P.E.R.C. NO. 2000-83

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CO-H-94-310

RUTGERS COUNCIL OF AAUP CHAPTERS,

Charging Party.


SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against Rutgers, The State University. The Complaint was based on an unfair practice charge filed by Rutgers Council of AAUP Chapters alleging that Rutgers violated the New Jersey Employer-Employee Relations Act by refusing to negotiate over its decision to create a non-tenure track clinical faculty series. The AAUP also incorporated its allegations in an earlier unfair practice charge filed before the establishment of the new title series, and later amended the instant charge to allege that the employer refused to negotiate over the eligibility of employees in the clinical position to receive tenure and to be promoted to the Professor II rank and salary. The Commission concludes that given the University's unfettered right to set criteria for academic tenure, it cannot be forced to negotiate over making tenure available to employees without the requisite scholarship. The Commission further concludes that the decision to create the non-tenure clinical faculty series for nursing and pharmacy was non-negotiable. Given the holding that eligibility for tenure for these clinical faculty titles is not mandatorily negotiable, and the Commission's belief that the AAUP's demand to negotiate over job security is intertwined with its demand to negotiate over tenure, the Commission declines to find that Rutgers refused to negotiate in good faith. The Commission also dismisses that aspect of the Complaint concerning promotion to Professor II.

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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RUTGERS COUNCIL OF AAUP CHAPTERS,

Charging Party.

Appearances:

For the Respondent, John B. Wolf, Rutgers Employment and Labor Counsel

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

DECISION

On April 18, 1994, Rutgers Council of AAUP Chapters filed an unfair practice charge against Rutgers, the State University. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5),[1/] by refusing to negotiate over its decision to create a non-tenure track clinical faculty series. The AAUP incorporated its allegations in an earlier

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

unfair practice charge (CO-94-112) filed before the employer established the new title series, and later amended the instant charge to allege that the employer refused to negotiate over the eligibility of employees in the clinical position to receive tenure and to be promoted to the Professor II rank and salary.

On September 8, 1994, a Complaint and Notice of Hearing issued. The employer filed an Answer denying that it had violated the Act. By way of affirmative defenses, the employer stated that the Complaint raises matters outside the scope of negotiations; alleges nothing more than a breach of contract; and is barred by Article 19 of the parties' contract.

Hearing Examiner Arnold H. Zudick conducted eleven days of hearing between March 30, 1995 and February 23, 1996. The parties filed post-hearing briefs and replies, the last of which was received on October 17, 1997.

On October 5, 1998, the Hearing Examiner issued a comprehensive report recommending that the Complaint be dismissed. He concluded that the employer did not violate the Act by: unilaterally creating a non-tenure clinical faculty position; not changing the qualifications and criteria for promotion to Professor II to include employees holding the clinical position; unilaterally submitting the proposal for the new position to the University Senate for advice; waiting until the advice process was completed before offering to negotiate over negotiable subjects; or any other means.

On April 26, 1999, after extensions of time, the AAUP filed exceptions. It argues that certain findings of fact are not supported by substantial evidence and that the Hearing Examiner's conclusions are contrary to law. In particular, the AAUP argues that the Hearing Examiner erroneously held that eligibility for tenure and for promotion to Professor II are not negotiable subjects and erroneously held that the administration acted in good faith.2/

On October 4, 1999, after extensions of time, the employer filed an answering brief urging adoption of the Hearing Examiner's report and recommendations.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's detailed findings of fact (H.E. at 10-67).

The key question in this case is whether the employer had an obligation to negotiate over whether clinical faculty positions would be eligible for tenure or some other form of job security. That question is predominately one involving the scope of negotiations. If, and only if, the answer to that question is yes, then we must answer the questions of when that negotiations obligation attached and whether the employer intentionally evaded negotiations by submitting the clinical faculty proposal to the Senate.

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2/ The AAUP does not except to any of the Hearing Examiner's findings of fact. Its exceptions focus on the Analysis portion of his decision. We will address those concerns in our legal analysis.

Tenure at Rutgers means that faculty members enjoy continued employment and are not subject to any kind of periodic review. Generally, the process leading to tenure at Rutgers takes six years. A faculty member is hired as an assistant professor with a three-year contract. Near the end of that contract, the individual is evaluated and either offered a second three-year contract as an assistant professor or asked to leave. Those who are renewed are evaluated near the end of the second three-year period and are either promoted to the tenured rank of associate professor or granted a terminal year to look for other employment.

Tenure at Rutgers applies only to faculty whose positions are funded by the State. In addition to tenure track faculty, the AAUP also represents non-tenure track faculty in grant-funded positions, self-sustaining positions such as continuing education courses from which money is generated and used to pay salaries, and non-renewable assistant professorships.

University regulations specify the criteria to be used in considering reappointments, promotions and tenure for different faculty categories.

> For general teaching/research faculty and extension specialists, the criteria are teaching, scholarship and service. The primary criterion is scholarship, including research accomplishment.
>
> For faculty in the creative and performing arts, the criteria are teaching, scholarship and/or artistic accomplishment, and service. The primary criterion is scholarship and/or artistic accomplishment.

> For library faculty, the criteria are librarianship, scholarship and service. The primary criteria is librarianship.
>
> For county agent faculty, the criteria are teaching, extension practice and service. The primary criterion is extension practice.
>
> For extension specialist faculty, the criteria are teaching, extension scholarship, and service. The primary criterion is extension scholarship.

Individuals who make substantial progress and demonstrate distinction beyond an associate professor level may be considered for the rank of Professor. The rank of Professor II is reserved for those who have achieved scholarly eminence in their discipline and fields of inquiry.

Rutgers College of Nursing offers Bachelor of Science, Master of Science and Ph.D. degrees in nursing. The Bachelor and Master programs require clinical instruction for graduation. When students perform their clinical intervention courses, they are accompanied and supervised by a clinical faculty member. Students and supervising faculty are at their clinical site six to eight hours per day, two days per week.

The College of Nursing appoints about six assistant professors per year. Approximately 75% do not receive a second three-year appointment. At the hearing, the Dean of the College of Nursing explained her reasons for supporting a non-tenure clinical faculty position.

> 1. Since the professors who were providing clinical instruction were not competing for tenure and, therefore, often leaving faculty

positions after a three-year term, they had neither the time nor inclination to study and understand the curriculum, nor were they able to stay within the goals and mission of the curriculum.

2. Due to the turnover of clinical instructors, the College has often been unsuccessful in finding new clinical faculty experienced or talented enough to be accepted by the institutions and agencies where the clinical instruction occurs.

3. It is difficult to attract clinical faculty to tenurable positions because they know that they may not have the time to do the publication, research and scholarship necessary to obtain tenure.

4. Having non-tenure clinical positions would give the College the ability to renew talented clinical instructors who maintain their skills, while still allowing it to remove those clinical instructors whose skills have waned.

The College of Nursing is accredited by the New Jersey Board of Nursing and the National League for Nursing. Both agencies visited the College in the fall of 1992 and accredited the College in 1993.

The College of Pharmacy offers Bachelor of Science, Doctor of Pharmacy (Pharm.D.), and Ph.D. degrees. Clinical instruction is required for the Bachelor and Pharm.D. programs. As of 1976, the College of Pharmacy had approximately 45 full-time faculty members. Fourteen of those positions are in the Pharmacy Practice Department, which is solely responsible for clinical instruction. Six of those 14 positions are fully funded by the State and tenure eligible. As of 1996, of the six, only one faculty member had tenure.

The Dean of the College of Pharmacy also testified. He believes that the heavy involvement of the pharmacy practice faculty in clinical care activities is inconsistent with the research and scholarship requirements of tenure. Candidates for clinical tenure track positions are very concerned about whether they will have enough time and the proper facilities to conduct their research.

The accrediting organization for pharmacy schools is the American Council on Pharmaceutical Education (ACPE). The College was accredited in the 1930s or 1940s and has been reaccredited since then. The process for reaccreditation began during the 1990-91 academic year with a self-study evaluation. The self-study report recommended the creation of a non-tenure clinical faculty track. It noted a danger in the low percentage of tenured faculty and anxiety among tenure-track faculty over whether teaching and service were really being counted in evaluating faculty for tenure. The ACPE accreditation team conducted a site visit in September 1991. Its report stated that:

> The establishment of a non-tenure accruing or clinical track series may assist in addressing this issue by balancing the utilization of non-tenure track appointments with tenure track and other faculty appointments.

Its accreditation decision provided:

> the proposed non-tenure accruing or clinical-track faculty appointment series will be necessary to implement the College's comprehensive strategy for development of clinical faculty resources.

The evaluators thought a non-tenure line for clinical faculty would improve morale.

The issue of creating a non-tenure track clinical track title for Nursing and Pharmacy had existed for many years. For example, in 1991, the Associate Provost for Administration and Personnel wrote to the University's Vice President for Administration and Personnel recommending a non-tenure track position for the Pharmacy Department because of its problems in retaining faculty, competition from the pharmaceutical industry, and the research requirements for tenure. At about the same time, the Dean of Nursing drafted a proposal for a non-tenure track clinical faculty position. The advantages listed included greater stability in the clinical instruction program and increased opportunities for research and scholarship by tenure-track assistant professors relieved of clinical responsibilities.

On April 7, 1995, the Rutgers Board of Governors adopted a new Appendix D to its Policy with Respect to Academic Appointment and Promotions. Clinical faculty was added as a faculty category; clinical practice was added as a criterion; and the criteria applicable to clinical faculty were established as teaching, clinical practice, and service, with the primary criterion being clinical practice. The definition of clinical practice in the criteria section anticipates that clinical faculty will concentrate their efforts and apply their knowledge to patient and client care; and apply research to the clinical

setting. Clinical faculty was added to the faculty category as non-tenure track.

The Hearing Examiner correctly found that the employer unilaterally established non-tenure track clinical faculty titles in nursing and pharmacy in response to the high rate of turnover of faculty performing clinical duties in both schools. In nursing, the turnover of tenure track faculty performing clinical practice was so high that students were denied knowledge and experience they needed to pass their licensing examination. Having only tenure track positions also hurt the department's ability to recruit the best clinical faculty which in turn threatened its ability to place students in health-related institutions for instruction, and limited its ability to renew talented clinical faculty who had neither the time nor the inclination for extensive scholarship and research. Pharmacy had high turnover because it could not offer clinical faculty a renewable position not requiring scholarship and research; and, health-related institutions preferred clinical instructors whose attention was not diverted from the clinical setting.

Rutgers argues that it had a compelling educational policy need to establish the non-tenure track titles that outweighed any obligation to negotiate. The AAUP argues that there were alternative means to address the university's concerns and that those alternatives could have been addressed through the collective negotiations process. In particular, the AAUP argues

that the employer could have de-emphasized the scholarship and research criteria for tenure as it has done for other tenure track titles in the university.

Local 195 v. State, 88 N.J. 393 (1982), articulates the tests for resolving negotiability disputes:

> [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. [88 N.J. at 404-405.]

Job security intimately and directly affects the work and welfare of these employees. See Wright v. City of E. Orange Bd. of Ed., 99 N.J. 112 (1985); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 84 (1978); Plumbers & Steamfitters v. Woodbridge Bd. of Ed., 159 N.J. Super. 83 (App. Div. 1978); Rutgers, the State Univ., P.E.R.C. No. 91-81, 17 NJPER 212, 214 (¶22091 1991). Academic tenure is one form of job security that provides review of adverse personnel actions. University faculty have an additional interest in job security in the form of tenure because it provides protection from university intrusions into faculty members' academic freedom.

No statute or regulation preempts negotiations over tenure or job security for faculty at Rutgers. By contrast, N.J.S.A. 18A:28-5 et seq. establishes tenure rights after three consecutive calendar years for public school teaching staff members and N.J.S.A. 18A:60-6 et seq. establishes tenure rights after five consecutive calendar years for county and State college professors. See also N.J.S.A. 18A:64-20 et seq. (preserving tenure rights after reorganization of State college system).

Under some circumstances, tenure or job security for professional employees at State colleges may significantly interfere with educational policy. For example, in Association of New Jersey State College Faculties v. Dungan, 64 N.J. 338, 355 (1974), having unduly high proportions of tenured faculty disserved sound educational interests. In that case, the State Board of Higher Education had the right to establish tenure guidelines without negotiations. In State of New Jersey (Stockton State College), P.E.R.C. No. 76-33, 2 NJPER 147 (1976), the college had a prerogative to implement a tenure plan setting a ratio of tenured to non-tenured faculty. In both cases, having too high a proportion of tenured faculty threatened the vitality of the educational institutions. Similarly, in UMDNJ v. AAUP, 223 N.J. Super. 323 (App. Div. 1988), aff'd 115 N.J. 29 (1989), the courts held that the university had a managerial prerogative to unilaterally adopt a mandatory retirement policy because "[n]othing could be more germane to the educational goals of an

institution of higher education than the vitality of that institution as reflected in its ability to hire, retain and deploy its faculty." 223 N.J. Super. at 335-336. Compare Rutgers (Rutgers has prerogative to hire part-time lecturers, but once hired, those employees may be protected by a job security provision that affords Rutgers an opportunity to evaluate their performance before tenure is granted). Consistent with scope of negotiations case law in general, and tenure cases in particular, we must examine the facts of this case to determine whether the issue the AAUP sought to negotiate would significantly interfere with educational policy.

We begin with the employer's action and the AAUP's response because they set the framework for this dispute.

In May 1993, the University's Vice-President for Academic Affairs sent a letter to the Chair of the University Senate asking for the Senate's advice on a proposed non-tenure track faculty series. The Senate's Executive Committee referred the matter to the Academic Personnel Committee, whose membership included a member of the AAUP's leadership.

Having been informed of the proposal, the AAUP made numerous demands to negotiate. Its first, in September 1993, demanded to negotiate over all aspects of the proposal that were mandatory subjects of negotiations. In particular, it asked that:

> all references to employment security -- the question of whether these new positions will carry the possibility of tenure rather than be limited to three-year contracts must be withdrawn from the Administration's Senate proposal.

This request to negotiate over job security was intertwined with a request to negotiate over whether the new positions would be tenure-eligible. That makes sense because it does not appear that either party was contemplating any form of job security other than tenure.

Later AAUP requests to negotiate also focused on whether the clinical faculty series could be a tenured position. After the University Senate adopted a resolution for the clinical faculty series, the University offered to resume "discussions." The AAUP responded that it was not interested in resuming "discussions."

On April 12, 1994, University Vice President Norman notified the AAUP of the Board of Governors meeting scheduled for April 15 at which it would consider the clinical faculty series. He stated that:

> if there are specific mandatorily negotiable subjects that the AAUP wishes to negotiate that are different from the terms of the contract, please let me know.

The AAUP responded by renewing its demand for "negotiations" on the issues of tenurability and eligibility for the rank of Professor II. The AAUP wrote:

> With regard to the Administration's position that tenurability is not a mandatory subject of negotiation, I call your attention to "Rutgers, the State University, P.E.R.C. No. 91-81 ... in which it was determined that tenurability of Visiting Part-Time Lecturers ... is a mandatory subject of negotiation. How can one in good faith hold that this subject is mandatorily negotiable for part-time faculty and not for full-time clinical faculty.

Later correspondence from the AAUP again renewed its demand for negotiations over eligibility for appointment or promotion to Professor and Professor II and eligibility for tenure.

Thus, we conclude that the AAUP's overall demand to negotiate over job security was intertwined with its demand to negotiate over tenure. Under these circumstances, we will limit our inquiry to whether the University violated the Act by refusing to negotiate over traditional academic tenure for clinical faculty.

The employer argues that it needed to create the non-tenure clinical positions to maintain the vitality and integrity of its clinical education programs in nursing and pharmacy. Because of the scholarship and research demands of achieving tenure, the turnover rate for clinical faculty was unacceptably high. In addition, because the clinical faculty knew that they were not likely to attain tenure, they had neither the time nor the inclination to study and understand the curriculum.

At first blush, it appears somewhat incongruous that the solution to high turnover is to deny tenure. But the record supports the conclusion that tenure was unattainable for most clinical faculty and that therefore tenure eligibility led to a high turnover rate.

The question posed by the AAUP is whether the unilateral creation of the non-tenure clinical faculty series was the only solution to this educational policy concern. If not, it asserts that decision should have been subject to the statutory obligation

to negotiate. The AAUP argues that, in fact, Rutgers changed the criteria for clinical faculty to de-emphasize scholarship and that change alone could have addressed the University's concerns without having to eliminate tenure eligibility for clinical faculty. The AAUP notes that the tenure-eligible titles of county agent and librarian do not have scholarship as the major criterion for hire or tenure.

On this record, it is not clear that eliminating all forms of job security for clinical faculty was necessary to the achieving of the University's educational policy goals. But given the University's unfettered right to set criteria for academic tenure, it cannot be forced to negotiate over making academic tenure available to employees without the requisite scholarship. Snitow v. Rutgers Univ., 103 N.J. 116, 121-123 (1986). In other words, if Rutgers decides that academic tenure requires scholarship and that a particular faculty title should not emphasize scholarship, then an agreement to make that title tenure-eligible would significantly interfere with an educational policy determination.

Thus, we conclude that the decision to create the non-tenure clinical faculty series for nursing and pharmacy was non-negotiable. Given our holding that eligibility for tenure for these clinical faculty titles was not mandatorily negotiable, and given our belief that the AAUP's demand to negotiate over job security was intertwined with its demand to negotiate over tenure,

we decline to find that the University was refusing to negotiate in good faith when it refused the AAUP's negotiations demand.

