

P.E.R.C. NO. 83-125

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY INSTITUTE OF
TECHNOLOGY,

Petitioner,

-and-

Docket No. SN-83-76

NEWARK COLLEGE OF ENGINEERING
PROFESSIONAL STAFF ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission, in considering the arbitrability of a grievance the Newark College of Engineering Professional Staff Association filed against the New Jersey Institute of Technology, permits arbitration in part and restrains arbitration in part. The grievance alleged that NJIT violated its collective negotiations agreement when it denied tenure to an assistant professor. The Commission denied a restraint of arbitration to the extent the Association sought to have the arbitrator determine whether the president and the Board denied tenure for academic reasons, whether NJIT merely asserted, incorrectly, that such an academic judgment had occurred, and whether, assuming tenure was denied for non-academic reasons, these reasons were arbitrary and capricious and the matter should be remanded to NJIT for reconsideration. The Commission granted a restraint of arbitration to the extent that the Association sought to have the arbitrator limit the power of the president or the Board of Trustees to assess the academic qualifications of a tenure candidate, require the president and the Board of Trustees to follow the recommendations of the faculty committees, or grant tenure.

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Appearances:

For the Petitioner, DeMaria, Ellis & Hunt, Esqs.
(H. Reed Ellis, of Counsel)

For the Respondent, Sterns, Herbert & Weinroth, P.C.
(Michael J. Herbert, of Counsel)

DECISION AND ORDER

On February 17, 1983, the New Jersey Institute of Technology ("NJIT") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The petition seeks to restrain binding arbitration over a grievance which the Newark College of Engineering Professional Staff Association ("Association") has filed against NJIT. The grievance alleges that NJIT violated its collective negotiations agreement when it denied tenure to Assistant Professor Alan Wexler.

Both parties have filed briefs and accompanying documents. NJIT has filed a reply brief. Arbitration proceedings have been held in abeyance pending this decision.

The Association is the majority representative of NJIT's full-time faculty members, full-time special lecturers and certain full-time administrative personnel. NJIT and the Association have entered an agreement effective between July 1, 1981 and June 30, 1983. Article IV, entitled Management Rights, provides:

B. All such rights, powers, authority, and prerogatives of management possessed by the Employer are retained and may be exercised without restrictions, subject to the limitations imposed by law and except as they are specifically abridged or modified by this Agreement and by the system of faculty governance at the New Jersey Institute of Technology. (Emphasis supplied)

Article VI, entitled Grievance Procedures, provides, in part:

B. The only grievances which may be...arbitrated are...
(b) those which allege that there is a violation of procedure or capricious or discriminatory treatment of the grievant pertaining to reappointment of non-tenured faculty, tenure or promotion. In such cases the power of the Arbitrator shall be limited to remanding this matter for compliance with established procedures. It shall be the Arbitrator's first responsibility to rule as to whether or not the grievance relates to procedure rather than academic judgment. In no instance shall the Arbitrator substitute his judgment for academic judgment rendered by the persons charged with making such judgment.

During the 1981-82 academic year, NJIT used the following process for determining whether to grant tenure: (1) the candidate's Department Promotion and Tenure Committee ("P&T Committee") decided whether to recommend the candidate for tenure; (2) if the Department P&T Committee recommended tenure, the Institute P&T Committee decided whether to recommend tenure; (3) if the Institute P&T

Committee recommended tenure, NJIT's president decided whether to recommend tenure; and (4) the Board of Trustees decided whether to grant or deny tenure.

In the spring of 1981, NJIT considered whether to grant tenure to Dr. Alan Wexler, Assistant Professor of Architecture. Dr. Wexler's Department P&T Committee recommended him for tenure. The Institute P&T Committee also recommended him. The President, however, did not. The Board of Trustees then denied Dr. Wexler tenure and instead issued him a one year terminal contract for 1982-83.

