

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Petitioner,

-and-

Docket No. SN-95-88

RUTGERS COUNCIL OF AAUP CHAPTERS,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants Rutgers, the State University's request for a restraint of binding arbitration of a grievance filed by Rutgers Council of AAUP Chapters. The grievance asserts that the employer violated the parties' collective negotiations agreement when it denied an assistant professor tenure allegedly in reprisal for his having won an earlier grievance. The Commission holds that an employer has a prerogative to grant or deny a promotion and tenure application and an unfair practice proceeding is the proper forum to resolve a claim that an application was denied in reprisal for winning a grievance.

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

P.E.R.C. NO. 96-42

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,  
Petitioner,

-and-

Docket No. SN-95-88

RUTGERS COUNCIL OF AAUP CHAPTERS,  
Respondent.

Appearances:

For the Petitioner, Carpenter, Bennett & Morrissey,  
attorneys (Linda B. Celauro, of counsel; David A. Cohen, on  
the brief)

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

DECISION AND ORDER

On April 6, 1995, Rutgers, the State University petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by an assistant professor represented by the Rutgers Council of AAUP Chapters. The grievance asserts that the employer violated the parties' collective negotiations agreement when it denied an assistant professor tenure, allegedly in reprisal for his having won an earlier grievance.

The parties have filed an affidavit, exhibits and  
briefs.<sup>1/</sup> These facts appear.

---

<sup>1/</sup> The employer has also requested oral argument. We deny that request.

AAUP represents the employer's faculty. The parties entered into a collective negotiations agreement effective from July 1, 1992 through June 30, 1995. Article X is entitled Faculty Personnel Grievance Procedure and seeks "to ensure the integrity of the reappointment, promotion, and tenure procedures" by providing "a process for determining whether evaluations resulting in negative personnel actions were flawed (as defined in A.1) and to provide remedies in cases where defects are found." Section A.1 in turn provides:

A.1. A grievance under Article X is an allegation that, in the course of an evaluation which resolved in failure to award reappointment, promotion, and/or tenure:

A.1.a. there occurred a material procedural violation of (i) the Academic Reappointment/Promotion Instructions and/or their appendices applicable in the year in which the grievant was evaluated, and/or (ii) Article XIV of this Agreement, and/or (iii) a University regulation or an established practice of the University related to reappointment or promotion. An established practice within the meaning of this Article is one which is not inconsistent with either a University Regulation or a provision of this Agreement. A violation is material if it has an important influence or effect upon the evaluation.

or

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

nonmembership in or activity on behalf of or in opposition to the AAUP, or (ii) enmity by an evaluator against the grievant.

or

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

or

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

A.1.d[1] Academic judgment is the conclusion reached when a candidate's record is evaluated according to the criteria set forth in the University Policy with Respect to Academic Appointments and Promotions.

A.1.d[2] A candidate's record has been evaluated in accordance with the criteria whenever reasonable evaluators possibly could reach the conclusion arrived at based on the application of the criteria. If the conclusion could not have been reached by reasonable evaluators, connecting the record to their conclusions, the evaluation fails to qualify as academic judgment.

A.1.d[3] In arriving at academic judgment, reasonable evaluators may disagree on the ultimate decision as to whether or not a candidate's record warrants promotion, reappointment, and/or tenure. An academic judgment need not

be the same decision other evaluators or grievance committees might reach.

A violation, as defined above, does not encompass disagreement with the academic judgment of any evaluator or evaluative body.

The grievance procedure set forth in Article X ends in an appeal to a Faculty Appeals Board which may either order a remanded evaluation or recommend to the University's president that a faculty member receive reappointment, promotion, and/or tenure.

Section G.2 of Article X provides:

No reprisals shall be taken against any grievant, advisor, witness, or member of a Grievance Committee or the Faculty Appeals Board for participation in the grievance process. Claims of any such reprisals shall be grievable under Article IX, Category One.