We recognize that this holding may appear unjust from the perspective of the AAUP because it may have construed its negotiations demand to encompass all forms of job security. However, the University cannot be expected to have focused on the distinction between tenure and job security that neither party was making clear at that time. We find it more appropriate to clarify the distinction in what we stated at the outset is essentially a scope of negotiations determination. Should the AAUP choose to pursue other forms of job security and make a specific negotiations demand that the employer believes is not mandatorily negotiable, the employer may file a scope of negotiations petition.

As for the issue of promotion to Professor II, we adopt the Hearing Examiner's analysis and dismiss that aspect of the Complaint. We accept the distinction between negotiations over promotion to higher rank and negotiations over salary.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. Commissioners Buchanan and Madonna voted against this decision.

DATED: April 27, 2000
Trenton, New Jersey
ISSUED: April 28, 2000

H.E. NO. 99-7

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CO-H-94-310

RUTGERS COUNCIL OF AAUP CHAPTERS,

Charging Party.

## SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that Rutgers, The State University, did not violate the New Jersey Employer-Employee Relations Act by unilaterally creating a clinical faculty position on a non-tenure track; by not changing the qualifications and criteria for promotion to Professor II to include employees holding the clinical position; by unilaterally submitting the proposal for the new position to the University Senate for advice and waiting until the advice process was completed before offering to negotiate over negotiable subjects; or, by any other actions.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 99-7

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

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-and- Docket No. CO-H-94-310

RUTGERS COUNCIL OF AAUP CHAPTERS,

Charging Party.

Appearances:

For the Respondent, John B. Wolf, Esq.
Rutgers Employment and Labor Counsel

For the Charging Party, Reinhardt & Schachter
(Denise Reinhardt, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On April 18, 1994, Rutgers Council of AAUP Chapters ("AAUP") filed an unfair practice charge with the New Jersey Public Employment Relations Commission, amending it on June 29, 1994, and again on July 25, 1995, alleging that Rutgers, The State University ("Rutgers" or "University"), violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4(a)(1) and (5).1/ In the original charge (C-1), the

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to

Footnote Continued on Next Page

AAUP began its allegations by incorporating into this case the allegations from its charge against Rutgers in Docket No. CO-94-112. In CO-94-112, the AAUP alleged that: Rutgers, by correspondence of September 27, 1993 (CP-7), refused to negotiate with the AAUP over a proposal it (Rutgers) submitted to the University Senate proposing the creation of a non-tenure track clinical professor title named the "Clinical Professor Series"; Rutgers violated the AAUP's right to negotiate over terms and conditions of employment by refusing to negotiate until it (Rutgers) had a completed proposal and the process of receiving advice from the Senate was completed; and, that Rutgers engaged in a pattern of conduct designed to deprive the AAUP of its right to negotiate by refusing to negotiate until Senate review of the proposal had been completed.

In the instant charge (CO-94-310), the AAUP further alleged that: Rutgers refused to negotiate in good faith because it unilaterally prepared and meant to implement the proposed non-tenure track clinical professor series even though the new positions would be in its unit; by failing to notify the AAUP that it believed the non-tenure term of clinical faculty was non-negotiable; by failing

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1/ Footnote Continued From Previous Page

negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

to negotiate in good faith by submitting the proposal for clinical non-tenure track faculty positions to the University's Board of Governors for approval without first negotiating over the terms of tenurability and the cap on rank with the AAUP; by establishing the non-tenure nature of the position at the time of its proposal without first negotiating over that subject with the AAUP; by presenting the proposal to the Senate merely to delay negotiations over the terms of the new position; by delaying negotiations since September 1993 to undermine the AAUP's standing, authority and ability to negotiate; by intending to negotiate only some terms pertaining to the new clinical series; by not claiming whether the tenurability of the new positions was a matter of educational necessity; by withdrawing its position that tenure for these positions was non-negotiable; by delaying negotiations until March 29, 1994; by placing the resolution adopting the non-tenurable clinical series on the Board of Governors Agenda for April 15 without negotiations with the AAUP; by placing in the resolution the provision that non-tenure clinical appointments may be made immediately; and by impeding timely access to contractually agreed upon methods for dispute resolution.

Finally, the AAUP alleged that Rutgers has refused to negotiate in good faith and that its conduct constitutes repudiation of its duty to negotiate.

In its first amendment (C-2), the AAUP further alleged that by letter of April 22, 1994 (CP-26), Rutgers refused to negotiate

over the eligibility of employees in the clinical position to receive tenure, and for their promotion to higher rank and salary.

A Complaint and Notice of Hearing was issued regarding the original and first amended charges on September 8, 1994 (C-1). Rutgers filed an Answer and affirmative defenses on October 27, 1994, admitting to certain correspondence and documents, but denying it violated the Act (C-3). Rutgers raised several defenses including that the matters raised in the Complaint involve subjects that are outside the scope of collective negotiations; the complaint alleges nothing more than a breach of contract and does not rise to the level of an unfair practice; and, that the Complaint is barred by virtue of Article 19 of the parties collective agreement.

Hearings were held on March 30, May 9, July 25 and 31, August 8, September 13 and 28, and October 27, 1995, and January 3 and 4, and February 23, 1996.2/

Both parties filed post-hearing briefs and proposed findings of fact by January 29, 1997, and reply briefs by October 17, 1997.

Procedural History

On October 25, 1989, the AAUP filed an unfair practice charge with the Commission (Docket No. CO-90-119) (R-2) alleging

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2/ The transcripts will be referred to as 1T (March 30), 2T (May 9), 3T (July 25), 4T (July 31), 5T (August 8), 6T (September 13), 7T (September 28), 8T (October 27), 9T (January 3), 10T (January 4), 11T (February 23).

that Rutgers violated the Act by refusing to negotiate over changes in the 1989-90 Academic Promotion/Reappointment Instructions, and that it unilaterally imposed changes in the reappointment, promotion and tenure procedures. On March 23, 1990, the AAUP filed a petition for scope of negotiations with the Commission (Docket No. SN-90-62) (R-4) seeking a determination on whether procedures for promotion, reappointment and tenure evaluations as proposed in a particular article were negotiable. Neither the charge (R-2) nor the petition (R-4) raised an issue over the negotiability of tenure. On July 9, 1990, the parties reached a memorandum of agreement (R-3) resulting in the withdrawal of the charge in CO-90-119. The scope petition was litigated before the Commission and the courts but did not address the negotiability of tenure. Rutgers, the State University and Rutgers Council of AAUP Chapters, P.E.R.C. No. 91-44, 16 NJPER 593 (¶21261 1990), aff'd in pt., rev'd in pt. 256 N.J.Super. 104 (App. Div. 1992), aff'd 131 N.J. 118 (1993).

On October 8, 1993, the AAUP filed its unfair practice charge with the Commission in Docket No. CO-94-112, amending it on January 6 and February 24, 1994, alleging that Rutgers violated paragraphs 5.4(a)(1) and (5) of the Act. The specific allegations are set forth above.[3/]

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3/ The parties stipulated that Commission staff conducted an exploratory conference in CO-94-112 on December 1, 1993; that an amended charge was filed in CO-94-112 on January 6, 1994; and, that a second amended charge was filed in that case on February 24, 1994 (4T6).

On March 11, 1994, the Director of Unfair Practices issued a decision dismissing the charge in CO-94-112. Rutgers, The State University, D.U.P. No. 94-29, 20 NJPER 161 (¶25073 1994). He found that the charge was premature and did not raise a valid refusal to negotiate at that time. He indicated that the University had not yet created the new positions, and concluded there could be no refusal to negotiate until after a final decision had been made regarding the creation of the positions.

The Director also held that Rutgers' request for advice from the Senate over the creation of a non-tenure track clinical position was of no significance. He explained that the sincerity of Rutgers' desire for review and advice from the Senate was immaterial to the AAUP's refusal to negotiate allegation.

The Director concluded that decision with a footnote indicating he was not deciding the negotiability of tenure, but noted that once Rutgers created the position the parties were obligated to negotiate over mandatorily negotiable subjects and reminded the parties that either of them could raise negotiability issues through a scope of negotiations petition.

The AAUP appealed the Director's decision to the Commission. It argued, in part, that it should not have to wait for Rutgers to implement the term of "no tenure" for the new positions before it can seek negotiations. In Rutgers, The State University, P.E.R.C. No. 95-41 (1994), the Commission noted that the AAUP had incorporated the allegations raised in CO-94-112 into this charge

(CO-94-310), and that the Director issued a complaint in CO-94-310, and, therefore, denied the appeal in CO-94-112 as moot.

On March 17, 1995, the AAUP filed a motion with me seeking my disqualification from hearing this case (C-4). The AAUP argued that I should be disqualified because of credibility determinations I made in a prior, but unrelated, case between these same parties, Rutgers, The State University, P.E.R.C. No. 95-32, 20 NJPER 431 (¶25221 1994), adopting H.E. No. 94-16, 20 NJPER 130 (¶25068 1994), because some of the same witnesses would be testifying at this hearing, and credibility, it thought, was likely to be an issue.

The University opposed the motion by letter brief of March 21, 1995 (C-5). It argued, in part, that it had raised a non-negotiability defense in this matter and concluded that credibility was likely to be of only slight importance.

By letter of March 22, 1995 (C-6), I denied the motion noting that each case before a hearing examiner is decided based upon the particular facts of that case. Compare, State v. Marshall, 148 N.J. 89, 276 (1997), and State v. Walker, 33 N.J. 580, 591 (1960) (a judge's adverse ruling in prior proceedings does not warrant disqualification); Hall v. NLRB, 941 F.2d 684, 689, 138 LRRM 2266, 2270 (CA 8 1991) (Court rejects argument of ALJ bias where only evidence of bias is ALJ's adverse credibility determinations and findings of fact and conclusions of law); Town of Penfield, 29 PERB (¶3028 1996), and State of New York (Burns), 25 PERB ¶3007 (1992) (disqualification of ALJ was not required where alleged bias

was premised upon ALJ's rulings and conduct in processing charge). The AAUP did not file for special permission to appeal my decision on that motion. N.J.A.C. 19:14-4.6. The hearing commenced on March 30, 1995.

In its opening remarks on March 30, 1995, the University asserted, in part, that the AAUP was required by their contract (J-1, Art. 19, Section B) to file a scope of negotiations petition in this matter (1T37). I noted that the issue of whether the contract obligated one side or the other to file a scope petition was not before me. I considered that issue immaterial to the issue of whether tenure was negotiable for the clinical faculty involved in this case (1T40; 1T43).

On the third day of hearing in this matter, July 25, 1995, the AAUP filed its second amendment to the charge (C-2A) alleging that: on April 7, 1995, without prior notice to the AAUP, Rutgers adopted an amended "University Policy with Respect to Academic Appointments and Promotions" (CP-16) incorporating it into the "Academic Reappointment and Promotion Instructions" for 1995-96; on June 19, and again on July 12, 1995, Rutgers refused to negotiate over salary scales and eligibility for access to promotion and tenure procedures for clinical faculty; Rutgers' conduct was a refusal to negotiate in good faith and a unilateral imposition of negotiable terms of employment; Rutgers has refused the AAUP's demands to negotiate over the terms of the new clinical faculty series.

Pursuant to N.J.A.C. 19:14-2.2(a), I amended the Complaint at hearing on July 25, 1995 to include the second amendment (3T7-3T8). On the fourth day of this hearing, July 31, 1995, Rutgers, pursuant to N.J.A.C. 19:14-3.3, filed an amended answer and separate defenses (C-3A) to the second amendment (4T7-4T8). Rutgers admitted that it amended its policy on April 7, 1995, and that the parties exchanged correspondence through July 12, 1995, but it denied violating the Act. Rutgers raised several defenses including that the matters raised in the Complaint involved subjects outside the scope of collective negotiations; that it fulfilled its negotiations obligation; that the complaint alleged nothing more than a breach of contract; and, that Article 19 of the parties collective agreement barred the Complaint.

Issues

In its opening remarks, the AAUP framed the issues in this case as:

1) When did the obligation to negotiate accrue? (1T19, 1T24). That is, if Rutgers was obligated to negotiate, when was it first obligated to negotiate over the clinical faculty series proposal? Before, or just after the proposal was first submitted to the Senate; during the time the Senate was considering the proposal but prior to a Senate vote; after the Senate vote but before the Board of Governors considered the proposal; or, after the vote by the Board of Governors?

2) Did the Administration refuse to negotiate (1T24)? That is, did Rutgers intentionally evade negotiations by submitting the clinical faculty proposal to the Senate to avoid negotiations with the AAUP?

3) Is this a negotiable term and condition of employment (1T24)? That is, whether tenure for clinical faculty was a negotiable term and condition of employment; and, whether there was a genuine issue of educational necessity preempting negotiations over tenure?

The AAUP, subsequently, rephrased the issue as:

> ...whether or not a series of classifications may be established for which tenure is not a possibility without negotiating with the union. (1T49).

The AAUP was not asserting it had the right to negotiate over which employees specifically received tenure, but that it had the right to negotiate over whether the clinical faculty positions were tenurable (1T49-1T50).

In its opening remarks, Rutgers framed the issue in this case as: whether the AAUP had the right to negotiate over whether the clinical faculty positions could be tenure track (1T28)?

Based upon the entire record, I make the following:

## FINDINGS OF FACT

1. The Collective Agreement: Rutgers and the AAUP are parties to a collective agreement effective from July 1, 1992

through June 30, 1995 (J-1).[4/] The AAUP generally represents all faculty members employed by Rutgers engaged at least 50% of their time in instruction, research, or other academic service. The AAUP has represented this unit since approximately 1970 (see R-4). There is no dispute over the inclusion of the clinical faculty series in the AAUP's unit.

There is no language in J-1 that addresses tenure, but the AAUP represents both tenure and non-tenure track positions. Most of the faculty represented by the AAUP hold tenure track positions which are renewably funded by the State. The AAUP also represents faculty holding the following non-tenure track positions including: grant funded (soft money) positions for which money is provided to the University for a specific purpose; self-sustaining positions such as continuing education courses from which money is generated and used to pay salaries for the positions; and, non-renewable assistant professorships (including Hill Professorships). Those non-tenure track positions have been included in the AAUP's unit since the 1970's (2T68; 8T18-8T21; CP-2, p.20). Visiting faculty also hold non-tenure track positions but they are not included in the AAUP's unit (8T19). The University unilaterally established that grant funded positions were not eligible for tenure (2T68-2T69; CP-2).

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4/ J-1 was actually signed in April 1994, but was effective from March 3, 1994 retroactive to July 1, 1992.

By resolution of July 13, 1984, Rutgers unilaterally created non-renewable or fixed term non-tenure track Assistant Professorships (8T22-8T23; R-25, p.8-p.10). The AAUP did not object to the unilateral creation of those non-tenure track positions. By letter of January 7, 1985 (R-29), the AAUP asked the University for information regarding those non-tenure track positions. The University provided the information by letter of February 5, 1985 (R-28). By letters of July 26 and October 10, 1989 (R-27 and R-26, respectively), the University provided the AAUP with a list of non-tenure track assistant professors (R-27). The list contained approximately 15 names.

The language in J-1, Article 19, Section B.1 and B.2, addresses how proposed changes shall be handled. It provides that:

> B.1. Before being presented to the Board of Governors, proposed changes in University Regulations, policies, and/or practices affecting the terms and conditions of employment of the members of the bargaining unit shall first be submitted to the AAUP for negotiation.
>
> B.2. Section B.1. above shall be construed to require negotiations only as to those aspects of such proposed changes that constitute mandatory subjects of negotiation. Disputes concerning the application of section B.1. and B.2. shall be resolved by submission to the Public Employment Relations Commission under its scope-of-negotiation processes.

Neither party complied with Article 19, Section B.2. They did not file a scope petition with the Commission asking for a determination over whether tenure for clinical faculty positions was negotiable.

Article 8, and the salary schedules listed in J-1, provide different salaries for Professor I and Professor II positions. The latter position has the highest salary. Unit members holding certain non-tenured track positions are eligible for promotion through the Professor I level, but are not eligible for promotion to Professor II (9T77; CP-16, p.10-p.13).

Tenure

2. In an academic environment tenure generally refers to the permanence with which an employee holds his/her position. At Rutgers, tenured faculty are not evaluated for the purpose of deciding whether their employment will continue (9T90). The AAUP's former president defined tenure for Rutgers faculty as an "employment status that is conferred under a variety of different circumstances upon faculty members so that their continued employment is not subject to any kind of periodic renewal," and is no longer at the employers will (1T63). He noted that the concept of tenure is designed to provide both stability and protection for academic freedom (1T64).

Generally, the process leading to the grant of academic tenure at Rutgers takes six years. Those years constitute a probationary period. The process begins with the hiring of a faculty member as an assistant professor with a three year contract. Near the end of that contract the individual is evaluated and either offered a second three year contract as an assistant

professor or asked to leave. Those assistant professors who are renewed will undergo a lengthy evaluation near the end of their second three year appointment, and either be promoted to the rank of associate professor at which point they are granted tenure, or offered neither promotion nor tenure. The latter employee is entitled to a seventh year of employment known as the terminal year, during which he/she may look for other employment, and then is expected to leave the University (3T102-3T104; 5T58-5T59; 8T15; 8T19-8T20).

