

P.E.R.C. NO. 2008-62

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Petitioner,

-and-

Docket No. SN-2007-055

RUTGERS COUNCIL OF AAUP CHAPTERS,
AAUP-AFT,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of Rutgers, The State University for a restraint of binding arbitration of a grievance filed by Rutgers Council of AAUP Chapters, AAUP-AFT. The grievance alleges that the University violated a contractual confidentiality provision when its Reviewing Officer routinely sent grievances and related documents claiming violations of reappointment, promotion or tenure procedures to other administrators even though the Officer had determined that the grievances were not properly filed and the grievants still had an opportunity to withdraw them before any consideration on the merits. The Commission concludes that Rutgers could have legally bound itself to limit the distribution of grievance materials at this preliminary stage of the grievance procedure. However, the Commission holds that the University may refile its petition if the arbitrator finds a contractual violation and issues an award that the University believes would significantly interfere with its ability to address alleged discrimination or harassment or correct any systemic problems jeopardizing the integrity of the evaluation process.

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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Appearances:

For the Petitioner, Office of the President and General Counsel (John B. Wolf, Deputy General Counsel, on the briefs)

For the Respondent, Levy Ratner, P.C., attorneys (Carl Levine, of counsel and on the brief; Dana Lossia and Paul Schachter, on the brief)

DECISION

On March 9, 2007, Rutgers, the State University petitioned for a scope of negotiations determination. Rutgers seeks a restraint of binding arbitration of a grievance filed by Rutgers Council of AAUP Chapters, AAUP-AFT. The grievance alleges that the University violated a contractual confidentiality provision when its Reviewing Officer routinely sent grievances and related documents claiming violations of reappointment, promotion or tenure procedures to other administrators even though the Officer had determined that the grievances were not properly filed and the grievants still had an opportunity to withdraw them before

any consideration on the merits. Under our scope of negotiations jurisdiction, we must determine if Rutgers could have legally bound itself to limit the distribution of grievance materials at this preliminary stage of the grievance procedure. We find that it could and therefore deny the request for a restraint of arbitration. However, the University may refile its petition if the arbitrator finds a contractual violation and issues an award that the University believes would significantly interfere with its ability to address alleged discrimination or harassment or correct any systemic problems jeopardizing the integrity of the evaluation process.

The parties have filed briefs and exhibits. Rutgers has submitted the certification of its Associate Vice-President for Academic Affairs, Karen R. Stubaus and the certifications of two former Reviewing Officers. The AAUP-AFT has submitted certifications of its staff representative, Mary Gibson. These facts appear.

The AAUP-AFT represents faculty members, including department chairpersons, and teaching and graduate assistants. The parties' collective negotiations agreement is effective from August 2, 2004 through June 30, 2007. The grievance procedure ends in binding arbitration of Category One grievances, which allege violations of mandatorily negotiable provisions of the parties' agreement.

This case involves the application of a contractual confidentiality provision to grievances filed by faculty members alleging violations of reappointment, promotion and tenure procedures. These grievances do not challenge the academic judgment of any evaluator or evaluative body.

Article X is entitled Faculty Personnel Grievance Procedure. Section C is entitled Confidentiality. It provides:

The University and the AAUP have a vital interest in confidentiality in order to preserve the impartiality of the process, the reputation of the institution, and the peace of the academic environment. Therefore, all participants in a grievance proceeding have an obligation to maintain strictly the confidentiality of that proceeding.

C.1. The grievance statement, University response, associated documents, identities of witnesses and evidence presented at the hearing shall be kept confidential by all concerned, except that the grievant or the University may make disclosure only to the extent necessary and only to potential witnesses and/or persons against whom allegations have been made and/or persons the party has reason to believe may be able to assist in the preparation and/or presentation of that party's case. Such disclosure shall be limited in scope to those aspects of the case the party has reason to believe are relevant to discloser's potential testimony or other assistance. The form and content of such disclosure shall be sensitive to the concerns outlined above, and shall in no case include providing tape recordings or transcripts of the proceedings to persons other than the Grievance Committee members, grievant, counselor, co-counselor,

university representative, and his/her designated assistant.

Each witness to whom disclosure is made shall be identified to the other party before that witness's testimony is given.

Each person to whom disclosure is made shall be provided, prior to disclosure, a copy of this confidentiality provision and the no reprisals provision (G.2), and shall not use the information about the grievance for any other purpose.

- C.2. The grievance proceeding shall be conducted in confidence, including only those agreed to by the participants in the process specified in the procedures set forth in this Article and such observers as may be mutually grievant [sic] and the University representative
- C.3. During the course of the grievance (from the filing of the letter of intent through the Appeals Board decision) there shall not be exerted or caused to be exerted, pressure on any individuals involved in the grievance.

An allegation of a violation of confidentiality shall be made to the Grievance Committee which shall render a binding decision concerning the propriety of the breach and continuing participation of any participant, except the grievant, who, in the judgment of the committee, has violated confidentiality.