On September 14, 1982, the Association filed a grievance on Dr. Wexler's behalf. It alleged that (1) NJIT violated the system of faculty governance incorporated in Article IV when it refused to defer to the recommendations of the Department and Institute P&T Committees, (2) the denial of tenure was arbitrary and capricious and therefore violated Article VI, and (3) the denial of tenure violated a previous arbitrator's award which, the Association asserted, required the administration to accept joint tenure recommendations of Department and Institute P&T Committees except in the rarest of circumstances. The grievance asked that the joint recommendations of the Department and Institute P&T Committees be accepted and that Dr. Wexler be granted tenure.

On October 8, 1982, the Executive Director of Employee Relations denied the grievance. On October 21, 1982, the president sustained this decision.

On November 3, 1982, the Association demanded arbitration. The demand asserted the same contractual violations as the grievance and also requested that Dr. Wexler be granted tenure. The instant petition ensued.

In its initial brief, NJIT contends that the grievance is not arbitrable because it seeks to have the arbitrator award Dr. Wexler tenure solely because the Department and Institute P&T Committees recommended tenure. It maintains that why and which teachers get tenure are not mandatory subjects of negotiations and adds that under a previous Commission decision involving the same parties and same contract clauses, In re New Jersey Institute of Technology, P.E.R.C. No. 81-45, 6 NJPER 494 (¶11252 1980), the arbitrator lacks power to grant tenure or to review academic judgments and instead may only remand a tenure matter to NJIT's normal tenure review processes for further consideration in the event he finds a violation of a contractual procedure or that tenure was arbitrarily denied for non-academic reasons. NJIT specifically agrees that any claim of violation of either a contractual tenure procedure, the contract's specific anti-discrimination clause, or the contractual guarantee against capricious treatment of tenure candidates for non-academic reasons is arbitrable.

In its brief, the Association contends that NJIT unjustifiably delayed in filing its scope petition and that the grievance should be allowed to proceed to arbitration so that the Association can test whether the contract denial was for academic reasons, and not for capricious or discriminatory reasons

(for example, personal hostility, religion, retaliation for the assertion of faculty rights). It relies upon previous arbitration awards which, it asserts, require the President to provide a "substantial supporting presidential rationale" for a decision to reject a joint tenure recommendation of the Department and Institute P&T Committees. The Association also states that it does not ask that the arbitrator grant Dr. Wexler tenure, but instead seeks only a determination that the denial of tenure was capricious and discriminatory and a remand for corrective action to the Institute itself.

In its reply brief, NJIT asserts that it has cooperated with the Association in expediting this proceeding and has agreed to a March 28, 1983 arbitration date in the event that the Commission does not restrain arbitration. NJIT further repeats that it does not object to arbitration of a claim that the contractual prohibition against "capricious and discriminatory" treatment was violated because no academic judgment was made nor does it object to arbitration where the remedy sought is remand. It does object, however, to arbitration in this case because, it asserts, the gravamen of the Wexler grievance is the demand that tenure be granted solely because the president and Board did not follow the recommendations of the Department and Institute P&T Committees.

At the outset, we find that NJIT's scope petition is properly before us, despite a 3 1/2 month delay between the

demand for arbitration and the filing of petition. While the delay has unfortunately caused the postponement of one scheduled arbitration session, NJIT has agreed to expedite any further arbitration proceedings and a session has been jointly scheduled for March 28. While the earliest possible filing of a scope petition is most desirable for all parties and the Commission, we are not persuaded, under the circumstances of this case, that NJIT acted unfairly in filing its petition or that the Association was prejudiced by the delay.

In the previous NJIT case, we declined to restrain arbitration of a grievance alleging that NJIT misrepresented that a non-tenured faculty member's non-renewal was due to a reduction in force. The Association there invoked the same contract clause, Article VI B, as it invokes here. We stated:

It is apparent that under this provision the arbitrator may not review any educational policy judgment or managerial prerogative of the Institute. The clause is intended to insure that the Institute follow the procedures outlined for making these decisions and not act in a capricious or discriminatory fashion in making these decisions. Moreover, the arbitrator, even if a violation is found, cannot award tenure or renew a contract or in any other way substitute his or her judgment for the Institute's. The arbitrator's power is specifically limited to remanding the matter to NJIT for compliance with the proper procedure.
6 NJPER at 495.