3. The University has many policies, rules, regulations and instructions regarding tenure. Exhibits CP-2 and CP-3 are excerpts from the University's Regulations and Procedures Manual. Exhibit CP-4 is the University's 1993-94 Academic Reappointment/Promotion Instructions. Appendix D of that document is the University's policy concerning academic appointments and promotions. A version of that document, sometimes the same document, is distributed by the University each academic year (1T74).

CP-2 contains the 1984 regulations concerning faculty appointments and academic tenure. Those regulations generally provided for the tenure process as explained above, and noted that they applied only to those faculty whose positions were State funded. Those regulations also provided that:

> All full-time faculty appointments or reappointments, after a seven-year period shall be considered to be without limitation of term and the appointee shall hold office indefinitely at the pleasure of the Board of Governors and shall be said to have academic tenure.

CP-3 is the University's procedures for faculty personnel actions.

4. Appendix D of CP-4 contains the criteria leading to promotion and tenure and explains how that criteria is applied. Article III, Paragraph C of Appendix D (p.6) provides that once tenure is obtained the University no longer has the freedom to dismiss the employee, except for cause as provided by University Regulations (R-31).

Appendix D begins by citing Paragraph 3.30 of the University Regulation listing the specific criteria to be used in considering reappointments and promotions (and tenure) for different faculty categories. The provisions of the regulation are then more fully explained in Appendix D.

The faculty categories listed in Appendix D include:

1) General teaching/research faculty and extension specialists. The general teaching/research faculty are the largest group of Rutgers faculty and can be characterized as the regular faculty who teach, research and provide service for students (1T77). The extension specialists are at Cook College and/or the N.J. Agricultural Station and they implement programs and/or provide others with technical assistance.

2) Faculty for the creative and performing arts. This category includes faculty in the fields of literature, music, art, dance and drama.

3) Library faculty.

4) County Agent Faculty. County agents perform extension practice to service community needs. Extension practice includes interpreting research results, identifying ways of applying research, applying research in the field, attracting external support, and more.

5) Extension Specialist Faculty. These faculty are specialists in a particular field and perform their duties outside the University. They create programs; work with clients; recruit, train, supervise and evaluate program personnel, and more.

The criteria listed in Appendix D include: a) teaching; b) scholarship; c) service; d) artistic accomplishment; e) librarianship; f) extension practice of county agents; and g) extension scholarship.

Teaching includes: classroom, field and non-credit instruction, supervision of research, student internships, professional practice, academic advising and mentoring, training extension volunteers and others, writing textbooks and developing instructional materials, and more.

Scholarship includes: research, direct contributions to knowledge in that field, design and execution of applied research through several means including: presentation of papers, attraction of fellowships and awards, publication, and more.

Service includes: contributions to the academic profession, the University and to society.

Artistic accomplishment includes: the dissemination of artistic work through performance, publication or exhibition.

Librarianship includes: maintaining effective systems, techniques, services, materials and collections.

Extension Practice of County Agents includes: applying knowledge to the needs of the community by: interpreting and applying research, and more.

Extension scholarship includes: assessing client needs, designing, implementing and disseminating delivery systems, recruiting, training, supervising and evaluating personnel, and more.

The Appendix lists which of the above criteria will be applied to the five faculty categories as follows:

1) For general teaching/research faculty and extension specialists:

Teaching
Scholarship
Service

Of those criteria, the primary criterion is scholarship, including research accomplishment.

2) For faculty in the creative and performing arts:

Teaching
Scholarship and/or Artistic Accomplishment
Service

The primary criterion is scholarship and/or artistic accomplishment.

3) For library faculty:

Librarianship
Scholarship
Service

The primary criterion is librarianship:

4) For county agent faculty:

Teaching
Extension Practice
Service

The primary criterion is extension practice.

5) For extension specialist faculty:

Teaching
Extension Scholarship
Service

The primary criterion is extension scholarship.

Appendix D does not limit any of the above categories of full-time faculty from eligibility for promotion to Professor. It notes, however, that an individual must make substantial progress and demonstrate distinction beyond an associate professor level to be considered for the professor level. Appendix D further notes that the rank of Professor II is reserved for those who have achieved scholarly eminence. It said in pertinent part:

> Within the rank of Professor, the designation of Professor II is reserved for those faculty in the University (usually already in the rank of Professor) who have achieved scholarly eminence in their discipline and fields of inquiry. CP-4, Appendix D, p.8.

That section then listed the most important criteria for consideration in determining promotion to Professor II as follows:

> ...for general teaching/research faculty is scholarship; for faculty with appointments in the creative and performing arts is scholarship and/or artistic accomplishment; for library faculty is scholarship and/or librarianship; for county agents is extension practice; and for extension specialists is extension scholarship. Only those faculty who have demonstrated

> outstanding achievement in those areas by earning significant recognition inside and outside the University are eligible for promotion to Professor II. Typically, such recognition is reflected in national and international reputation in one discipline. Teaching and service also apply to the general evaluation of a candidate for promotion to Professor II. A candidate for promotion to Professor II should be an exemplary member of the University faculty who consistently has demonstrated a high standard of achievement in all professorial roles. CP-4, Appendix D, p.8.

5. The Senate - The University Senate is composed of faculty, students and administrators (1T59; CP-1; §7.12A excerpt from the University's Regulations and Procedures Manual 1T54). It is responsible for, among other things, advising the University President on matters of broad education and research policy. After the Senate provides the President with a recommendation, the President normally presents that recommendation, as well as his/her own recommendation on the issue, to the Board of Governors (CP-1 §50.19a; CP-49 - The 1993 University Senate Handbook pp.5, 7, 14).

Wells Keddie, former AAUP president and still part of the AAUP leadership, has been a Senate member nearly every year since the 1970's (1T153).

6. The College of Nursing - Rutgers College of Nursing offers Bachelor of Science, Master of Science and Ph.D. degrees in nursing (5T15). The Bachelor and Master programs require clinical instruction for graduation, the Ph.D. program does not (5T22-5T23).

The Bachelor and Master programs include theory courses which are taught in the classroom; process courses which are taught

in a laboratory to simulate a clinical setting; and clinical intervention courses which are taught in approximately 60 affiliated health related agencies including hospitals, mental health institutions, nursing homes, grade schools, health centers (doctors offices), in the home with the Visiting Nurses Association, and other locations (5T12, 5T24-5T25, 5T52-5T53). When students perform their clinical intervention courses they are accompanied and supervised by a clinical faculty member at a ratio of no more than ten students to each faculty member (5T21, 5T23, 5T25; 5T100). Students and their supervising faculty are at their clinical site 6 to 8 hours a day, two days each week (5T115).

In the Masters program the faculty responsible for clinical supervision may not be on site with the student every moment, but is responsible for meeting with the student on a weekly basis (5T112; 5T114).

In 1995, the College of Nursing had approximately 440 Bachelor students and 286 Masters students (5T19; 6T27-6T28). At that time there were 41.3 state funded positions, about 6 partly grant funded positions, and about 10 part-time lecturer positions (5T20). Of the 41.3 positions, eight of them were tenured, four of which are professors, and of the remaining 35.3 positions approximately 27.3 of them were assistant professors, the remaining 8 were instructors (5T83-5T84). Normally, all the part-time lecturers do clinical instruction (5T110). Based upon the above enrollment, the nursing faculty may have 20 to 24 hours of contact time instruction per week.

On average, the College of Nursing has appointed six assistant professors a year between 1989-90 and 1994-95 (6T34-6T35). They typically receive three year appointments (6T37) and do not receive a second three year appointment unless they are potentially tenurable (6T42). Approximately 75% of those assistant professors do not receive a second three year appointment (6T65). In the fall of 1995, approximately 80 to 90% of the nursing faculty taught clinical courses which represents about 30 instructors (6T69-6T70).

The College of Nursing is accredited by two different entities, the New Jersey Board of Nursing, and the National League for Nursing. The Board of Nursing visits and accredits every four years, the League does the same every eight years. Both accrediting agencies visited the College in the fall of 1992 and accredited the College in 1993 (5T16; 5T116-5T117). Nurses themselves are certified by the American Nurses Association (6T73).

7. The College of Pharmacy - Rutgers College of Pharmacy offers a Bachelor of Science degree, a Doctor of Pharmacy (Pharm.D.) degree, and a Ph.D. degree. Clinical instruction is required for the Bachelor's and Pharm.D. programs, but not for the Ph.D. degree. In 1996, there were 875 students enrolled in the Bachelor's program, 40 students in the Pharm.D. program, and 60 students in the Ph.D. program (9T7; 9T9-9T11; 9T98-9T99).

Both the Bachelor's and Pharm.D. degree programs educate their students in the use and dispensing of drugs for patient care

(9T99). The Pharm.D. recipient receives more clinical training than a Bachelor's recipient and, therefore, can practice at a higher and more diverse level (9T10).

The College of Pharmacy has five academic departments, but clinical instruction is only provided through the Department of Pharmacy Practice and Administration (9T11; 9T10). Clinical instruction begins in the classroom (9T61-9T62), but the primary clinical instruction takes place in health related institutions including hospitals, HMO facilities, nursing homes, the pharmaceutical industry and other health care agencies (9T9-9T12). The students, accompanied by their supervising faculty member, see patients along with physicians and nurses to learn to solve problems related to drug therapy (9T12).

As of 1996, the College of Pharmacy had approximately 45 full-time faculty members, approximately 30 of which were state fully funded positions. The remainder were fully or partially grant funded (9T97-9T98). The state fully funded positions are eligible for tenure (9T8).

Fourteen of the 45 College faculty positions are in the Pharmacy Practice Department which is solely responsible for clinical instruction. Six of those 14 Department faculty positions are fully state funded and tenure eligible, the remaining 8 positions in the Department are not tenure eligible. As of 1996, of the 6 state fully funded tenure eligible positions, only one faculty member, Associate Professor Joseph Barone, had tenure (9T7-9T8;

9T33; 9T97-9T98). Professor Barone no longer provides clinical supervision to students, but the five assistant professors holding tenure eligible positions, and the 8 assistant professors holding grant funded positions provide clinical supervision to students (9T62-9T63).

The accrediting organization for pharmacy schools in the United States is the American Council on Pharmaceutical Education (ACPE). The accreditation or reaccreditation process begins with a self-study prepared by the faculty and administration of the affected school. The self-study reviews the same areas that will be reviewed by the formal evaluation team. A self-study report is provided to the ACPE (9T103).

The formal evaluation is conducted by a team selected by the ACPE which includes faculty and administrators from pharmacy schools other than the one being evaluated. The team is typically on-site for three days (the site visit) visiting the schools' entire operation including its clinical instruction sites. It conducts an oral exit interview on the third day, then issues a written report and recommendation to the ACPE. Based upon the written report and findings the ACPE may grant full or limited accreditation or reaccreditation, place a school on probation, or reject accreditation or reaccreditation (9T85; 9T104-9T105). Failure to obtain accreditation (or reaccreditation) could be disastrous to a pharmacy program by resulting in the loss of program money and students because graduates of non-accredited pharmacy schools may not be eligible to be licensed pharmacists (9T85-9T86; 9T107).

The ACPE's award of full accreditation is normally for six or seven years. Rutgers College of Pharmacy was initially accredited in the 1930's or 1940's and has been reaccredited since then. The Pharm.D. program began around 1990 and received initial accreditation at that time (9T106-9T107). The process for reaccreditation of the College of Pharmacy began during the 1990-91 academic year with the conduct of the self-study evaluation (R-32a; R-32b).

The History of the Proposal for a Non-Tenure Clinical Faculty Position Prior to its Being Presented to the University Senate

8. Issues regarding clinical faculty, including the creation of non-tenure track clinical positions, have existed at the College of Nursing since the 1970's (5T25). Clinical instruction is very time intensive. Clinical faculty must spend six to eight hours a day, two days a week with students in a clinical setting in addition to preparatory work, classroom instruction, and perhaps their own clinical practice (5T26-5T27; 6T59-6T60; R-22).

Dorothy DeMaio has taught at Rutgers for 25 years, and was the Dean of the College of Nursing from approximately 1981 through October 1995 (5T7). DeMaio supported the creation of a non-tenure clinical faculty position for four primary reasons. The first involved the quality of the academic program and the integrity of the clinical teaching; the second was the stability of the relationship with the agencies or institutions at which clinical

instruction occurred; the third was the difficulty with faculty recruitment; and the fourth was her concern for the safety of the patients in the institutions where clinical instruction took place because of the continually changing clinical faculty (5T56).

DeMaio explained the basis for those reasons. I credit her testimony. There was no significant contrary evidence. First, since the professors who were providing clinical instruction were not competing for tenure and, therefore, often leaving faculty positions after a three year time period, they had neither the time nor inclination to study and understand the curriculum, nor were they able to stay within the goals and mission of the curriculum. That scenario denied students the opportunity for the level of knowledge and experience they needed for their licensing exam (5T56-5T57). The College of Nursing has faculty coming in and out on a regular basis and has the lowest tenure rate at the University (5T58).

Non-tenured clinical faculty could focus more on teaching students in clinical practice, and would be better able to carry out their own clinical practice, than employees in tenure track positions (5T62).

Second, due to the turnover of clinical instructors, the College has often been unsuccessful in finding new clinical faculty that were experienced or talented enough to be accepted by the institutions or agencies where the clinical instruction occurs. Not having enough clinical faculty acceptable for teaching in those

institutions threatens the College's ability to place students in those institutions (5T63). When institutions don't accept a clinical instructor, the College must assign that instructor to work with another instructor, or reassign the new instructor to classroom or lab teaching (5T66-5T68). Having non-tenured clinical positions would help alleviate that problem because the faculty would then have time to focus on all aspects of clinical work rather than on publication and research which must be focused on by tenure track candidates (5T63-5T64).

Third, it has been the College's experience that it is difficult to attract clinical faculty to tenurable positions. The work load of clinical instructors at Rutgers does not give those instructors enough time to do the publication, research and scholarship necessary to obtain tenure. Historically, nursing faculty have had one of the highest contact hour workloads at the University which has impaired the College's ability to attract faculty into tenurable positions (6T61). Thus, potential faculty members are more reluctant to accept tenurable positions knowing they may not have the ability to stay beyond three years and move upward in the academic community (5T69-5T70).

Fourth, clinical faculty must have the clinical knowledge and clinical experience to closely supervise ten students working with patients. The lack of such experience endangers the patients (5T70). Having non-tenure clinical positions would give the College the opportunity to renew talented clinical instructors who maintain

their skills, while still allowing it to remove those clinical instructors whose skills have waned (5T72-5T73).

9. John Colaizzi has been the Dean of the Rutgers College of Pharmacy since 1978 (9T92; 9T94). He has been interested in the creation of non-tenure track clinical positions at the College since his arrival because such positions are common at most colleges offering degrees in health care (9T100). In fact, nearly all of the pharmacy schools in the United States have non-tenure clinical track positions (9T21).

By the early 1980's, Colaizzi noticed that clinical faculty had a greater turnover rate than other College faculty because of their inability to meet the research and scholarship demands of the tenure system (9T101). Colaizzi found that many clinical faculty instructors are primarily interested in clinical practice and patient care, and not research and scholarship. For many years the pharmacy practice faculty had talked to Colaizzi about the need to develop a clinical track at the College of Pharmacy (9T16). Colaizzi concluded that the heavy involvement of the pharmacy practice faculty in clinical care activities was inconsistent with the research and scholarship requirements of tenure (9T102). Some assistant professors have left the College because of the tenure/publishing (research and scholarship) requirement (9T81-9T82). At least one of those assistant professors accepted a non-tenure track position at another university (9T81).

Since 1990, Colaizzi has had discussions about non-tenure track clinical positions with officials from some of the health care sites where pharmacy students receive clinical training. An official at one of the College's affiliated teaching hospitals told Colaizzi that faculty who are not on a tenure track position (co-funded faculty) participate more fully in clinical patient care activities as compared with employees holding tenure track positions (10T27; 10T31). That same official told Colaizzi that it was easier to recruit clinical faculty into non-tenure positions in part because it allowed those instructors to devote more effort to patients and clinical practice activities (10T31-10T33). Candidates for clinical tenure track positions are very concerned about whether they will have enough time and the proper facilities to conduct their research (9T31-9T33). He also requested that a particular position be placed on a non-tenure track in order to retain an assistant professor who refused to accept a tenure track position (10T32).

During the 1993-94 academic year, the pharmacy director at another hospital with which the College is affiliated told Colaizzi that he would only accept faculty supervisors who were on non-tenure track positions because he believed tenure-track faculty were diverted toward research which prevented them from establishing an effective clinical practice and patient care at the hospital (10T28-10T29).

10. The issue of creating a non-tenure clinical track title for Nursing and Pharmacy had existed at the University for many years. On January 8, 1991, Robert Pack, Associate Provost for Administration and Personnel, wrote a memorandum (the 1/8/91 memorandum attached to CP-37) to the University's Vice President for Administration and Personnel recommending the creation of a non-tenure clinical track position for the Department of Pharmacy. He recommended clinical faculty be hired in unlimited three year appointments. His recommendation was based upon Pharmacy's problem in retaining faculty because of competition from the pharmaceutical industry and because of the research requirements for tenure. The vice-president responded with several questions (1/9/91 memorandum to CP-37).

