

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY,

Petitioner,

-and-

Docket No. SN-97-132

RUTGERS COUNCIL OF AAUP CHAPTERS,

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 the Rutgers Council of AAUP Chapters. The grievance contests the College's nonappointment of a lecturer to an assistant professor position and Rutgers' denial of a request for information concerning the filling of that position. The Commission finds that the AAUP does not seek to arbitrate over the decision not to appoint the grievant and instead seeks to have the arbitrator declare that the grievance could be processed through the grievance procedure short of binding arbitration. The Commission further finds that the issue of providing information concerns an alleged contractual right to information, not a statutory right, and that given that the parties may agree to allow unit members to contest non-appointments through the grievance procedure short of binding arbitration, the parties may also agree to exchange information and materials relevant to such a grievance. The arbitrator must determine whether any such agreement has been made in this case and the extent of any such agreement.

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. 98-109

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Appearances:

For the Petitioner, Wayne M. Richardson, Employment and
Labor Counsel

For the Respondent, Reinhardt & Schachter, attorneys
(Denise Reinhardt, on the brief)

DECISION

On June 25, 1997, Rutgers, the State University of New Jersey petitioned for a scope of negotiations determination. The petition seeks a restraint of arbitration of a grievance filed by the Rutgers Council of AAUP Chapters.

The parties have filed a certification, exhibits and briefs. These facts appear.

The parties' collective negotiations agreement recognizes the AAUP as the exclusive representative of all faculty members "currently employed or to be employed by Rutgers to discharge at least one-half (50%) of a full-time academic job assignment." The negotiated grievance procedure provides for three categories of grievances. A category one grievance generally involves an

alleged violation of a contractual provision concerning a mandatorily negotiable employment condition. A category two grievance generally involves an alleged violation of University policies, agreements, administrative decisions, or regulations affecting a mandatorily negotiable employment condition. A category three grievance generally involves an alleged violation of University policies, agreements, administrative decisions, or regulations which are not mandatorily negotiable but do intimately and directly affect the work and welfare of faculty members. Category one grievances may be submitted to binding arbitration; category two grievances may be submitted to advisory arbitration. According to the AAUP, the parties have agreed that category three grievances have been subsumed into category two and may be submitted to advisory arbitration. The grievance procedure also provides that "[i]nformation, material, and documents relevant to a grievance shall be provided, if available, by either party upon written request of the other party within 15 working days after the conclusion of mediation."

Article IV of the collective negotiations agreement is entitled Nondiscrimination. It prohibits sex discrimination by Rutgers or the AAUP against negotiations unit members. Grievances alleging sex discrimination are heard as category two grievances.

Richard Langford was appointed to a one-year, non-tenure track position in the Department of Geological Sciences at Rutgers-Newark. He held the title of lecturer from July 1, 1995

to June 30, 1996. According to Langford, he was told that, after one year, the position would be converted to a three-year, tenure-track position and that he would be eligible to apply.

In October 1995, the Department of Geological Sciences conducted a search to fill an assistant professor position. Langford applied, but someone else was appointed.

On June 19, 1996, Langford filed a grievance alleging that the University had discriminated against him because of his sex. The grievance asked the University to supply this information:

1. Copy of the "AA/EE Guidelines for Recruitment and Selection of Faculty".
2. Copies of any and all correspondence generated by the dean or other administrative personnel pertaining to the recruitment and appointment of a tenure-track Assistant Professor in the Department of Geological Sciences. FASN.
3. Copies of the Vitas of all persons interviewed by the Department of Geological Sciences for the tenure-track position at issue herein.

After mediation failed, the AAUP renewed its request for the information. The Assistant Vice-President for Faculty Affairs provided the guidelines described in item no. 1, but not the other items. She wrote:

Educational policy decisions of whom to hire to teach and to do research are solely at the managerial discretion of the University. Since neither the grievance nor the AAUP may second-guess the University's decision of who is

the best qualified candidate, the University is not obliged to provide information to explain its academic decision-making process.

Moreover, the recruitment was for a new hire for which the Union has no right to information.

The AAUP's president responded by letter. He wrote that the grievance involved an alleged violation of Article IV and the University's anti-discrimination policies and that AAUP was entitled to the information under Dixon v. Rutgers, the State Univ., 110 N.J. 432 (1988). He also wrote that Langford was in the AAUP's unit when he was denied the appointment and thus his grievance was contractually cognizable.

On December 23, 1996, the assistant vice-president denied Langford's grievance at step one of the grievance procedure. She concluded that Article IV did not apply to new appointments.