Analyzing the background of the parties' dispute against the clause which was allegedly violated, we concluded that the Association only sought to submit to arbitration very limited issues -- whether a reduction in force took place and whether, if one did not, it was arbitrary and capricious to assert that

one did -- and that these issues predominantly concerned mandatorily negotiable procedural protections to insure that NJIT acted in good faith.

In the instant case, the demand for arbitration specifically requests that the administration accept the recommendations of the Department and the Institute P&T Committees and that Dr. Wexler be granted tenure. Requiring the administration to follow the recommendations of lower level tenure review bodies and granting tenure go far beyond the range of arbitral authority we contemplated in the previous NJIT case. We have repeatedly held that an educational employer has a non-negotiable managerial prerogative to review the academic qualifications of tenure candidates and to decide whether to grant tenure. In re State of New Jersey (Stockton State College), P.E.R.C. No. 76-33, 2 NJPER 147 (1976); In re Middlesex County College Bd. of Trustees, P.E.R.C. No. 78-13, 4 NJPER 47 (¶4023 1977); In re Ocean County College, P.E.R.C. No. 80-54, 5 NJPER 402 (¶10209 1977). Accordingly, we hold that the arbitrator may not limit the power of the president or the Board of Trustees to assess the academic qualifications of Dr. Wexler, may not insist that the president and the Board of Trustees follow the recommendations of the faculty committees, and may not order the granting of tenure.

We believe, however, that arbitrable aspects of this case remain. The Association and NJIT agree that arbitration is legally permissible where the remedy sought is remand to NJIT's

tenure review processes and the grievance alleges that contractual procedures were violated or the decision to deny tenure was made for arbitrary or capricious reasons unrelated to academic judgment. In its brief, the Association has placed precisely such limitations on its grievance: the Association now asserts that the arbitrator should determine whether the denial of tenure is based on any academic reasons and, if he finds NJIT has acted arbitrarily or capriciously for non-academic reasons, should merely remand the matter for an ultimate decision by NJIT through its normal processes.^{1/} Thus, we hold that arbitration may proceed on the limited issues of (1) whether the president and Board of Trustees denied tenure for academic reasons or whether NJIT merely asserted, incorrectly, that such an academic judgment had occurred, and (2) if tenure was denied for non-academic reasons, were these non-academic reasons arbitrary and capricious and should the matter be remanded to NJIT for reconsideration.

ORDER

The request of the New Jersey Institute of Technology for a permanent restraint of arbitration is granted to the extent that the Newark College of Engineering Professional Staff Association seeks to have the arbitrator limit the power of the president or

^{1/} The record does not specifically indicate why tenure was denied. The Executive Director for Employee Relations merely quoted from the Staff Handbook: "Academic tenure is intended for persons whose abilities and accomplishments are substantial and who have demonstrated their fitness for permanent membership on the Faculty."

the Board of Trustees to assess the academic qualifications of Dr. Wexler, require the president and the Board of Trustees to follow the recommendations of the faculty committees, or grant tenure.

The request of the New Jersey Institute of Technology for a permanent restraint of arbitration is denied to the extent the Newark College of Engineering Professional Staff Association seeks to have the arbitrator determine whether the president and the Board denied tenure for academic reasons, whether NJIT merely asserted, incorrectly, that such an academic judgment had occurred, and whether, assuming tenure was denied for non-academic reasons, these reasons were arbitrary and capricious and the matter should be remanded to NJIT for reconsideration.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Graves, Hartnett, Hipp, Newbaker and Suskin voted in favor of this decision. Commissioner Butch was not present. None opposed.

DATED: Trenton, New Jersey
March 16, 1983
ISSUED: March 17, 1983