That same month (January 1991), Dean DeMaio, after consultation with Nursing's Faculty Executive Advisory Committee, drafted a proposal for a non-tenure track clinical faculty position (R-22) (5T29-5T32). She recommended renewable three year appointments. The advantages listed in the proposal included greater stability in the clinical instruction program and increased opportunity for research and scholarship by those assistant professors who could be relieved of clinical responsibilities. DeMaio had not been directed to create R-22 by Rutgers hierarchy. She prepared the proposal herself, discussed it with faculty and Pharmacy's Dean Colaizzi, then asked her superior, Provost Norman Samuels of the Newark campus, if he could assist her in moving that proposal forward (5T12; 5T31).

On January 24, 1991, Norman Schnayer, Newark's Associate Provost, sent a draft proposal for a clinical faculty position in Nursing and Pharmacy to Deans Colaizzi and DeMaio, and Associate Provost Pack (CP-45 and attachment to R-23). Schnayer proposed that the clinical faculty series be non-tenured, and that there be no opportunity for promotion to Professor II for such faculty because scholarship was deemphasized (CP-45, Reappointments and Promotions). He generally explained reasons for the proposal: Having non-tenured clinical faculty would enable the Colleges to make long term clinical appointments which benefited students with clinical faculty who had more experience and continuity; having clinical faculty would relieve tenure track faculty from clinical work which would strengthen the academic program and enhance scholarly development.

On March 20, 1991, Schnayer sent Colaizzi a second draft of the clinical faculty proposal which included suggestions DeMaio had made (CP-46). Schnayer recommended three year renewable appointments. On April 25, 1991, Provost Samuels sent DeMaio a draft proposal for a non-tenure track clinical specialist position (CP-36). In that proposal, Samuels noted that tenure track assistant professors did most of the clinical instruction and that by creating clinical positions it would relieve those tenure track professors of clinical instruction and enable them to spend more time on teaching, scholarship and service.

On May 10, 1991, Colaizzi sent his proposed position description for a non-tenure clinical track faculty position to Associate Provost Pack (attachment to CP-37). Colaizzi explained the economic need for creating the position. He noted that the only way to create a non-tenured position was to obtain half the funds from non-state sources. Since he found that impossible to meet, he needed a non-tenure position that was fully state funded. Colaizzi sent a copy of that proposal to DeMaio (CP-37), who sent it to Provost Samuels (6T11).

On June 18, 1991, Provost Samuels sent a memorandum to DeMaio and Schnayer (CP-48) informing them he had met with University officials who agreed to seek the creation of the non-tenure track clinical position with three year renewable appointments. He also noted that the proposal should be presented to the Senate this fall, and to the Board of Governors by December 1991.

On July 27, 1991, Colaizzi sent a memorandum to New Brunswick Provost, Paul Leath (CP-39), notifying him of actions taken to create a clinical track position, and asking him to make the position's creation a priority.

11. The self-study report that was prepared as part of the College of Pharmacy accreditation process issued sometime in mid-1991 (R-32a and R-32b). The report addressed many issues including the difficulties tenure track employees were having completing the research and scholarship required for tenure. In

listing accomplishments the College had made, the report, nevertheless, noted the difficulty Pharmacy Practice faculty were having achieving tenure because of their diverse responsibilities which included clinical instruction.

> Concerns persist about the reasonableness of expectations for Pharmacy Practice faculty in their ability to achieve tenure in view of their diverse responsibilities and limited time to devote solely to research (R-32a p. 30).

In the section listing the challenges that needed addressing, the report recommended the creation of a non-tenured clinical faculty track which could broaden the base of tenured faculty.

> Essential to establishing a broader base of tenured faculty in this department will be the provision of additional faculty lines for Pharmacy Administration faculty, the establishment of "clinical-track" lines to enable the appointment of faculty on state lines whose major responsibility will be teaching and whose appointments will be on a non-tenure track basis. (R-32a pp.35-36).

The report noted danger over the low percentage of tenured faculty in Pharmacy Practice (R-32a p.43); and anxiety among tenure-track faculty over whether teaching and service were really being counted in evaluating faculty for tenure (R-32a p.55). The report attributed the problem in Pharmacy Practice to excessive turnover caused in part by a heavy clinical teaching load by tenure-track faculty and the low number of fully state funded faculty lines.

> The deficiency in Pharmacy Administration is becoming increasingly acute and must be addressed. Excessive turnover of faculty in this department and the difficulty faculty experience in obtaining tenure, seriously threatens the stability and viability of the department and its programs. The number of faculty in the department and clinical service that tenure-track faculty must bear in this department places them at a severe disadvantage in comparison with most other faculty in the College. (R-32a p.53).

In reference to tenure-track faculty who perform clinical instruction, the report summary noted:

> Morale is eroded when they sense that the heroic efforts they have made in keeping the teaching programs going and dealing with large classes will not be recognized when they are evaluated for reappointment, promotion and tenure by faculty who have much more time to devote to scholarship. (R-32b p.168).

12. The ACPE accreditation team conducted its site visit at the College of Pharmacy from September 24-26, 1991 (10T19). At the exit interview on September 26, Colaizzi discussed the excessive turnover problem of the clinical faculty with the evaluation team. The evaluators thought a non-tenure line for clinical faculty was a good approach to deal with that problem (10T15-10T16).

Colaizzi also discussed related concerns with the evaluation team. He noted that the turnover of good clinical instructors because of the tenure-track titles was making it more difficult to retain those instructors, which in turn was adversely affecting the College's relationship with the best clinical teaching facilities, and was having a negative impact on the quality of patient care (10T17).

In October 1991, the ACPE evaluation team issued its report on the College of Pharmacy (R-33). The report listed a number of "points" that needed to be addressed in a timely and satisfactory manner. They included the need for new faculty positions in pharmacy practice (R-33 p.8); and the "establishment of the proposed non-tenure accruing or clinical track faculty appointment series" (R-33 p.10).

The report then commented on the various points it had listed. It noted that:

> ...additional faculty resources are critically needed in the pharmacy practice area so as to support a broadened clinical base, to attend to adequate student supervision in clerkships, to address enrollment needs,...and to permit the further pursuit of scholarly activities (R-33 pp.17-18).

In noting that clinical faculty needs should take practice activities into consideration, the report said:

> The establishment of a non-tenure accruing or clinical track series may assist in addressing this issue by balancing the utilization of non-tenure track appointments with tenure track and other faculty appointments. (R-33 p.18).

In addressing faculty scholarship, the report said:

> ...faculty resources for the pharmacy practice area need to be developed in a range of configurations (e.g., tenure/tenure track, non-tenure or clinical series, as well as co-staffed or co-funded positions) to effectively and efficiently satisfy College goals. (R-33 p.20).

In January 1992, the ACPE issued its decision and recommendations regarding the College's accreditation (R-34). It continued accreditation for the bachelors in pharmacy program, and accredited the doctor of pharmacy program. The ACPE noted, however, that it would review those professional Pharmacy programs earlier than the normal six-year cycle to determine whether to continue accreditation. The College was required to submit a report to the ACPE by May 1994 addressing "issues" cited in R-34 and R-33 (R-34, p.2). Those issues were raised in the comment and recommendation section of R-34 which also said that "critical needs exist in pharmacy practice and pharmacy administration, requiring immediate attention" (R-34, p.4). The pertinent need addressed by the Decision provided:

> ...the proposed non-tenure accruing or clinical-track faculty appointment series will be necessary to implement the College's comprehensive strategy for development of clinical faculty resources. (R-34, p.5).

13. On February 25, 1992, Colaizzi sent Associate Provost Pack a memorandum (2/25/92 memo attached to CP-47) with his comments on Provost Schnayer's proposal for clinical track professors in Pharmacy. In his cover page, Colaizzi told Pack in pertinent part:

> The College critically needs the availability of this special track for faculty. We are being hurt by not having it. Our accreditation report also supported a need to establish this arrangement.
>
> To illustrate the fact that this is an arrangement that is made by other peer Universities, I am attaching some information

> that was passed on to me by Joe Barone. It illustrates that a "regular clinical track" has been established at the Ohio State University. This arrangement at Ohio State involves five-year renewable contracts rather than tenure, and a primary emphasis on clinical teaching/clinical pharmacy practice. The precedent also exists at other AAUP institutions.

On February 26, 1992, Schnayer sent Dean DeMaio a memorandum (R-23) enclosing the draft of the clinical faculty position proposal he had prepared on January 24, 1991 (CP-45). The first time DeMaio saw the CP-45 proposal was when Schnayer sent it to her with R-23 (5T47; R-23). DeMaio responded to R-23 on February 28, 1992 by returning it with her written comments. She noted that having non-tenured clinical faculty was a common phenomenon on the national scene, and that after conducting a national survey found that non-tenure clinical tracks were the norm (5T47-5T48; R-23). DeMaio had conducted the national survey by telephone, calling nursing programs at at least twenty major universities to determine whether they had clinical faculty positions (5T49-5T50).

On the morning of March 31, 1992, Colaizzi faxed a copy of CP-47 to Schnayer. That same day Schnayer sent Colaizzi, DeMaio and Pack a draft for a clinical faculty position in Pharmacy and Nursing incorporating some changes that had been suggested. The draft and the first addendum note that tenure track assistant professors are performing too much clinical instruction making it too difficult for them to cover the traditional instruction courses in Pharmacy and Nursing. That, in turn, has weakened their programs and

necessitated the creation of non-tenure track clinical positions to perform the clinical instruction. The CP-41 draft provides in pertinent part:

> The constant turnover and the continued need to orient new faculty members with the Rutgers standards and requirements increase the workload of other faculty members, have a negative effect on instruction and curriculum development and weaken the bonds between the colleges and health care agencies.
>
> The ability to hire clinical faculty members will strengthen the academic programs in the two colleges and enhance the scholarly development of the junior faculty at the College of Nursing and the College of Pharmacy. Their release from clinical instruction will permit them to devote more of their time and energy to the schools's curricular and research needs. Students in clinical courses will benefit from the greater experience and continuity of the clinical instructors. The University will benefit because scholarship in the Nursing and Pharmacy [sic] will increase as the burden of clinical instruction and supervision is transferred from traditional Assistant Professors to clinical faculty members. The University also benefits because the overall quality of clinical instruction will be strengthened. It should not be overlooked that the establishment of clinical faculty positions will be of great advantage to the successful candidates for these positions in that they will be able to obtain respected, long-term University positions where the criteria for reappointment and promotion are consonant with their interests, knowledge and abilities.

The addendum notes:

> Because clinical instructors are the only supervisors of their students and because legally they must always be present when students are administering care, the supervisory process is exhausting. Without a regular core of clinical faculty, the College of Nursing has found that it cannot cover all of its courses without relying

> on faculty with traditional criteria. Most of the Assistant Professors teaching clinical courses have had to do so every semester.
>
> The hours required of clinical faculty members are as long as the program is intense. For this reason, the college is reluctant to assign Assistant Professors to an excessive number of clinical courses but finds that it is necessary because of the inability to hire qualified clinical faculty without the benefit of long term appointments or promotional opportunities.

14. On April 28, 1992, Provosts Samuels and Leath sent their proposal for a non-tenure track clinical series in Pharmacy and Nursing to the University's Vice President for Academic Affairs, Joseph Seneca; and its Vice President for Administration and Associate Treasurer, Richard Norman (CP-40). The proposal explained the difficulty of clinical instruction; the negative impact on traditional course instruction if tenure-track Assistant Professors are assigned to clinical instruction; the constant turnover that has occurred because tenured track professors performing clinical instruction do not have enough time for scholarship; and, that non-tenure track clinical positions are the norm in most pharmacy and nursing schools. The proposal recommended renewable three year appointments as non-tenured assistant professors.

Richard Norman succeeded Susan Cole who had been the University's Vice President for University Administration and Personnel, and who had had some knowledge of non-tenure track positions (R-26 - R-29). Norman did not know of Cole's involvement in the non-tenure track positions (7T23), and he had not been aware

of or discussed the subject of the non-tenure track clinical faculty proposal prior to receiving CP-40 (7T9-7T10).

After discussing the proposal with Vice President Seneca, Norman gave it to Jean Ambrose, the University's Assistant Vice-President for Faculty Affairs (7T9). Ambrose had not seen the proposal prior to receiving CP-40, but she knew of the need for a clinical professor series from Dean DeMaio (8T10-8T11, 8T46). Ambrose was asked to comment on the proposal and she said that the Pharmacy component should be more developed and she requested additional information (8T12-8T13; CP-38). On July 17, 1992, Schnayer asked DeMaio to provide information that Ambrose had requested (CP-38).

On October 1, 1992, Schnayer sent Colaizzi, DeMaio and Pack a memorandum with a revised draft for the non-tenure clinical faculty position (10/1/92 attachment to CP-42). The additional language added to that draft provided in pertinent part:

> The importance of these positions cannot be overstated. Nor can the need for their non-tenure track nature. The clinician is necessarily an active practitioner and as such a professional whose identity is drawn more from the clinical environment than from the academic one. Professional standards dictate that the training and development of our students depend on practitioners who bring state of the art knowledge about their professional responsibilities and extensive hands-on experience to the instructional programs in Pharmacy and Nursing. Given this emphasis, it cannot be expected that the highly skilled and experienced clinician who we have long desired to recruit has the interest or inclination in pursuing a scholarly path. The opportunity to have a non-tenure track series will allow the

> College of Nursing and the College of Pharmacy to hire excellent clinicians. The fact that their interests are devoted more to their professions than the academy will prove an advantage to our students. The non-tenure track positions with their diminished emphasis on scholarship will permit Rutgers University to successfully recruit these valuable men and women.

Attached to that draft was a list of six universities that had non-tenure track clinical faculty lines at least for their nursing programs. On November 25, 1992, Colaizzi sent to Pack his suggested changes to the clinical faculty proposal (CP-42). On December 2, 1992, Schnayer sent Ambrose a revised proposal for the clinical faculty series incorporating recommendations from both Colaizzi and DeMaio (CP-43).

That proposal included the following paragraph explaining the advantage of having designated clinical faculty for both Pharmacy and Nursing:

> The ability to hire clinical faculty members will strengthen the academic programs in the two colleges and enhance the scholarly development of the junior faculty at the College of Nursing and the College of Pharmacy. Their release from all or a portion of their clinical instructional course load will permit them to devote more of their time and energy to the schools's curricular and research needs. Students in clinical courses will benefit from the greater experience and continuity of the clinical instructors. The University will benefit because scholarship in Nursing and Pharmacy will increase as the burden of clinical instruction and supervision is transferred from traditional Assistant Professors to clinical faculty members. The University also benefits because the overall quality of clinical instruction will be strengthened. It should not be overlooked that the establishment of clinical faculty positions will be of great advantage to

> the successful candidates for these positions in that they will be able to obtain respected, long-term University positions where the criteria for reappointment and promotion are consonant with their interests, knowledge and abilities. In the case of the College of Pharmacy, the University will also benefit from improved relationships with teaching hospitals and related health care institutions in that clinical faculty members will be able to provide the necessary programmatic continuity to sustain strong teaching programs (CP-43).

Senate Action on the Proposal for a Non-Tenure Clinical Faculty Position and Implementation by the Board of Governors

15. On May 14, 1993, Vice President Seneca sent a letter and a copy of the draft for the non-tenure clinical faculty series to Professor Paul LaChance, Chair of the University Senate (R-9). Seneca asked LaChance for the Senate's advice on the matter. The draft proposal attached to R-9 was substantially the same as the proposal Schnayer sent Ambrose on December 2, 1992 (CP-43).[5/] The R-9 proposal recommended the creation of a non-tenure clinical position with three year renewable appointments and no opportunity for promotion to Professor II, and included the explanation for recommending a non-tenure track clinical position that was discussed in CP-43, CP-42 and CP-41. The proposal attached to R-9 was assigned number A-9401 by the Senate (4T103-4T104).

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5/ The third paragraph in the Appointments, Reappointments and Promotions section of R-9 contained some additional language than contained in the same section of CP-43, but the difference was not material to the examination of this case.

On May 25, 1993, James Burkley, Secretary of the Senate, distributed a notice listing the agenda for the upcoming June 4, 1993 meeting of the Senate's Executive Committee (R-10). The notice listed A-9401 as a topic for the agenda, and a copy of A-9401, the proposal for a non-tenure clinical faculty series, was attached to R-10 (4T18-4T19). At the June 4th meeting, the Executive Committee referred A-9401 as a "charge" or assignment to the 1993-94 Academic Personnel Committee (APC) (R-11 p.5). The APC is a standing committee of the Senate and generally charged with the authority to review all procedures and regulations by which appointments, promotions and tenure are governed (CP-49, p.23). The Executive Committee appointed Professor Wells Keddie, a member of the AAUP's leadership, to the Academic Personnel Committee (4T23; R-11, Appendix A). Professor Barone from Pharmacy and Professor Lucille Joel from Nursing were also on the APC (9T18; 9T40; CP-5).

16. By memorandum of September 2, 1993 (CP-5), Antonia Tripolitis, Chairperson of the APC, notified the committee members, including Keddie, that a committee meting had been scheduled for September 17 to consider A-9401, the clinical professor series. A copy of A-9401 was attached to the memorandum. Keddie, Barone, Joel and others attended the September 17th meeting (CP-32).

