petition ensued.<sup>2/</sup>

NJIT asserts that this dispute predominantly involves its managerial prerogative to promote employees based on its unilateral application of promotional criteria.

PSA asserts that this dispute predominantly involves mandatorily negotiable promotional procedures. It asserts that the sole issue which it seeks to arbitrate is whether the promotional criteria set forth in the 1962-63 staff handbook, rather than the current criteria, were in fact used. PSA asserts that it is not

1/ The document denying promotion does not refer to the 1962-63 staff handbook.

2/ The parties have postponed arbitration pending this decision.

asking the arbitrator to apply the proper promotional criteria or to determine whether Kingery should be promoted. PSA concedes that if an arbitrator determines that the 1962-63 guidelines were not in fact applied, the arbitrator's power is limited to remanding the matter for compliance with the proper procedures.

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

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 decide the contractual merits of the grievance or any defenses NJIT may have. We specifically do not decide whether the 1962-63 criteria were applied, as NJIT asserts, or the current criteria, as PSA and Kingery assert.

It has long been settled that promotional criteria are not mandatorily negotiable while promotional procedures are. Snitow v. Rutgers University, \_\_\_ N.J. \_\_\_, No. A-55 (March 17, 1986); Bethlehem Twp. Bd. of Ed. v. Bethlehem Twp. Ed. Ass'n, 91 N.J. 38 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 58

(1978) ("State Supervisory"); State v. State Troopers NCO Ass'n of New Jersey, 179 N.J. Super. 80 (App. Div. 1981) ("State Troopers").

It is clear, therefore, that NJIT has a managerial prerogative to select and apply the appropriate promotional criteria. We agree with PSA, however, that the grievance and demand for arbitration do not threaten this prerogative and predominantly present a much more limited procedural and factual dispute. The submissions of both NJIT and PSA agree that the appropriate promotional criteria are set forth in the 1962-63 staff handbook and PSA is only asking the arbitrator to determine whether these criteria, rather than current criteria, were applied. If they were in fact applied, the arbitrator's jurisdiction would be at an end; if they were not in fact applied, the arbitrator's remedial power would still be limited to ordering NJIT officials to reconsider Kingery's application based on the 1962-63 criteria. So limited, this dispute predominantly involves the mandatorily negotiable interest of employees in knowing the basis upon which they will be evaluated and the weight to be given each criterion. State Supervisory at 90; State Troopers at 91; New Jersey Highway Authority, P.E.R.C. No. 86-75, 12 NJPER 31 (¶17011 1985). To ensure, however, that NJIT's interests in adopting and applying promotional criteria are not compromised, we will enter the following order.

ORDER

The Public Employment Relations Commission declines to restrain binding arbitration to the extent that PSA asserts that the 1962-63 staff handbook criteria were not in fact applied and that Kingery's application should therefore be reconsidered by NJIT officials.

The Commission restrains binding arbitration to the extent that any argument may be made that Kingery should have been granted promotion under the 1962-63 staff handbook criteria.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Hipp and Horan were not present.

DATED: Trenton, New Jersey  
April 18, 1986  
ISSUED: April 21, 1986