Grievances alleging a violation of Article X evaluation procedures must allege that: a material procedural violation occurred; the evaluation was based on discrimination or enmity by the evaluator against the grievant; the narrative of the

evaluative body or evaluator contains material that is factually inconsistent with the record as presented in the candidate's reappointment packet; or the evaluation was not in accord with the criteria set forth in the University Policy with Respect to Academic Appointments and Promotions.

Under the grievance process, after a grievance is filed, a Reviewing Officer makes an initial review of the grievance statements to determine if the grievance complies with the definition of grievance under Article X and is timely filed. The Reviewing Officer does not address the substance of the grievance.

If the Reviewing Officer finds that the grievance does not comply with Article X, the grievance is returned to the grievant with a letter indicating the reasons for rejection. The grievant is permitted to withdraw the rejected allegations or revise and resubmit them or appeal the rejection to an outside arbitrator designated as the "Permanent Referee." That person is jointly selected by Rutgers and the AAUP-AFT.^{1/}

1/ Article X, Section B provides, in part:

B.1.c. Such grievances shall be reviewed by the Reviewing Officer who shall determine if the grievance filing complies with Section A.1. above and Section H below. The Reviewing Officer shall not address the substance of the grievance. He/she shall confine his/her review to two questions:

(continued...)

After the Permanent Referee process, if any, the Reviewing

1/ (...continued)

[1] Do the allegations contained in the grievance statement conform to the definitions of an Article X grievance as set forth in A.1 above.

[2] Are the letter of intent to file and/or the grievance statement timely filed in accord with B.1.a. and B.1.b. above?

B.1.d. The Reviewing Officer shall forward to the designated University Representative each grievance statement that meets the filing requirements within ten working days of the Reviewing Officer's receipt of the grievance. At the same time, a copy of the grievance statement with confirmation of acceptance shall be sent to the grievant and to the AAUP.

B.1.e. If the Reviewing Officer finds that a grievance statement does not meet the filing requirements, he/she shall return it to the grievant within 13 working days with a written statement specifying the defects leading to its rejection. A copy of such statement shall at the same time be sent to the AAUP. If the Reviewing Officer is unable to meet the deadlines specified herein, he/she shall so notify the AAUP in writing.

B.1.f. Unless the Reviewing Officer has held the grievance to be untimely, the grievant may resubmit a revised statement within ten working days of receipt of the letter rejecting the grievance. Such resubmission to the Reviewing Officer shall be handled according to the above procedure. Failure to resubmit a revised statement within ten working days or to appeal the Reviewing Officer's action as provided below shall constitute withdrawal of the grievance.

Officer forwards to the designated University representative each grievance statement that meets the filing requirements. At the same time, a copy of the grievance statement with confirmation of acceptance is sent to the grievant and to the AAUP-AFT. Within 25 working days of receipt of the grievance statement, the University forwards the grievance statement to the Grievance Committee, with copies to the grievant and the AAUP-AFT, and at the same time, forwards a written response to the particulars of the grievance, and the grievant's reappointment/promotion packet, excluding the supplementary materials and the external confidential letters of evaluation.

In March 2006, the AAUP-AFT filed a grievance alleging that the Reviewing Officer distributes copies of confidential documents to members of the administration including assistant deans, associate deans, deans and others prior to acceptance of those documents as properly filed under Article X. It further alleges that the Reviewing Officer improperly distributed both confidential grievance documents and his letters of rejection setting forth the University's reasons for rejecting allegations to individuals who were potential witnesses in the resulting grievance hearings as well as potential future evaluators of the faculty grievant/candidate. It asserts that the Reviewing Officer's practice of sending grievance documents to administrative officers prior to acceptance of the documents as

legitimately filed grievances violates Section C and flies in the face of the parties' recognition that such documents are confidential. As a remedy, the grievance seeks to have the Reviewing Officer cease distributing grievance documents in violation of Article X. The AAUP/AFT is not challenging the distribution of grievance documents that are accepted as properly filed by the Reviewing Officer and are forwarded to the Grievance Committee for processing.

The AAUP/AFT contends that from 1993 to 2002, the University complied with the confidentiality provision of Article X. During that period, the Reviewing Officer sent documents to the grievants, the Assistant Vice President for Faculty Affairs, and to designated union representatives. Beginning in late 1993, the Reviewing Officer also sent documents to the Office of the Provost or to the dean or assistant dean of the college or school where the grievant was employed. In certain cases, documents were also sent to the Office of the Vice President for Academic Affairs.^{2/} Associate deans and assistant deans are not involved as evaluators in reappointment, promotion and/or tenure evaluations.

During the 2002-2003 and 2003-2004 academic years, the Reviewing Officer began sending documents to the Executive Vice-

^{2/} In one case, the rejection letter was also sent to a Center Director.