Prior to CP-5, the AAUP had no knowledge of the move to create a non-tenure clinical professor series (1T101). After receiving CP-5, Wells Keddie notified AAUP President Mary Gibson of A-9401 (2T49). By letter of September 21, 1993 (CP-6), Gibson

notified Vice President Norman she had become aware of the proposal to create the clinical professor series and noted that the proposal covered certain negotiable terms and conditions of employment. The letter made the following demand:

> Therefore, the AAUP hereby demands negotiations over all aspects of this proposal that are mandatory subjects of negotiations. We also demand that the Administration immediately amend the proposal now before the Senate Academic Personnel Committee so that it contains no references to those items over which we shall be negotiating. In particular, all references to employment security--the question of whether or not these new positions will carry the possibility of tenure rather than be limited to three-year contracts must be withdrawn from the Administration's Senate proposal.

Gibson concluded CP-6 by stating that since the AAUP had not been directly informed of A-9401 it suggested a deliberate attempt by the University to bypass the normal channels of negotiations.

On September 24, 1993, APC members were notified that their next committee meeting scheduled for October 8, 1993 would continue the discussion over A-9401 (R-12). By letter of September 27, 1993 (CP-7), Vice President Norman responded to CP-6. He said in pertinent part:

> Please be assured that we are well aware that some portions of the final proposal may be mandatory subjects for negotiation. However, this is still a proposal and we are seeking the advise of the University Senate and, until we complete that process, we will not be in a position to present the proposal to the AAUP. When we do have a completed proposal, we will follow our normal procedures for negotiations.

By letter of October 5, 1993 (CP-8), Gibson sent Norman the following response to CP-7:

> I send you the enclosed material in the hope that it will help you to understand why your response to my demand that we begin negotiations on the proposed Clinical Faculty Series is not acceptable to the AAUP. I urge you to reconsider, and I assure you that the AAUP will not again delay seeking legal enforcement of our right and obligation to negotiate.

That same day Gibson sent University Senate Chair Professor Natalie Borisovets a letter (CP-9) explaining the AAUP's concern over what Gibson labeled was the University's failure to negotiate particularly over whether the clinical faculty series could be a tenured position. Gibson stated that the AAUP believed the Administration was attempting to enlist the Senate as an ally to preempt negotiations. Gibson sought a meeting with Borisovets to discuss the matter. A copy of CP-9 was sent to Vice President Norman.

The material attached to CP-8 included ten letters dated between October 24, 1986 through November 11, 1991 concerning a prior request for Senate advice that kept the AAUP waiting for negotiations on another issue about which the University eventually said was not negotiable. Gibson sent CP-8 to Norman with the attached materials, and CP-9 to him because she was concerned the same scenario would occur regarding A-9401 (3T13-3T14).

On December 2, 1993, Professor Joel FAXed a revised proposal for the clinical professor series (R-13) to the Secretary

of the Senate. That proposal still recommended a non-tenure track for clinical faculty with three year renewable appointments, but used different language to explain the reason a non-tenure clinical faculty series was needed. R-13, however, also contained some significant attachments. Attachment 2 was a survey of 19 pharmacy schools summarized by Professor Barone, and Attachment 3 included a survey of 29 nursing schools summarized by Professor Joel.

Of the 13 pharmacy schools having a specific clinical track, all of them were non-tenure positions with different lengths of renewable appointments and reappointments. Barone noted that all of the schools having a clinical track also had the standard tenure track for hiring clinical faculty. The proposal in A-9401 similarly provides that clinical faculty may apply for tenure track titles.

The nursing survey showed that at least 19 schools had a clinical track, all of which were non-tenure positions and all but one of which had different lengths of renewable appointments. Additionally, six other schools had teaching or lecturer positions which were non-tenured with different lengths of renewable appointments. Professor Joel noted that clinical nursing faulty in the surveyed institutions often may apply for tenure-track status, and she concluded that:

> ...a non-tenured faculty status for the unique educational needs of nursing is common even among the profession's most elite institutions. (R-13, Attachment #3, p.2.)

By memorandum of December 6, 1993 (R-14), an APC meeting was scheduled for December 17 to continue discussions about A-9401. Professor Joel's proposal, R-13, was attached to R-14 (4T35). On December 16, 1993, Pat Hurley, Acting Dean of the College of Nursing, sent a memorandum (R-24) to Professor Joel in her capacity as an APC member expressing the unanimous support of the nursing faculty for the non-tenure clinical faculty series. R-24 said:

> Please be advised that the faculty again expressed their long term commitment to a clinical faculty series. The following motion was unanimously supported at the faculty meeting held on December 6, 1993:
>
> > "That the faculty of the College of Nursing enthusiastically support the establishment of a clinical faculty series to enhance the recruitment and retention of faculty for clinical instruction. The series is designed to allow renewable contracts and promotional opportunities, but will not lead to tenure."
>
> I encourage you to share this with the Personnel Committee and urge them to recommend that the proposal be sent to the University Senate.

17. The Academic Personnel Committee met on December 17 which, in addition to Professors Joel, Barone, Keddie and other committee members, was also attended by Vice President Norman, and Assistant Vice-President Ambrose (1T113; 7T12; 11T37; CP-34). No minutes were kept at that meeting (4T36).

During the meeting, Keddie raised a question about why the Senate was being asked to decide or make recommendations about "negotiable topics". He was pressing the Committee to remove the

reference to tenure from its approval or disapproval of A-9401 (1T114). Keddie then testified that Norman spoke as follows:

> Richard Norman assured the committee that in due time those--that topic would be up for negotiation, but that it wasn't ready yet. They had to wait for the senate to provide advice. 1T114.

On his direct examination, Norman was asked if he recalled anything he said at the December 17 APC meeting about clinical faculty. He recalled being asked about whether the University would "negotiate over this," and he testified.

> ...my response was that we would negotiate over anything that was negotiable. (7T12)

Norman testified that on December 17 he was not asked, nor did he unilaterally identify any subject that was or was not negotiable (7T12-7T13).

At hearing, Norman was shown paragraph four of C-2, the amended charge in this case. The pertinent portion of paragraph four provides:

> The union had demanded to negotiate terms and conditions of the new positions, including the prohibition against eligibility for tenure. The administration claimed that it had refused to negotiate only because the "proposal" was "not complete" in its view, not because any aspects of the proposal were not negotiable. In fact, Vice President Richard Norman admitted in front of the University Senate's Academic Personnel Committee in December 1993, three months after negotiations had first been demanded, that the nontenurability of the positions was negotiable.

He was then asked if on December 17, 1993, he made the claim or statement set forth in the second sentence. He responded:

> The first part of the sentence, that would have been something that I would have had on my mind, whether I said it or not I don't know, I can only say that at that point we didn't have a complete proposal, and so I would say that as far as the second part, not because of any aspects of the proposal were not negotiable, I think I've already testified to that, what I said was that we would negotiate anything that was negotiable. I wasn't saying anything was or was not. [7T16]

He was then asked about the remark in the third sentence that non-tenurability of the proposed clinical series was negotiable and asked if he said that. He responded:

> A. No.
> Q. Are you sure?
> A. Positive.
> Q. Do you remember why you did not say that?
> A. Well, because I wouldn't have had the knowledge. I mean I hate to admit it but I wouldn't have known whether it was or was not at that time because I really hadn't looked at it. I mean I just didn't know, I couldn't have said something like that and I know not to say something like that unless I know it. [7T16-7T17]

Professor Gibson was not at the December 17 meeting, but she testified that on that day Keddie reported the events of that meeting to her. This is what she said:

> Immediately after the meeting Wells Keddie came to the AAUP office where I was working and recounted to me, reported to me as President of the AAUP, the events of the meeting which included his arguing that the condition of non-eligibility for tenure and non-eligibility for the rank and pay of Professor II should be removed from consideration by the Senate and sent to the bargaining table where they belonged, and that Richard Norman had said that those items

> would be negotiated in due time, but that the Administration wanted the advice of the Senate before they negotiated. [11T27-11T28]

Gibson had also been asked if Norman testified correctly at 7T12 when he said he had not identified any subject matters that were or were not negotiable. Gibson testified Norman's testimony was not correct (11T26). She based her answer on what Keddie allegedly told her on December 17 (11T26-11T28).

Assistant Vice-President Ambrose was at the December 17 meeting. On direct exam she was asked if Norman said anything about collective negotiations at that meeting and whether he specified subjects that were or were not negotiable, and she testified:

> A. I remember Richard Norman saying the same thing in essence that I had said. That if there was to be -- if there were to be negotiations, they would come later. If there was anything to be negotiated, it would occur later.
>
> Q. Did he specify at that time, and by that I mean did he specify at that committee meeting what subjects in his view were or were not negotiable?
>
> A. I do not recall his discussing that. [8T29]

On rebuttal Ambrose was asked to read Norman's testimony from 7T12 about his remarks on December 17 and she was asked if he said that and she replied she recalled it (11T37). She was also asked if on December 17 Norman said:

> ...that the University would negotiate eligibility of tenure after the University had received advice from the Senate. [11T38]

She responded:

I do not recall him ever having said that (11T38).

I credit both Keddie and Norman and find that their testimony is in equipoise and not inherently inconsistent. The problem is not in the varacity of the witnesses, it is in the inferences that are being drawn from what was said. For example, Keddie only testified that Norman said that "that topic" - referring to tenure - "would be up for negotiation, but that it wasn't ready yet". Keddie did not testify that Norman said the University would negotiate over the eligibility for tenure or for the rank of Professor II. Keddie may have inferred as much from Norman's testimony as evidence by what Gibson said Keddie told her, but that is not what Keddie testified Norman said. I credit Keddie's testimony about what Norman said, but I do not draw the same inference therefrom. I infer that Norman was saying that the topic of tenure was not yet up for negotiation--that is--it was not yet an issue for the University to consider. That is consistent with what Norman told Gibson in CP-7.

I credit Norman and Ambrose that Norman said the University would negotiate over anything that was negotiable. Keddie did not dispute that testimony. I further credit their testimony that Norman did not identify any subject as negotiable or non-negotiable. I found Norman's candid explanation persuasive that at that point he did not know what was or was not negotiable and, therefore, would not have admitted that the nontenurability of the

clinical position was negotiable as alleged in C-2, nor, for the same reason, would he have made the remarks attributed to him by Gibson.

I credit Gibson that Keddie told her that Norman made the remarks set forth in her testimony, but since she has no personal knowledge of what Norman said or did not say, her hearsay testimony is insufficient to prove what Norman said.

Consequently, I find that Norman did not agree or admit that the University would negotiate over the tenurability of the clinical faculty series or about someone in that title being able to obtain the rank of Professor II, nor did he identify any topic that was or was not negotiable.

18. On December 22, 1993, Professor Joel sent Secretary of the Senate Burkley a memorandum (R-15) attaching a revised, completed final draft of the clinical professor proposal and asked him to review it, and to ask Professor Barone for authorization to send it to the Senate's Executive Committee. She also asked him to forward a copy to APC Chair Tripolitis (4T39). That draft was consistent with prior drafts recommending a non-tenure clinical position with no opportunity for promotion to Professor II. By memorandum of January 10, 1994 (CP-10), the APC Chair sent copies of the R-15 proposal to APC members and the Executive Committee members (4T40-4T41). The form of A-9401 attached as the proposal to CP-10 did not change before it was presented to the full Senate (1T115). Professors Joel and Barone were instrumental in preparing the proposal and attachments that comprised CP-10 (9T18-9T23).

On or about January 14, 1994, AAUP President Gibson received a letter from Nursing Assistant Professor Nancy Redeker (R-8) urging her (Gibson) to support the proposal for the non-tenure clinical faculty series which had been overwhelmingly approved by the Nursing faculty (3T83-3T84). Redeker made certain pertinent remarks:

> The Clinical Faculty Program will be an effective solution to problems that have plagued faculty at the Colleges of Nursing and Pharmacy for many years and will improve our ability to address the needs of students and health care consumers. The time-intensive nature of clinical teaching at the College of Nursing has limited the ability of tenure-track faculty to achieve the criteria of scholarship, teaching, and service. Relief from the burden of clinical teaching will allow tenure-track faculty to focus on tenure and promotion criteria with equitable workloads, as compared with faculty in other Rutgers schools and departments.
>
> ...[I]t is nearly impossible for tenure-track faculty to remain directly involved in expert clinical practice and teaching, while attaining levels of scholarship required for success at Rutgers. (R-8)

On January 21, 1994, Gibson sent a letter (R-7) to faculty members of the Senate asking them to meet with her on February 18, 1994 to discuss A-9401. On January 26, 1994, Senate Secretary Burkley sent a notice to Executive Committee members for a meeting scheduled for February 4, 1994 which included discussion about A-9401.

Minutes were taken at the February 4th Executive Committee meeting (R-17). They reflect that Vice President Norman, and

Professors Joel and Barone attended. APC Chair Tripolitis explained that A-9401 had been discussed and re-worked, and that there was some opposition to the proposal. Professor Barone apparently explained that there would be two clinical tracks, one with tenure and one without. Professor Joel explained that many other schools that are members of the Association of American Universities had non-tenure tracks for clinical faculty. The Executive Committee requested the APC to develop a resolution for its review in preparation for Senate action on March 25, 1994.

On February 8, 1994, APC members were notified of an APC meeting for February 18, 1994 to discuss A-9401 (R-18). On or about February 10, 1994, Professor Keddie and AAUP officials, Professors Boikess and O'Connor, met with Vice President Norman about A-9401. The AAUP had requested the meeting to express their opposition to the non-tenurability of the clinical faculty series and to seek negotiations on that topic. The meeting did not result in any agreement (2T15-2T16; 2T95-2T99).

On February 18, 1994, Professor Gibson conducted a faculty meeting regarding A-9401 as arranged by R-7. The meeting was attended by certain AAUP Executive Council members, some University Senators and some Nursing faculty including Professor Joel (2T17-2T18). Professor Barone attended the meeting, but only for a short time (2T42). The purpose of the meeting was to explain the AAUP's position on the clinical faculty series to senators and Nursing and Pharmacy faculty. The AAUP explained it favored a

clinical faculty series but objected to those positions not being eligible for tenure or advancement to Professor II (3T15).

The AAUP further explained it wanted those issues to be resolved through negotiations (2T19-2T20). One solution offered was the creation of two tenure tracks, one traditional, one clinical. The criteria for the clinical track would be different than the traditional track (3T95-3T96).

As a result of those discussions, Professor Joel announced that at the APC meeting to follow that day she would revise the APC resolution about the clinical faculty series to remove all reference to the non-tenure nature of those positions (2T19; 3T17).

That same day, February 18, an APC meeting was held as scheduled by R-18. Professors Barone and Joel attended, but Professor Keddie was absent (CP-35). As requested by the Senate's Executive Committee on February 4, 1994, the APC on February 18 attempted to develop a resolution for the Senate to consider regarding A-9401. The APC, however, could not reach a consensus on a resolution for the Senate. Consequently, it prepared two resolutions to send to the Executive Committee. Draft "A" (CP-12) recommended the creation of a clinical professor series in Nursing and Pharmacy but did not include any language that such a position would not lead to tenure. Draft "B" (R-19 p.[7]) recommended the creation of a non-tenure clinical professor series. Both drafts concluded that discussions continue between the University and the AAUP over tenurability and progression to Professor II (4T50-4T54).

On February 28, 1994, Senate Secretary Burkley sent the Executive Committee a memorandum (R-19) scheduling a meeting for March 11 which would include discussion of the proposal for the clinical professor series and Drafts A and B which were attached thereto.

Professor Keddie testified that sometime shortly after February 18, 1994, he received a telephone call from Professor Barone who allegedly told him that the administration (of the University) or someone in the administration had told him (Barone) that the clinical faculty series would not be established unless it came without tenure (1T121-1T123; 2T80; 2T83-2T86). Gibson testified that Keddie told her about Barone's comment (11T24-11T25). Professor Barone denied making that comment and denied having such a conversation with Keddie (9T41-9T42). I see no need for resolving the factual conflict. For analysis purposes only, I will assume Barone made that remark.

19. The Senate Executive Committee met on March 11 as scheduled. It discussed Drafts A and B and adopted Draft B, the non-tenure plan, and placed it on the Senate's agenda for March 25, 1994 (4T55; CP-13). On March 14, 1994, Senate Secretary Burkley sent Senate members a memorandum (CP-14) scheduling the March 25th meeting and attached A-9401.

The Senate met on March 25, in part to consider the resolution marked as Draft B. A motion was made offering the Draft A resolution in place of Draft B (2T27; CP-15). Professors Gibson,

Keddie and O'Connor spoke in favor of Draft A, Professors Joel and Barone, and Dean Colaizzi, spoke against Draft A (and in favor of Draft B). The motion was rejected and the Draft B resolution was adopted (2T36; R-20). On March 28, 1994, the Senate advised University President Lawrence that it had adopted the Draft B resolution for the Clinical Professor Series (R-21).

As a result of the Senate's action, Vice President Norman on March 29, 1994 sent the following letter (CP-18) to AAUP President Gibson:

> As you know the University Senate has provided advice to the President on the clinical faculty series. In view of the University's desire to implement the series as soon as possible, we should probably resume our discussions. Please ask Wells, Bob, or Dan to contact this office to schedule a meeting.

Gibson responded by letter of March 31, 1994 (CP-19) as follows:

> I write in response to your letter of March 29, 1994 regarding the proposed clinical faculty series. The AAUP is not interested in resuming discussions. We hereby renew our demand for negotiations.
>
> With regard to the administration's desire to implement the series as soon as possible, I remind you that the AAUP first demanded negotiations on September 21, 1993, some six months ago. Had negotiations begun at that time, they might well have been completed by now.