Article IX is entitled Grievance Procedure. Category One includes "[a]n allegation that, with respect only to those provisions of this Agreement which affect mandatorily negotiable terms and conditions of employment, there has been a violation of such a provision or provisions of this Agreement which has affected mandatorily negotiable terms and conditions of employment of a member or members of a bargaining unit." The grievance procedures set forth in Article IX end in binding arbitration of Category One grievances.

Spyros N. Agathos is an untenured assistant professor in the University's clinical and biochemical engineering department. He works on the Busch Campus.

In 1991, Agathos was evaluated for promotion to associate professor, a tenured position. Promotion and tenure were denied.

Agathos filed an Article X grievance contesting the 1991 evaluation process. The grievance was sustained and Agathos received a remand to have his qualifications for promotion and tenure reevaluated. After the reevaluation, Agathos was again denied promotion and tenure.

On June 7, 1993, Agathos filed an Article X grievance contesting the denial of promotion and tenure as a result of the remanded evaluation process. He alleged, among other things, that the denial was a reprisal against him for winning his earlier Article X grievance. The Faculty Appeals Board denied this grievance.

On August 26, 1993, Agathos filed an Article IX grievance. He asserted that the employer had violated Article X, G.2 by denying him promotion and tenure in reprisal for filing the 1991 Article X grievance. The grievance proposed these remedies:

Professor Agathos shall be awarded promotion and tenure and shall be made whole in all respects; or, alternatively,

Professor Agathos shall be transferred to the AGBIOTECH Center at Cook College and shall be given a three-year contract to begin on the effective date of the transfer. Professor Agathos shall be evaluated for promotion with tenure to Associate Professor at AGBIOTECH Center at Cook College in the third year of the contract. Said evaluation shall exclude any and all evaluators who participated in prior evaluations at the College of Engineering. Professor Agathos shall receive backpay and benefits for the period September 1, 1993 to the effective date of the three year contract and shall be made whole in all other respects; or alternatively,

Professor Agathos shall be awarded a monetary sum equal to three years salary and benefits.

On February 2, 1994, the employer's Vice President for Administration and Associate Treasurer denied the grievance. He found no evidence substantiating "the allegation of reprisal in the administration of or judgments made in the remanded evaluation...."

AAUP demanded arbitration. This petition ensued.<sup>2/</sup>

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the contractual merits of this grievance or its contractual arbitrability or any other contractual defenses the employer may have.

This negotiability dispute is substantially similar to an earlier one involving these same parties. Rutgers, the State Univ.

---

<sup>2/</sup> The employer filed an action in the Chancery Division of the Superior Court of Middlesex County seeking a restraint of arbitration on the grounds that the grievance was not contractually arbitrable. The Hon. Robert Quackenboss, J.S.C. denied a restraint, finding that the grievance was contractually arbitrable under Section G.2 of Article X and under Article IX. The parties have since postponed arbitration pending this decision.

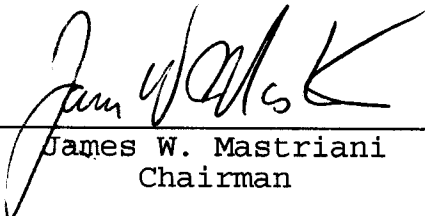
and AAUP, P.E.R.C. No. 89-9, 14 NJPER 513 (¶19217 1988). In that case, we restrained arbitration of a claim that a professor was unjustly denied an appointment to a graduate department position in retaliation for his having won other grievances. Relying on Teaneck Tp. Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983), we held that granting or denying an appointment was a managerial prerogative, and we stated that an unfair practice proceeding before us was the proper forum for resolving a claim that an appointment was denied in retaliation for filing a grievance.

Teaneck and our earlier decision control this case because AAUP contests the merits of the decision to deny Agathos an associate professorship. We decline AAUP's invitation to disregard Teaneck and to overrule our decision. The employer has a prerogative to grant or deny a promotion and tenure application and an unfair practice proceeding is the proper forum to resolve a claim that an application was denied in reprisal for winning a grievance.

ORDER

The request of Rutgers, the State University for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Boose, Buchanan, Finn, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioner Wenzler was not present.

DATED: December 21, 1995  
Trenton, New Jersey  
ISSUED: December 21, 1995