On March 5, 1997, the AAUP invoked step two of the grievance procedure "over certain limited aspects of the Step One and information responses"; in the alternative, it filed "a new Article IX Category One grievance with respect to violations of the contract found in the Step One response." This document emphasized that the AAUP was not appealing to arbitration or filing a new grievance over the merits of the decision not to appoint Langford. Instead, the document listed these issues to be arbitrated:

1. The administration's contention that the appointment at issue was "new," and that therefore it did not constitute "terms and conditions of employment." The AAUP contends that (a) the appointment was not "new," as

the grievant was previously employed at Rutgers, and (b) eligibility of unit members, and consideration of them, for positions within the unit are negotiable terms and conditions of employment.

2. The administration's contention that the union has no right to information regarding recruitment for a new hire. The AAUP contends that this violates Article III, which defines the unit to include faculty members "currently employed or to be employed."
3. The Step One response's failure to address the allegations of violations of the Affirmation Action policy, University Regulation 2.41 and Article XXI. The AAUP contends that this violates Article IX, which requires a written response to the grievance, not just to selected portions thereof.

The document sought a declaration that:

- a. The union represents unit members "to be hired" and the union is entitled to information concerning them and their potential positions.
- b. Article IC covers claims arising out of the failure of a unit member to be considered for, or be appointed to, a tenure track position in the unit.
- c. Article IX requires that the administration address the entire grievance, not just selected portions.

On April 16, 1996, the assistant vice-president denied the relief requested. She agreed that, by virtue of his temporary appointment, Langford had been in AAUP's negotiations unit; but she denied that any contractual rights extended to him when he applied for the tenure-track position. She also asserted that the parties' contract did not address any pre-employment interests;

AAUP was not entitled to the requested records or information since hiring decisions are non-negotiable; and the University's Equal Opportunity and Affirmative Action guidelines were not violated since the person hired was as qualified as Langford.

On April 22, 1997, the AAUP demanded binding arbitration of its March 5 grievance. AAUP asserted the grievance fell within category one of the grievance procedure. This petition ensued.

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 the March 5 grievance or any contractual defenses the employer may have. We specifically decline to consider whether the recognition clause, the Article IV anti-discrimination clause, or the Article IX grievance procedure applies when a faculty member holding a one-year appointment seeks a tenure-track position; whether the grievance was properly categorized as a category one grievance; whether the AAUP has any contractual rights to receive the information requested; whether there are any contractual limits on

such a claimed right; and what Article IX requires in responding to grievances.

Teaneck Bd. of Ed. v. Teaneck Ed. Ass'n, 94 N.J. 9

(1983), establishes the rule that the merits of the decision not to hire an applicant or appoint a negotiations unit employee to another position cannot be contested through binding arbitration.^{1/} Teaneck also establishes, however, that the merits of such a decision may be grieved and, if the parties agree, reviewed through advisory arbitration. The AAUP is not seeking binding arbitration over the decision not to appoint Langford so there is no basis for a restraint of arbitration on that ground. The AAUP instead seeks to have the arbitrator declare that Langford's grievance could be processed through the grievance procedure short of binding arbitration. That claim is within the the scope of negotiations.

The University asserts that AAUP's request for information concerning Langford's grievance is not legally arbitrable. It argues that its duty to disclose information under the Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., does not require it to disclose irrelevant or confidential information and that information pertaining to its recruitment or

^{1/} Teaneck's actual holding -- that the denial of a reappointment to an extracurricular position cannot be contested through binding arbitration -- has been legislatively superseded. N.J.S.A. 34:13A-23.

hiring activities is irrelevant to the parties' agreement because hiring is non-negotiable. The AAUP responds that the issue is not whether it has a statutory right to information under the Act, but whether the employer has contractually agreed to produce relevant information in instances where a negotiations unit employee has unsuccessfully competed in a selection process for another negotiations unit position. The AAUP also argues that it is up to the arbitrator, not the Commission, to decide the limits on the employer's contractual obligation to provide information and materials and to apply the standards for disclosure and withholding set forth in Dixon v. Rutgers.

The issue in this case involves an alleged contractual right to information, not a statutory right. Given that the parties may agree to allow unit members to contest non-appointments through the grievance procedure short of binding arbitration, the parties may also agree to exchange information and materials relevant to such a grievance. The arbitrator must determine whether any such agreement has been made in this case and the extent of any such agreement. The arbitrator may apply the requirements of Dixon v. Rutgers, in determining what, if any, information must be disclosed and what, if any, information may be withheld.

ORDER

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

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

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

DATED: February 26, 1998
Trenton, New Jersey
ISSUED: February 27, 1998