Norman did not directly respond to CP-19 (3T32), but on April 12, 1994, he sent the following letter (CP-21) to Gibson notifying her of the Board of Governors meeting scheduled for April 15, 1994 at which it would consider the clinical faculty series, and offering to negotiate over mandatorily negotiable subjects.

> The Board of Governors is scheduled to discuss the creation of clinical faculty positions on April 15, 1994. We believe this new classification could properly be included in your bargaining unit. If you do not agree, we will not insist upon including them. However, if you do agree, please advise me promptly.
>
> If these positions are to be included in your bargaining unit and if there are specific mandatorily negotiable subjects that the AAUP wishes to negotiate that are different from the terms of the contract, please let me know.

That same day, April 12, Gibson was formally notified of the Board of Governors April 15 meeting and provided with a copy of its agenda which included consideration of the non-tenure clinical faculty series (CP-20A; R-6; 3T38). On April 13, 1994, Gibson telephoned Norman and asked him whether the University was willing to remove from the resolution going to the Board any reference to the clinical faculty series being on a non-tenure track so that the issue could be preserved for negotiations. Norman agreed to find out, but on April 14 he told Gibson that the University would not change the resolution because it did not consider eligibility for tenure to be negotiable (3T32-3T38; 3T87-3T88; 7T18-7T20; 11T14). That was the first time Gibson became aware that the University thought the tenurability of clinical track faculty was non-negotiable (7T20).

By letter of April 15, 1994 (R-5), Gibson responded to Norman's April 12th letter (CP-21) and offer to negotiate and demanded negotiations over tenurability and eligibility for the rank of Professor II. She said:

> I write in response to your letter of April 12, 1994 regarding the creation of clinical faculty positions. As I have said to you on several occasions, we do agree that these positions will be in our bargaining unit. Indeed, as you know, beginning in September 1993, we have sought to negotiate mandatorily negotiable subjects pertaining to them.
>
> We hereby renew again our demand for negotiations on the issues of tenurability and eligibility for the rank of Professor II.
>
> With regard to the Administration's position that tenurability is not a mandatory subject of negotiation, I call your attention to "Rutgers, the State University, P.E.R.C. No. 91-81, 17 NJPER 212, 216-217 (par.22091 1991)" in which it was determined that tenurability of Visiting Part-Time Lecturers (as PTLs were called at the time) is a mandatory subject of negotiation. How can one in good faith hold that this subject is mandatorily negotiable for part-time faculty and not for full-time clinical faculty? (R-5).

Other than the tenurability and movement to Professor II issues, Gibson's response to CP-21 did not raise any other issues to negotiate. At that time she did not submit any proposals for negotiation about the clinical faculty series (3T88).

The Board of Governors met as scheduled on April 15, 1994. It permitted John Berkey, AAUP President of the Camden chapter, to deliver a statement about the clinical faculty series (CP-22). Berkey explained that the AAUP believed tenure was negotiable and that failure to negotiate that subject violated the parties collective agreement. Vice President Norman noted that the University would continue to discuss the issue with the AAUP (CP-24, p.5). The Board passed the following resolution adopting a non-tenure clinical track series:

> **NOW, THEREFORE, BE IT RESOLVED** that the Board of Governors hereby authorizes the establishment of clinical non-tenure track academic appointments in the Colleges of Pharmacy and Nursing and the Department of Nursing in the Camden College of Arts and Sciences, as specifically defined hereafter:
>
> 1. A full-time appointment as a clinical faculty member is a non-tenure track appointment.
>
> 2. A clinical faculty appointment may be made at any appropriate rank and shall be for a renewable term of not more than three years. The letter of appointment for clinical faculty shall explicitly state the fixed term of the appointment, the non-availability of tenure, and the specific responsibilities of the position.
>
> 3. A faculty member in a clinical position is not precluded from applying for or being offered other University positions, including tenure-track appointments; however, no preference is to be accorded him or her in the selection process for other positions.
>
> 4. If an individual who has held a clinical appointment is subsequently appointed to a tenure-track position, service in a full-time clinical position ordinarily will not be credited to service in a tenure-track position.
>
> **BE IT FURTHER RESOLVED** that clinical appointments may be made effective immediately; [CP-24, p.4; CP-20B]

The resolution did not restrict clinical faculty from moving to the rank of Professor II.

On April 18, 1994, Norman sent a memorandum (CP-23) to the AAUP Executive Council responding to the statements John Berkey made at the April 15 Board of Governors meeting. Norman criticized Berkey's statement, in part as a way of avoiding procedures that exist to determine whether a particular subject is negotiable. On

May 6, 1994, Norman sent Gibson a list of individuals (CP-25) who were sent CP-23. Not everyone on that list was a member of the AAUP's Executive Council (3T32).6/

20. On April 22, 1994, Norman responded to Gibson's April 15 letter, R-5, in which she demanded negotiations over tenurability of clinical faculty and their eligibility for the rank of Professor II. Norman wrote:

> In response to your April 15, 1994 letter, the University has the right and responsibility to create positions that meet the educational needs of the institution. The University believes that it need not negotiate over the creation of clinical faculty non-tenure track positions.
>
> With respect to eligibility for the rank of Professor II, the Board of Governors' resolution does not address this subject. In any event, the criteria for promotion, as you know, are not negotiable.
> [CP-26].

The AAUP noted it did not seek to negotiate over the creation of the new position nor over any criteria for promotion (3T54).

In compliance with the ACPE report of January 1992, R-34, which required the College of Pharmacy to submit a report by May 1994 addressing issues regarding its accreditation, the College, through Dean Colaizzi, and Professor Barone, submitted a report to the ACPE on April 30, 1994 (R-35) discussing the actions the

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6/ The AAUP did not allege that CP-23 or its transmittal violated the Act. It simply argued that CP-23 was "indicative" of the University's motive and intent (3T51; 3T57-3T58).

University and/or College had taken to continue its accreditation. The report noted the University had approved a non-tenure track clinical faculty position (R-35, p.22). On June 18, 1994, Colaizzi and Barone attended a meeting of the ACPE which considered the College of Pharmacy's accrediation. Colaizzi and Barone presented the ACPE with a report they had prepared (R-36) to summarize the information in R-35 (10T25). R-36 referred to the creation of the clinical faculty position.

As a result of R-35 and R-36, the ACPE on June 18 continued the accreditation for the College of Pharmacy (10T26). On June 30, 1994, the ACPE notified the University of its accreditation action and attached its accreditation report (R-37). In R-37 the ACPE scheduled the next comprehensive evaluation for Pharmacy in the 1997-98 academic year with an on-site observation during the 1995-96 academic year. The ACPE noted in R-37 that its continuance of accreditation was based on the progress Pharmacy had made to address issues raised in R-34, including the creation of a non-tenure clinical track position. In R-37, the ACPE noted:

> Of particular note were modest gains in the quantitive strength of faculty in the pharmacy practice and pharmacy administration areas, <u>creation of non-tenure accruing faculty positions</u>, continued attrition study and development of the pharmacy teaching and computer laboratories. [R-37, p.3. (Emphasis added)]

21. On June 29, 1994, the AAUP filed its amendment in this case (C-2) alleging in part that Norman's letters of March 29 (CP-18), April 12 (CP-21) and April 22, 1994 (CP-26) constituted a refusal to negotiate.

On July 19, 1994, Gibson sent a letter to Norman (CP-27) responding point-by-point to his April 18, 1994 memorandum to the AAUP (CP-23). Gibson criticized Norman for several statements he made in CP-23, but she also carefully explained why Berkey addressed the Board. She said:

> We sought specifically to negotiate over the eligibility of those hired in the new positions to be considered for tenure and for promotion to Professor II, as well as any other negotiable subjects.

22. On or about April 4, 1995, the AAUP received the tentative agenda for the Board of Governors meeting scheduled for April 7, 1995. That agenda included a proposal to adopt a new University policy regarding academic appointments and promotions and a change in University regulations regarding clinical faculty. Having received the agenda, Gibson telephoned Norman's office and requested a copy of the proposed revisions which she eventually received (3T60-3T62). On April 7, 1995, the Board adopted a new Appendix D to the University Policy with Respect to Academic Appointments and Promotions (CP-16), which included a revision to University Regulation 3.30. CP-16 includes criteria for non-tenure track clinical faculty. A comparison of the original Appendix D, CP-4, and the new Appendix D, CP-16, shows that clinical faculty was added as a faculty category (CP-16, p.12); clinical practice was added as a criteria (CP-16, p.8); the criteria applicable to clinical faculty was established as Teaching, Clinical Practice, and Service (CP-16, p.10), with the primary criterion being Clinical

Practice; and Regulation 3.30, and the definition of the Service criteria, and the Promotion to professor sections were amended to include reference to clinical practice (CP-16, p.5, p.6 and p.13, respectively).

The definition of Clinical Practice in the criteria section included concentrating their efforts and applying their knowledge to direct patient and client care; and the application of research to the clinical setting. The description of Clinical Faculty as added to the faculty category provided that clinical faculty were not tenure-track, but they were not precluded from promotion to the "senior ranks". The definition stated that excellence in clinical practice was required for promotion to Associate Clinical Professor, it then said that significant accomplishments under the criteria of service would strengthen a candidacy for promotion to the "senior ranks" (CP-16, p.12).

The first sentence of the second paragraph of the Promotion to Professor or Equivalent Ranks section of the new Appendix D (CP-16, p. 13) included clinical practice among those items considered for promotion to Professor. It read:

> Rigorous standards are applied for the assessment of scholarship, artistic accomplishment, librarianship, extension practice and clinical practice in consideration for promotion to professor or equivalent ranks.7/

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7/ The original copy of CP-16 introduced at hearing inadvertently omitted the words "and clinical practice" from that document (8T14; 8T53-8T55). I corrected the document to reflect the correct wording.

The last two paragraphs of that section concerned promotion to Professor II and were identical to the wording in the original Appendix D, CP-4, p.8. (Finding of Fact No. 4). The first of those paragraphs reserved promotion to Professor II for those faculty who achieved "scholarly" eminence. The second of those paragraphs began with the following words: "The most significant area of consideration in determining promotion to Professor II", and then listed scholarship for general teaching/research faculty; scholarship and/or artistic accomplishment for creative and performing arts; scholarship and/or librarianship for library faculty; extension practice for county agents; and extension scholarship for extension specialists. As in CP-4, the next sentence of CP-16 said:

> Only those faculty who have demonstrated outstanding achievement in those areas by earning significant recognition inside and outside the University are eligible for promotion to Professor II.

I believe that "those faculty" and "those areas" used above referred to the specific items listed in the previous sentence. Since neither the clinical faculty title, nor the criteria of clinical practice were included in that paragraph as part of "those faculty" or "those areas", I find that clinical practice was not included as a criteria for consideration in determining promotion to Professor II.

Professor Gibson believed that the language in CP-16 meant that clinical faculty were precluded from eligibility for those

higher ranks and their higher salaries (3T63). Assistant Vice President Ambrose said the language in CP-16 meant that clinical faculty were eligible for promotion to Professor, but not Professor II (8T55). I credit Ambrose's testimony of what CP-16 meant. Based upon that testimony, and upon my own reading of the Promotion to Professor section in CP-16, I find that clinical faculty were eligible for promotion to Professor, but not eligible for promotion to Professor II because clinical practice was not established as a criterion for consideration in determining promotion to that rank. There were no negotiations over any of the changes made in Appendix D (3T62).

The Board's adoption of the non-tenure clinical track series did not affect the tenure or salary of any tenure track faculty members (3T79; 8T27). In the College of Nursing, one person has been hired into a three year non-tenure clinical track position as an assistant professor beginning after July 1, 1995 (6T43-6T44). In the College of Pharmacy, one person holds a non-tenure clinical track position since July 1995. That person had requested she be switched from a non-tenure co-funded position to the non-tenure clinical position (9T69-9T70; 10T32; 10T48).

23. As a result of CP-16, Gibson, on June 13, 1995, sent Norman a demand to negotiate (CP-28) as follows:

> On April 7, 1995, the Board of Governors adopted changes in the above mentioned regulations and policies that affect mandatorily negotiable terms and conditions of employment including salary scales and eligibility for certain promotions and for tenure of unit members, specifically those in

> clinical faculty positions. We renew our pending demand for negotiations over these terms.

Norman responded on June 19, 1995 (CP-29) declining to negotiate over the criteria for appointments and promotions of faculty, but he made the following offer to negotiate salary:

> If the AAUP wishes to negotiate salary schedules for clinical faculty that are different than the salary schedules for other bargaining unit members, please send me a proposal.

Gibson responded to CP-29 by letter of June 27, 1995 (CP-30). She said:

> I write in response to your letter of June 19, 1995, replying to mine of June 13, 1995, which was perhaps not as clear as it should have been.
>
> It is our position that changes in the subject regulations and policies adopted by the Board of Governors on April 7, 1995 affect mandatorily negotiable terms and conditions of employment of persons employed or to be employed in clinical faculty positions. In particular, <u>eligibility</u> (<u>not</u> <u>criteria</u>) for appointment or promotion to the ranks of Professor and Professor II, which appears to be precluded, and <u>eligibility</u> for tenure, which is explicitly precluded, are mandatorily negotiable. We again renew our pending demand for negotiations over these terms.

She did not submit a proposal for a separate clinical faculty salary schedule. Norman responded to CP-30 by letter of July 12, 1995 (CP-31). He stated he did not see a distinction between eligibility for tenure and promotion to Professor II and criteria for tenure and promotion to Professor II and, therefore, declined to negotiate.

Gibson responded to CP-31 by letter of August 22, 1995 (CP-44). She defined what she meant by eligibility as being in a position to be considered or evaluated for the possible granting of tenure or promotion to Professor II; and defined criteria as the standards of accomplishment (i.e., service, clinical practice, etc.) that are applied when considering a faculty member for tenure or promotion. Gibson then renewed her demand to negotiate.

On November 14, 1995, Gibson sent Norman a formal proposal to negotiate over whether clinical faculty would be eligible to be evaluated for tenure and for promotion to Professor II (CP-50). CP-50 did not contain a proposal to negotiate over salary schedules, or any other term affecting clinical faculty. Gibson concluded CP-50 by requesting Norman to advise Keddie if the University had changed its position regarding negotiations. Assistant Vice President Ambrose responded to CP-50 by letter of December 22, 1995 (CP-51). Ambrose criticized Gibson for submitting a proposal so long after the Board's April action, she (Ambrose) nevertheless, stated that the proposal was not negotiable.

Although the AAUP clearly expressed its desire, and submitted a proposal, to negotiate over the tenurability of clinical faculty and their movement to the rank of Professor II, it did not submit proposals to negotiate over any other subjects affecting clinical faculty (2T79-2T80; 3T88; 7T10-7T11; 7T33). There were no negotiations between the AAUP and the University regarding terms of the clinical faculty positions prior to the commencement of this hearing (3T60; 3T66; 7T32).

## ANALYSIS

The AAUP raised numerous allegations/issues in this case. It is not my intent to answer all the issues as specifically framed by the parties, but to address what I believe are the significant issues raised by the litigation. The primary issue was a combination of the issues raised by the parties, that is, was the University obligated to negotiate with the AAUP over whether the clinical faculty title could be a tenure or non-tenure track position, and/or whether there was a genuine issue of educational necessity preempting negotiations over tenure. An important but secondary issue was whether the University was obligated to negotiate with the AAUP over whether employees holding the new clinical faculty position were eligible for promotion to the rank and salary of Professor II.

### The Primary Issue

Deciding the primary issue requires the implementation of the Supreme Court's three-part test in Local 195, IFPTE v. State, 88 N.J. 393 (1982), used for determining whether a subject is mandatorily negotiable. The Court held:

> [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. [88 N.J. at 404-405.]

There was no significant dispute over the first two tests. First, tenure is a form of job security and job security intimately affects the work and welfare of public employees. See, State v. State Supervisory Ees. Assn., 78 N.J. 54, 84 (1978); Plumbers & Steamfitters v. Woodbridge Bd. Ed., 159 N.J.Super. 83 (App. Div. 1978); Rutgers, The State University, P.E.R.C. No. 91-81, 17 NJPER 212, 214 (¶22091 1991). Second, no statute or regulation preempts negotiations over tenure for faculty at Rutgers. Compare, N.J.S.A. 18A:28-5 et seq. addressing tenure for school teachers, and N.J.S.A. 18A:60-6 et seq and 18A:64-20 et seq. addressing tenure for county and state college professors with N.J.S.A. 18A:65-6 which applies to Rutgers.8/

The third Local 195 test is the one that makes a difference in this case. While no statute or regulation preempts negotiations over tenure here, the Supreme Court has already restricted

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8/ N.J.S.A. 18A:65-6 neither guarantees nor denies tenure to Rutgers professors. It provides:

> Nothing in this chapter shall be construed so as to deprive any person of any right of tenure, or under civil service, or under any retirement system, or to any pension, disability or social security or similar benefits, to which he is entitled by law or contractually.

negotiations over tenure issues in the college and university setting, and may have held tenure (at least for faculty) to be non-negotiable in that setting altogether. In Association of New Jersey State College Faculties v. Dungan, 64 N.J. 338 (1974), the State Board of Higher Education adopted guidelines for granting tenure to faculty in state and county colleges. The guidelines were intended to give the colleges greater flexibility in establishing a ratio of tenured to non-tenured employees. The Union argued, in part, that the State Board's unilateral action violated the Act. Relying on its earlier cases finding that matters of educational policy were within management's prerogative and not subject to the Act, Dunellen Bd. Ed. v. Dunellen Ed. Assoc., 64 N.J. 17 (1973); Burlington Co. Collg. Fac. Assoc. v. Bd. Trustees, Burlington Co Collg., 64 N.J. 10 (1973); Bd. Ed. City of Englewood v. Englewood Teachers Assoc., 64 N.J. 1 (1973), the Dungan Court found the Board's action to be a management prerogative and held in pertinent part:

> While the guidelines towards institutional excellence and greater administrative care in the granting of tenure undoubtedly entail individual consequences, they embody only matters not mandatorily negotiable under the principles expressed in Dunellen,... Burlington, ... and Englewood....
> [64 N.J. at 355.]