President for Academic Affairs and in some cases the academic dean or the dean responsible for personnel matters. Starting with the 2005-2006 academic year, the practice of sending these documents to the Executive Vice-President, deans and provosts became consistent. After the AAUP-AFT filed its grievance, the Reviewing Officer began distributing these documents even more widely, adding department chairs to the distribution lists.

Before her Step One decision on the AAUP-AFT's grievance, Stubaus asked the AAUP-AFT to provide a list of names and departments of unit members who had been harmed by the allegations in the grievance. The AAUP-AFT responded with a list of names, but did not wish to provide information received from these members in response to its letter. On September 7, Stubaus issued her Step One decision denying the grievance. She found that Article X.C refers, and was always meant to refer, to the grievance hearings themselves, and not to the role of Reviewing Officer in the pre-hearing process. She also stated that "while the grievance is without merit on strictly contractual grounds, it also must be noted that the University requested the AAUP-AFT to provide evidence of how the alleged violation of Section C 'directly and negatively affects the work and welfare of members of the bargaining unit,' as it asserted in the grievance filing," but the AAUP-AFT did not do so.

On October 23, 2006, the AAUP-AFT demanded arbitration. This petition ensued. The parties have agreed to postpone arbitration pending a decision on this petition.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [Id. at 154]

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

____ Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets the standards for determining whether a subject is mandatorily negotiable. It states:

[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. [Id. at 404-405]

Neither party asserts that a statute or regulation preempts arbitration.

Rutgers argues that prohibiting administrative officers from communicating with one another about alleged violations of promotion and tenure procedures significantly interferes with its determination and implementation of educational policy. Rutgers also argues that vice-presidents, provosts, deans, department chairs and other administrative officers all have roles in the promotion and tenure evaluation system. It maintains that any constraint on their access to information or communications would limit its ability to supervise, monitor and evaluate that system and is therefore outside the scope of negotiations. Rutgers also maintains that denial of access to this information prohibits the University from investigating allegations of misconduct.

The AAUP-AFT argues that an arbitrator's enforcement of the confidentiality provisions in Article X would have a "minuscule" impact on Rutgers' claimed managerial prerogative, the ability to monitor and respond to allegations of abuse in the reappointment, promotion and tenure review process. The AAUP-AFT's concern is that allegations in the grievance that are deemed not proper

under Article X.B could be used in retaliation by the increased number of administration officials that are given access to the grievances at the Reviewing Officer stage. The AAUP-AFT argues that a public employer's interest in information must be balanced against the privacy interests of the employees. Also, the AAUP-AFT asserts that procedural aspects of a grievance procedure, including the confidentiality provision, are mandatorily negotiable.

Rutgers responds that it does not seek wide or unlimited disclosure of grievance documents. It argues that it is seeking a restraint of arbitration so that academic officers will have access to information and be able to confer with one another about complaints made by faculty about the promotion and tenure process. It argues that this confidentiality provision interferes with the core educational mission of Rutgers and is not negotiable. Stubaus points to two examples where sharing the information allowed the University to address certain issues, even though they were found to be not cognizable grievance claims.

Employees have an interest in not having overly widespread distribution of complaints, whether or not they are defective. The AAUP believes that grievances complaining of defects in the promotion or tenure evaluation system could trigger retaliation from those who are the subject of the complaints and who evaluate

the grievants. It further believes that distribution of documents during the Article X.B review process will discourage faculty members from pursuing grievances and taint any subsequently remanded evaluations. We conclude that the employee interest in non-disclosure intimately and directly affects employee work and welfare and therefore meets the first part of the Local 195 negotiability balancing test.

The University, however, has an interest in ensuring the integrity of the promotion and tenure evaluation systems and some complaints may need to be addressed, even if the complaints are untimely or improperly filed. On the one hand, an untimely allegation of race or sex discrimination cannot be ignored simply because it is untimely. On the other hand, a simple allegation that an evaluation was performed before the completion of a probationary period may not have systemic implications. Thus, in certain cases, the University's interest in disclosure may outweigh the employee interest in non-disclosure; in other cases, it may not. Under these circumstances, we will permit the AAUP-AFT to arbitrate its claim that the contractual confidentiality provision covers distributions by the Reviewing Officer, a claim the University disputes, and that the University breached that provision by broadening its distribution of grievance documents. Should the AAUP-AFT prevail on that claim, it may pursue its claim that the provision was violated when the Reviewing Officer

routinely distributed documents more widely than in the past. Should the arbitrator find that the University violated the contract and the University believe that the limitation on its distribution significantly interferes with its educational prerogatives, it may refile its scope petition based on those particular facts.

ORDER

The request of Rutgers, the State University for a restraint of binding arbitration is denied. Should the arbitrator find that the University violated the contract and the University believe that the limitation on its distribution significantly interferes with its educational prerogatives, it may refile its scope petition based on those particular facts.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed. Commissioner Buchanan was not present.

ISSUED: May 29, 2008

Trenton, New Jersey