The Court then cited with approval the following recommendation:

> ...that collective bargaining in colleges and universities not extend to academic freedom and tenure and related faculty personnel matters, and that grievances involving issues of freedom and

> tenure be referred to academic procedures outside the collective bargaining process. [64 N.J. at 355.]

The Dungan Court concluded its discussion citing from Dunellen that even though the issue was outside the field of mandatory negotiations, labor relations would be enhanced by voluntary discussion by the parties over the issue. 64 N.J. 356.

Although Dungan was issued long before Local 195 and other Court cases ruling on the negotiability of various subjects, the Court in The Matter of University of Medicine and Dentistry of New Jersey (UMDNJ), 144 N.J. 511 (1996), recently relied on the above cited recommendation from Dungan. 144 N.J. at 534. In UMDNJ, an intern doctor/employee was suspended due to his questionable performance. He sought assistance from his union, the Committee on Interns and Residents (CIR). The University, however, would not provide CIR certain requested information, nor would it let a CIR representative attend a hearing on the interns behalf despite the interns request for union representation. The intern was subsequently terminated. CIR filed an unfair practice charge and the Commission found that the University violated the Act particularly by denying the intern his "Weingarten" rights (the right to union representation at an investigatory interview).[9/] Although the Court affirmed, it clearly provided that rights under

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9/ NLRB v. J. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975). See also East Brunswick Bd. Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979).

the Act could not interfere with the University's right to assert its academic freedom. The Court said:

> To the extent that UMDNJ's actions do involve its assertion of its right to academic freedom, there is no doubt that the Employer-Employee Relations Act will not be permitted to frustrate that effort. [144 N.J. at 584.]

The Court has adopted the concept of academic freedom developed by other courts. Dixon v. Rutgers, The State University, 110 N.J. 432, 448-449 (1988); Snitow v. Rutgers University, 103 N.J. 116, 122 (1986). In Dixon, the Court held:

> ...courts have developed a concept of "[a]academic freedom, [which,] though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." [Citations omitted.] The extent of this academic freedom concept was charted thirty years ago by Justice Frankfurter in his oft-quoted concurrence in Sweezy v. New Hampshire, 354 U.S. 234, 263, 77 S.Ct. 1203, 1218, 1 L.Ed.2d 1311, 1332 (1957), when he spoke of "four essential freedoms" of universities, namely, the freedom to determine for themselves "on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study."
>
> In addressing the issue of academic freedom this Court has recognized the essential role that the selection of faculty plays in the development of academic institutions. In Snitow, ... 103 N.J. at 123, we noted that "[n]o decision can more fully implicate an institution's academic responsibility than the decision to hire, promote, and retain teaching faculty." Since this selection process involves "[d]eterminations about such matters as teaching ability, research scholarship, and professional stature [that] are subjective, and [also] ... often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges," courts have traditionally been "vigilant not to intrude" into

> this area to the extent that such specialized knowledge is required. [Citations omitted]. [110 N.J. at 448-449.]

In UMDNJ, the Court found that granting the intern his Weingarten rights would not interfere with the University's academic freedom because it was still free to make its academic decision. But the Court also emphasized that its:

> ...cases have recognized that rights guaranteed by the Act will be preempted when they infringe on important educational policies. [144 N.J. at 533],

at which point the Court cited Dungan, among other cases, and relied again on the recommendation about academic freedom and tenure cited in Dungan. 144 N.J. 534.

The Commission, too, has held that academic freedom relates to matters of educational policy and is non-negotiable. South Orange-Maplewood Bd. Ed., P.E.R.C. No. 97-54, 22 NJPER 411, 412 (¶27225 1996); Old Bridge Tp. Bd. Ed., P.E.R.C. No. 95-15, 20 NJPER 334, 339 (¶25175 1994); Rutgers, The State University, P.E.R.C. No. 91-81, 17 NJPER 212, 216 (¶22091 1991); North Hunterdon Bd. Ed., P.E.R.C. No. 85-100, 11 NJPER 238, 235 (¶16090 1985); Rutgers, The State University, P.E.R.C. No. 84-44, 9 NJPER 661, 662 (¶14286 1983); Edison Twp. Bd. Ed., P.E.R.C. No. 83-100, 9 NJPER 100, 102 (¶14055 1983).

Based upon Dungan, UMDNJ, and other reasons I will explain more fully below, I find that the University's decision placing the clinical faculty position on a non-tenure track was an exercise of

its academic freedom, thus, non-negotiable. I do not reach in this decision whether Dungan and UMDNJ intended to eliminate from negotiations all issues of tenure for University faculty members.

Notwithstanding the above analysis, the application of the third Local 195 test must begin with the determination of what was the dominant concern in establishing the clinical faculty position on a non-tenure track. If the reason was one of educational policy and/or academic freedom it was non-negotiable.

The record shows that prior to the creation of the clinical faculty series, there was no specifically designated clinical position in the Colleges of Nursing and Pharmacy. The move to create the non-tenure clinical series came from the Colleges themselves, not from the administration of the University. Deans DeMaio and Colaizzi explained the need for non-tenured clinical faculty in their respective Colleges (Findings of Fact 8 and 9). DeMaio noted the turnover of tenure track faculty performing clinical practice was so high it was denying students certain knowledge and experience they needed to pass their licensing exam; and having only tenure track positions was adversely affecting Nursing's ability to recruit the best clinical faculty which in turn threatened its ability to place students in health related institutions for instruction, and limited its ability to renew talented clinical faculty who had neither the time nor inclination for extensive scholarship and research.

Similarly, Colaizzi noted that Pharmacy had a high turnover rate because it could not offer clinical faculty a renewable position not requiring scholarship and research; and, the health related institutions preferred, and some required, non-tenure track positions for clinical instructors to avoid diverting their attention from the clinical setting. Additionally, during that same time period, the ACPE withheld final accreditation for Pharmacy until a non-tenure track clinical faculty position was created.

Having reviewed the facts, I find that the dominant concern leading to the creation of the non-tenure track clinical position was to give Nursing and Pharmacy the ability to include a viable and competitive clinical instruction program in its course of study. That included their ability to recruit, hire and continue to employ the best clinical faculty they could find. To do that the University needed a non-tenure track clinical faculty position. I am also particularly convinced that the failure to have created a non-tenure clinical position would have jeopardized Pharmacy's ability to maintain its accreditation and both Colleges' ability to offer a clinical instruction program in off-campus health related institutions. Such a result could have severely damaged the Colleges' educational goals and the University's overall academic reputation.

Consequently, I find that the University's decision to create the non-tenure track clinical position was an exercise of its academic freedom and a policy determination made to implement its

educational goals. Negotiations over that decision would have significantly interfered with the University's ability to offer qualified and accredited clinical instruction programs and was, therefore, not mandatorily negotiable. Local 195.

That result is consistent with the Commission's holding and language in State of N.J. (Stockton State College), P.E.R.C. No. 76-33, 2 NJPER 147 (1976). In that case the College adopted regulations dealing, in part, with the proportion of tenured to non-tenured faculty. The State argued that adopting such a proportion was a non-negotiable matter of educational policy. It was intended to address problems created by the high proportion of tenured faculty which limited the Colleges' flexibility to initiate new programs, hire newly trained and specially skilled faculty in new subject areas, adjust faculty to reflect changes in programs and enrollment, and to assure innovation and creativity. Id. at 149.

In agreeing with the State, the Commission held:

> We conclude that Stockton State College should be free, in the exercise of its educational responsibilities, ..., to determine those tenure limits which will encourage maximum flexibility in educational programs and maximum utilization of pedagogical skills. The extent to which tenure...is regulated by the...tenure ratio policy has profound implications for the quality of the Stockton State College educational program. Such decisions should not be subject to the mandatory negotiations process.... [Id. at 149.]

The same principles apply here. In carrying out its educational responsibilities, the University needed the flexibility

to determine how best to carry out its clinical education program. In Stockton, the State needed a certain tenure to non-tenure ratio, in part, to hire specially skilled faculty. Similarly, here the University needed a non-tenure clinical position to attract and retain the best clinical faculty available. Negotiations over whether clinical faculty should be eligible for tenure would significantly interfere with the University's flexibility to determine how best to keep the clinical program viable, and how best to resolve the concerns expressed by the health related institutions.

Naturally, the AAUP had a different approach. Throughout its post-hearing brief and reply brief, the AAUP consistently argued that the University unilaterally eliminated tenure eligibility for clinical faculty. The AAUP sought negotiations over whether clinical faculty would be eligible for consideration for tenure if they met the criteria established by the University. It argued that no academic decision would be affected by such negotiations, and it conceded it could not challenge the University's managerial prerogative to create positions (job creation is a managerial prerogative, Bergen Pines County Hospital, P.E.R.C. No. 87-25, 12 NJPER 753,754 (¶17283 1986)); establish criteria for tenure; and determine who should receive tenure (the establishment and application of criteria is a managerial prerogative, Local 195, 88 N.J. at 417; State v. State Supervisory Ees. Assoc.,78 N.J. at 90; Dept. of Law and Public Safety v. State Troopers NCO Ass'n., 179 N.J.Super. 80, 90-91 (App. Div. 1981); and, neither the criteria for

tenure nor who should get tenure are negotiable. See, Union County College v. AAUP, 295 N.J.Super. 15, 21-25 (App. Div. 1996)).

The AAUP further argued that the notion that clinical faculty were ineligible for tenure because they were not required to engage in scholarship was inconsistent with the fact that county agents were not required to engage in scholarship yet were still eligible for tenure, and argued that being considered for tenure and promotion to Professor II was a procedural matter not interfering with the University's managerial prerogative. Finally, the AAUP primarily relied upon the Commission's decision in Rutgers University, 17 NJPER 212 to support its arguments.

The AAUP's arguments were not persuasive. They ignored the fact that both Nursing and Pharmacy were facing a serious problem in providing quality clinical instruction. It affected their relationship with the health related institutions which provided clinical training for their students, and affected their accreditation. The University had to develop a policy to address that problem, and the overwhelming consensus among the Colleges and their faculty, the University administration, and the health related and accrediting institutions was to create a non-tenure track clinical faculty position. Based upon its right of academic freedom, that is what the University did. Any negotiations over whether clinical faculty should be eligible for consideration for tenure would have negated the very purpose for creating the clinical position and could jeopardize the Colleges accreditation and their

relationship with the health related institutions that trained their students.

In its post-hearing brief, the AAUP referred to a remark allegedly made by Professor Barone to Professor Keddie that the clinical faculty series would not be established unless it came without tenure. The AAUP seemed to be arguing that the alleged remark demonstrated the University's bad faith, and that it was offering its proposal for the new position in the Senate on a take it or leave it basis. While I am not finding whether Barone actually made the remark (Finding of Fact. No. 18), even assuming that he did, I do not reach the same inference apparently drawn by the AAUP. If made, I believe that remark merely expressed the policy the University had chosen to address the problems in Nursing and Pharmacy. The University already had a tenure track position available for those employees providing clinical instruction and who wanted the opportunity to be considered for tenure. But the tenure track position was not resolving the problem. It exacerbated it. What the University needed was a non-tenure position, and it makes perfect sense that it would only have created the clinical series if it came without tenure. Thus, if made, I do not find Barone's comment demonstrates University bad faith. In the context of this case, if made at all, it was an expression of the University's academic freedom.

I disagree with the AAUP's assertion that the University unilaterally "eliminated" tenure eligibility for clinical faculty.

Rather, I find that the University unilaterally "decided" it needed a non-tenure clinical position to resolve the problems in Nursing and Pharmacy. The difference is important because it impacts on the University's managerial prerogative to create positions.

To eliminate, commonly means to get rid of, remove or omit something. Webster's Collegiate Dictionary, Tenth Ed., 1993. The act of removing something, such as removing tenure eligibility from the clinical faculty position, assumes that tenure eligibility for that position preexisted and was now being changed. Such was not the case. Tenure eligibility for the clinical position had never been established. I find that the issue of tenure eligibility here was subsumed within the University's creation of the position. Tenure eligibility was never eliminated, the University simply created a non-tenure track position to meet its educational goals. Since the decision to create a non-tenure position was educationally based, the University was not obligated to negotiate over the tenure issue.

The comparison between the county agent position and the clinical faculty position is of little relevance. Certainly, county agents are not required to engage in scholarship to be considered for tenure. But that is because the University did not establish scholarship as a criteria for county agents. The AAUP seems to be suggesting that clinical faculty should be eligible for consideration for tenure because the University need not establish scholarship as a criteria for them to be considered for tenure. The

University has the exclusive right to determine the criteria for clinical faculty. In fact, the University did not establish scholarship as a criteria for the clinical faculty position (CP-16, p.8), but that does not translate into making the clinical faculty position eligible for tenure. As I have found, the position was not eligible for tenure because the University needed a non-tenure clinical position to carry out its clinical education program. Negotiations over whether clinical faculty could be considered for tenure would have interfered with the University's determination of how best to implement that program.

The county agent argument is also weak because clinical faculty can, if they so choose, compete for tenure. The University's resolution creating the non-tenure clinical position (CP-24, p. 4, item 3), clearly noted that faculty members in a clinical position were not precluded from applying for or being offered tenure-track appointments. Those tenure-track appointments would require scholarship, but since the criteria for tenure is not negotiable, the AAUP cannot negotiate for tenure track positions for clinical faculty that do not require scholarship. Thus, clinical faculty have the opportunity for tenure as do county agents.

The AAUP noted the well established principal that while a labor organization does not have the right to negotiate over the criteria for granting tenure or promotion, it does have the right to negotiate over the procedural process to be followed in making such a grant, Snitow, 103 N.J. at 124; State College Locals v. State Bd.

Higher Ed., 91 N.J. 18, 32-33 (1982) (both tenure); Law & Pub. Saf. Dept. v. State Troopers NCO Assoc., 179 N.J.Super. 80, 89 (App. Div. 1981) (promotions). Then, relying on language in Law & Public Saf. Dept., 179 N.J.Super. at 93, and Camden County, P.E.R.C. No. 88-115, 14 NJPER 350, 351 (¶19135 1986) which said in pertinent part:

> Included among negotiable procedures are guarantees that employees meeting all of the employer's promotional criteria will be considered for promotion. [Id.],

the AAUP argued that the procedural process here included the right of employees to be considered as eligible for promotion, appointment or tenure.

While I agree with the AAUP's statement of the law, I disagree with its application of it to the instant facts. With respect to the tenure issue, that statement of law must be read in pari materia with the Local 195 test. Since I have found that negotiations over whether employees holding the clinical faculty position can be considered for tenure in that position would interfere with the University's managerial prerogative to establish its educational policy, the AAUP's reliance on Law & Pub. Safety Dept., Camden County, and similar cases is still insufficient to establish a right to negotiate over the tenure issue. This result applies whether the AAUP seeks to negotiate over whether employees holding the clinical position can be considered for tenure in that position, or whether the AAUP seeks to negotiate over whether the position, itself, should be on a tenure track. As I have previously

noted, however, clinical faculty can be considered for tenure if they apply for and are appointed to a tenure track position. The issue over the consideration of clinical faculty for promotion to Professor II will be explained in my discussion of the secondary issue below.

The AAUP's reliance on Rutgers University, 17 NJPER 212 to prove its case here is misplaced. In that case, the AAUP represented Visiting Part-Time Lecturers (VPL's) who were employed for at least their second semester. The case primarily involved the negotiability of a number of proposals, some of which concerned job security. The AAUP quoted from the decision at several points, but primarily relied on the Commission's discussion regarding the proposed "Reappointment" clause. That clause said:

B. Reappointment

> 1. Where possible, assignments shall be made according [to] the part-time lecturer's record of employment. A new employee with no record of employment shall not be assigned, or reassigned, courses in advance of any part-time lecturer with a satisfactory record of employment, except where major educational policy dictates otherwise.
>
> 2. Each department shall publish an eligibility list for part-time lecturer reappointments at least 90 days before the semester begins. This list shall include the names of all those who have taught in the department and requested reappointment. Reappointment shall come from this list unless major educational policy dictates otherwise.
>
> 3. A part-time lecturer who does not accept a particular appointment shall suffer no adverse consequences in future semesters.

> 4. Part-time lecturers who complete 4 semesters of teaching shall be titled "senior part-time lecturers." Semesters taught prior to the signing of this agreement shall be applicable to this 4 semester total and each summer session shall constitute a semester under this provision.
>
> 5. "Senior Part-Time Lecturers" shall be appointed indefinitely and shall have priority in course assignments and schedules.
> [17 NJPER at 215.]

Earlier in that decision, the Commission had said:

> Although we have not decided the issue of non-statutory tenure for professional employees, we do not believe that all such forms of job security significantly interfere with educational policy. [Id. at 214.]

That quote demonstrates the Commission recognized that some forms of job security do interfere with educational policy.

In considering the Reappointment clause, the Commission first sought to distinguish between the decisions to hire, reappoint and assign. It said:

> Rutgers has a prerogative to hire employees. But once hired, those employees may be protected by a job security provision which affords their employer an opportunity to evaluate their performance before tenure is granted.
> [Id. at 216.]

The Commission found that Paragraph B.1. was not negotiable because it interfered with management's right to make assignments. It also found that paragraph B.3. was not negotiable because its protections were too broad, and paragraph B.5. was not negotiable because it did not protect management's right to remove employees

for cause, and because course assignment is a managerial prerogative. Id. at 216.

The Commission concluded, however, that Paragraph B.2. was negotiable. The Commission held that the third sentence of B.2. was negotiable because it predominately related to job security, and did not prevent the University from deviating from the list for major educational policy reasons. Id. at 216.

It also found that Paragraph B.4. was negotiable because it said indefinite appointment subject to removal for cause was a negotiable form of job security. Id. at 216.

The AAUP drew a comparison between the Commission's holding regarding Paragraphs B.2. and B.4., and the facts here. It argued that the third sentence in B.2. concerned eligibility for reappointment, and that here, it only sought negotiations over whether clinical faculty could be considered for tenure. Similarly, it argued that its request here is more modest than its request in B.4. which sought indefinite appointment, here it said it did not seek automatic tenure, only eligibility for tenure.

I do not find the AAUP's arguments persuasive. The Commission's decision on B.2. and B.4. was predicated on the principal that negotiations over those subjects would not significantly interfere with educational policy decisions. The Commission recognized that some forms of job security may interfere with the determination of educational policy. This case represents one of them. The AAUP's argument that it is not seeking to

negotiate over criteria for tenure, nor seeking to restrict Rutgers decision to grant or deny tenure misses the point. The University needs a non-tenure track position to hire and continue the employment of qualified clinical instructors and to maintain the Colleges' accreditation. It cannot do that if the clinical faculty position becomes a tenure track position. Similarly, even if the University could "hire" a clinical instructor into a non-tenure position, it would adversely affect the University's ability to implement its academic program if it was subsequently required to negotiate with the AAUP over whether employees hired into such a position could then obtain tenure. Besides, those clinical faculty professors who prefer a tenure-track position are already eligible to apply for one.

The Commission's reference in Rutgers, Id. at 214, to its decision in Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976), also does not help the AAUP's case. In the relevant part of Rutgers, 2 NJPER 13, the Commission held that a clause concerning the scope of tenure, that is, whether tenure, once given, is to be University-wide or less, is negotiable; but it also held that language relating to quotas on tenure would infringe on a matter of educational policy. The key is that where negotiations would interfere with educational policy it is not allowed. Such is the result here.

I believe that the Commission's decision in New Jersey Institute of Technology, P.E.R.C. No. 83-72, 9 NJPER 33 (¶14016

1982), aff'd NJPER Supp.2d 141 (¶126 App. Div. 1984), is a more relevant comparison to this case than Rutgers, 17 NJPER 212. The Institute had reached the point where it needed the flexibility to offer tenure on appointment, or a multi-year contract on appointment to teacher applicants who could not be recruited without such assurances. The Institute intended to make those offers to applicants who already had tenure or multi-year contracts elsewhere, and where it was necessary in order to induce those teachers to teach at NJIT. The Institute informed the professional association (PSA) of its decision, but after the PSA insisted the decision was negotiable the Institute filed a Petition for Scope of Negotiations regarding the matter.

The Commission applied the Local 195 test ultimately concluding the issue was not negotiable. It held that the issue was one of job security affecting employee work and welfare, and that no statute or regulation preempted negotiations, but after applying the third part of the test it said:

> ...we conclude that a negotiated agreement prohibiting NJIT's ability to grant tenure or multi-year appointments to applicants of its choice when necessary to recruit these applicants would significantly interfere with the determination of two fundamental matters of educational policy; selection of personnel and awarding of tenure for individual employees. [9 NJPER at 35.]

Citing a long list of cases, the Commission also said:

> It has been repeatedly held that a public employer has the non-negotiable right to select the applicants it deems best for particular positions. [Citations Omitted. Id.]

The Appellate Division affirmed substantially for the reasons expressed by the Commission. See also, North Bergen Bd. Ed. v. North Bergen Teacher Fed., 141 N.J.Super. 97, 103 (App. Div. 1976) (the selection of candidates is a major educational policy decision).

NJIT is, thus, closely related to this case. There the Commission and Appellate Division allowed the Institute to unilaterally offer tenure or multi-year contracts on appointment in order to recruit and hire the teachers it needed. The same philosophy must apply here but with a reverse fact. The University needed to unilaterally offer a non-tenure track position in order to recruit and hire the best clinical faculty it could attract, and to maintain its accreditation of the Colleges.10/ In accordance with NJIT, I find that the University's decision cannot be subject to negotiations.11/

In another related case, University of Medicine and Dentistry of New Jersey v. American Association of University Professors, 223 N.J.Super. 323 (App Div. 1988), aff'd 115 N.J. 29 (1989), the Appellate Division found that UMDNJ had the managerial prerogative to require tenured faculty to retire upon reaching age

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10/ Where an issue involves hiring it implicates a significant educational purpose and is non-negotiable. See Teaneck Bd. Ed. v. Teaneck Teachers Ass'n., 94 N.J. 9, 16, 20 (1983).

11/ See also, Gloucester County, P.E.R.C. No. 89-70, 15 NJPER 69 (¶20026 1988), where the County had the managerial prerogative to create a third shift beyond the work hours posted in the contract in order to alleviate an unsanitary condition in a County nursing home.

70. The Court applied the Local 195 test finding no impediment to negotiations on the first two parts of the test, but upon applying the third part of that test concluded that the dominant concern was how the institution could best achieve its mandated educational purpose which is a managerial prerogative. The Court said:

> It implicates important trade-offs between the desire of an individual to continue working and the expertise which he provides versus an institution's need to bring in new faculty, to deploy its faculty in different academic areas and to open up tenure and promotional positions in order to retain its current faculty and to afford equal employment opportunities. [Emphasis Added. 223 N.J.Super. at 334.]

The Court cited examples as to why the retirement policy may be implemented including that "the ability to employ new faculty is essential to the vitality of the academic environment...." Id. at 335. It also said that:

> Nothing could be more germane to the educational goals of an institution of higher education than the vitality of that institution as reflected in its ability to hire, retain and deploy its faculty. [Id. at 335-336.]

I find the court's above-quoted language and reasoning applicable to the instant case. Here the University needed to create the non-tenure clinical position to maintain the vitality and integrity of its clinical education programs in Nursing and Pharmacy. That position gave those Colleges the ability to hire, retain and deploy the best clinical faculty it could attract to maintain a viable relationship with the health related institutions

in which its students were trained and to meet the accreditation standards.

In addition to the above Local 195 discussion, I note the evidence here shows a history of the University unilaterally creating a non-tenure track position without AAUP objection (Finding of Fact No. 1). To the extent the University acted consistent with its prior practice its conduct did not violate the Act. See, So. River Bd. Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER. Supp.2d 170 (¶149 App. Div. 1987); Sussex County, P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982); Rutgers University, P.E.R.C. No. 82-98, 8 NJPER 300 (¶13132 1982).

Based upon the above discussion, I recommend the Commission find that the University had the managerial prerogative to create the clinical faculty series as a non-tenure track position and, therefore, it did not violate the Act by refusing to negotiate with the AAUP over the tenurability of the position. Having found that the tenurability of the clinical faculty position was not negotiable, I also find that the University did not violate the Act by refusing to negotiate over the proposal submitted to the University Senate as alleged in CO-94-112 which was incorporated into this charge, and, did not violate the Act as alleged in CO-94-310 by: refusing to negotiate over the creation and implementation of the clinical faculty series; failing to earlier notify the AAUP that it believed the tenurability of the clinical faculty position was non-negotiable; unilaterally establishing the

non-tenure nature of the new position at the time it was proposed; not claiming whether the tenurability of the position was a matter of educational necessity; refusing to negotiate over the eligibility of incumbents for tenure in the clinical faculty position; and, failing to negotiate with the AAUP over the tenurability of the position before the Board of Governors approved the proposal for the position.

The Secondary Issue

In its charge, argument and briefs, the AAUP alleged that the University failed to negotiate with it over the eligibility of clinical faculty for promotion to higher rank and salary. Its reference to "higher rank" meant the Professor II level which was the highest professor rank, and highest pay level for members of the AAUP unit. In its brief, the AAUP argued that by precluding clinical faculty from promotion to Professor II, Rutgers was imposing a cap on available salaries for clinical faculty. In its reply brief, the AAUP argued,

> ...that because promotion to Professor II affects whether a faculty member has access to higher salary ranges, eligibility for promotion is negotiable as an issue concerning rates of pay.

There are two elements to this secondary issue, eligibility for promotion to the rank of Professor II, and eligibility to reach the salary levels that apply to the Professor II rank. Based upon the above arguments in its briefs, I believe that the AAUP is

primarily concerned about clinical faculty having the opportunity to reach the highest salary levels provided by contract.

It is well established that the qualifications for promotion are not negotiable. Middlesex County Bd. Social Services, P.E.R.C. No. 92-93, 18 NJPER 137, 139 (¶23065 1992); Franklin Twp. Bd. Ed., P.E.R.C. No. 90-82, 16 NJPER 181 (¶21077 1990); Willingboro Bd. Ed., P.E.R.C. No. 82-67, 8 NJPER 104 (¶13042 1982); and the criteria for promotion and decision to promote are not negotiable. Teaneck Bd. Ed., 94 N.J. at 16; State Supervisory, 78 N.J. at 90; North Bergen Bd. Ed., supra. The amount of salary or compensation an employee in a given title can receive, however, is negotiable, Englewood, 64 N.J. at 6, 7.

Based upon those legal standards, the AAUP is not entitled to negotiate with the University over the qualifications or criteria for promotion to Professor II. Since in CP-16, p.13, the University set "scholarly eminence" as a qualification for promotion to Professor II, and because it did not include clinical practice as a criteria for consideration in determining promotion to Professor II, those employees holding the non-tenure clinical faculty position are not qualified, and therefore not eligible, for promotion to the Professor II rank while holding such positions. In comparison, clinical faculty holding the tenure track positions listed in CP-16 are, of course, eligible for promotion to Professor II. Thus, the AAUP is not entitled to negotiate with the University over the eligibility of non-tenured clinical faculty for promotion to Professor II.

Compensation is another matter. The AAUP was, and is, entitled to negotiate with the University over salaries for clinical faculty, including a salary equal to or better than the one available to employees holding the Professor II rank. On September 21, 1993, in CP-6, the AAUP made its first demand to negotiate over negotiable subjects for the clinical faculty position. On April 12, 1994, just before the Board of Governors considered the clinical faculty position, the University offered to negotiate over

> ...specific mandatorily negotiable subjects that the AAUP wishes to negotiate that are different from the terms of the contract.... [CP-21]

The AAUP responded by letter of April 15, 1994 (R-5), but it did not request negotiations over salary for clinical faculty, or over procedural matters, or over other negotiable matters affecting the clinical faculty position. Rather, it continued to demand negotiations over tenurability, and eligibility for the rank of Professor II.

After the Board passed CP-16 in April 1995, the AAUP on June 13, 1995 (CP-28), notified the University that the regulation changes in CP-16 affected:

> ...mandatorily negotiable terms and conditions of employment including salary scales and eligibility for certain promotions and tenure...

for clinical faculty, and it renewed its demand to negotiate over those terms.

The University promptly responded on June 19, 1995 (CP-29), specifically offering to negotiate salary:

> If the AAUP wishes to negotiate salary schedules for clinical faculty that are different than the salary schedules for other bargaining unit members, please send me a proposal.

The AAUP never pursued that offer, nor did it submit a proposal to negotiate over any negotiable matters. On June 27, 1995 (CP-30), it again insisted that negotiations over eligibility for tenure, and eligibility for promotion to Professor II was mandatorily negotiable. On November 14, 1995 (CP-50), the AAUP submitted a proposal to negotiate, but it did not contain a proposal to negotiate salary schedules as the University had offered. The proposal in CP-50 merely concerned the AAUP's demand to negotiate eligibility for tenure, and promotion to Professor II.

Since the University clearly offered to negotiate a different salary schedule for employees holding the non-tenure clinical faculty position, an offer which the AAUP failed to pursue, the University has, to date, met its obligation to negotiate over compensation for clinical faculty. Compare, New Jersey Highway Authority, P.E.R.C. No. 91-19, 16 NJPER 486 (¶21211 1990). Once made, the AAUP had the burden to pursue the University's offer to negotiate over compensation. Compare, Trenton Bd. Ed., P.E.R.C. No. 88-16, 13 NJPER 714 (¶18266 1987); Town of Secaucus, P.E.R.C. No. 87-104, 13 NJPER 258 (¶18105 1987); Monroe Tp. Bd. Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶15265 1984). The AAUP, of course, may choose to engage in such negotiations at a later time.

Additionally, I conclude that the University made a timely offer to negotiate compensation. The University was entitled to complete the title creation process, including obtaining advice from the Senate, before it engaged in negotiations over compensation. The University made its first offer to negotiate over negotiable subjects on April 12, 1994 (CP-21), before the Board of Governors adopted the new clinical series on April 15, 1994. It made the specific offer to negotiate salary on June 19, 1995 (CP-29) two months after the Board adopted the criteria and regulations for the position (CP-16), but before anyone was hired into the position. Under those circumstances, the University met its obligation to negotiate.

Based upon the above discussion, I find that the University has not failed to negotiate with the AAUP over compensation for clinical faculty or over other negotiable subjects. Thus, I recommend dismissal of the allegation that the University refused to negotiate over the eligibility of clinical faculty for promotion to Professor II, and refused to negotiate over salary scales or procedural matters affecting the clinical faculty position.

Other Issues

Of the remaining issues raised by the other allegations in the charge several concerned the University's submission of the clinical faculty proposal to the Senate for advice and to the Board of Governors for final adoption.

Contrary to the AAUP's allegation, the evidence does not establish that the University intentionally sought to delay or avoid its negotiations obligations or undermine the AAUP by seeking Senate advice. Nor did it violate the Act by refusing to negotiate over negotiable subjects until after the Senate process had been completed. In Dungan, the Court encouraged bringing issues of academic freedom and tenure to academic procedures outside the collective negotiations process. 64 N.J. at 355. That is precisely what the University did in bringing its proposal before the Senate. The Senate process certainly took some time, but the University could not be required to negotiate over the terms and conditions for a position until the position existed. The position did not exist until adopted by the Board in April 1994, and the University made its first offer to negotiate just before the Board formally created the position. That met its obligation to negotiate. The evidence did not support a finding that the University intended to negotiate only some negotiable terms pertaining to the clinical series.

Additionally, the University did not repudiate its duty to negotiate, and did not unlawfully impose negotiable terms of employment. I find it acted in good faith. The University offered to negotiate over salary and other negotiable terms but the AAUP did not pursue those offers. Rutgers' adoption and implementation of its academic and promotions policy in CP-16 was the exercise of its managerial prerogative to establish job qualifications and criteria, and was, thus, not negotiable. The evidence did not show that

Rutgers unlawfully impeded timely access to contractually agreed upon methods for dispute resolution; and, the University was entitled to include in the resolution creating the non-tenure clinical position that appointment thereto could be immediately made. The appointment process was a hiring function, and hiring is a managerial prerogative. Teaneck Bd. Ed., 94 N.J. at 16; No. Bergen Tp. Bd. Ed., 141 N.J.Super. at 103.

Having found that the University did not repudiate its collective agreement with the AAUP (J-1), any issue over whether either party violated Article 19 was not properly before me. Such issues should be pursued through the dispute resolution mechanism contained in the parties collective agreement. See State of N.J. (Dept. Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

Finally, even assuming that Vice-President Norman offered to negotiate over tenure for the clinical position and then withdrew that offer arguing it was non-negotiable, it would not constitute a violation of the Act. Since the tenure issue here was not mandatorily negotiable Norman would have had the right, perhaps the obligation, as a matter of law, to withdraw any offer to negotiate over that issue. The negotiability of tenure in this case does not turn on Professor Keddie's belief or opinion about what Norman said. It turns on the application of Local 195. See Rutgers University, P.E.R.C. No. 96-88, 22 NJPER 247, 248 (¶27130 1996). Consequently, the non-negotiability of the tenure issue here was a defense for refusing to negotiate.

Accordingly, based upon the above findings and analysis, I make the following:

## Conclusions of Law

The University did not violate N.J.S.A. 34:13A-5.4a(1) or (5) by creating the clinical faculty series as a non-tenure track position; by not changing the qualifications and criteria for promotion to Professor II to include employees holding the above clinical faculty position; by unilaterally submitting the proposal for the new position to the Senate for advice and waiting until the advice process was completed before offering to negotiate over negotiable subjects; or, by any other actions it engaged in regarding this matter.

## RECOMMENDATION

I recommend the Complaint be dismissed.

Arnold H. Zudick
Senior Hearing Examiner

Dated: October 5, 1998
Trenton, New Jersey