

BEFORE  
SEYMOUR STRONGIN  
ARBITRATOR

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August 5, 1991

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In the Matter of the Arbitration between-

THE UNIVERSITY OF DELAWARE  
CHAPTER OF THE AMERICAN  
ASSOCIATION OF UNIVERSITY  
PROFESSORS

-and-

AAA Case No. 14 390 1935 90 A

THE UNIVERSITY OF DELAWARE

Professors Linda Gottfredson and Jan Blits ("Grievants"), through the American Association of University Professors ("Union"), protest the University of Delaware's ("University") refusal to solicit or accept further research grants from the Pioneer Fund, and the University's refusal to process applications from faculty members for research grants from the Pioneer Fund. The grievance states that the University's decision violates the grievants' right to academic freedom provided to them under the terms of the Collective Bargaining Agreement ("Agreement") entered into by the parties.<sup>1</sup> Article II (Purpose) of the Agreement incorporates the Statement on Academic Freedom as approved by the Board of Trustees of the University, May 31, 1979. The Statement on Academic Freedom reads in pertinent part:

The teacher is entitled to full freedom in research and in the publication of results, but research for pecuniary return should be based upon an understanding with the authorities of the University. (underscoring in original).

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<sup>1</sup> The grievants initially brought their grievance under Article XVI (Maintenance of Practices) of the collective bargaining agreement. At the April 18, 1991 arbitration hearing, grievants amended their request for arbitration, to bring the grievance under Article II. The University does not dispute the propriety of that amendment.

The Union contends that the University's policy rests on the ideological content of grievants' research in violation of Article II of the Agreement, and seeks the following relief:

1. Reversal of the ban on Pioneer monies and assurance that funding sources will not again be restricted on ideological or political grounds.
2. Public apology from the President in a manner that is fair and appropriate under the circumstances.
3. Release from all non-research duties for just and reasonable periods to be proven at arbitration and to be devoted to repairing damage and delay to the [grievants'] research programs.
4. Just and reasonable monetary awards, in amounts to be proven at arbitration, for financial expenses and damage to the [grievants'] reputations.
5. Assurance that the administration will not again selectively punish, stigmatize, or otherwise burden any past or future Pioneer Fund applicant.

The facts giving rise to the grievance are not materially disputed. Professor Gottfredson became a faculty member in the Department of Educational Studies of the College of Education at the University of Delaware in 1987. She was previously employed at the Johns Hopkins University in Baltimore, Maryland, where she received the Ph.D. degree. Professor Gottfredson has since been tenured and promoted to associate professor at the University of Delaware.

While at the University of Delaware, the primary focus of Professor Gottfredson's research has been "the societal consequences of differences of ability between groups and individuals." Since arriving at the University, Professor Gottfredson has made three successful grant proposals through the University for research grants from the Pioneer Fund. The Pioneer Fund is a funding organization established in 1937 to provide aid for the education of certain children and to fund research into the problems of heredity and eugenics. Professor Gottfredson's Pioneer Fund-sponsored activities include research into the relationship between general intelligence and education, intelligence quotient and crime, the merits of objective tests for hiring workers, and the relationship between ability differences and educational policy. In pursuit of this research,

Professor Gottfredson, with the permission of the University, established a joint Delaware-Johns Hopkins Project for the Study of Intelligence and Society, which she co-directed with Professor Robert Gordon of Johns Hopkins University. The joint project's activities were funded entirely by Pioneer Fund grants. According to the University, each of Professor Gottfredson's successful proposals was processed through the University's Office of Research & Patents. In accordance with University policy, Professor Gottfredson completed the standard Contracts and Grants Proposal form provided by the University, which forms were then processed and approved by her department, college and the Office of Research & Patents.

Professor Blits is a political scientist with a Ph.D. from the New School for Social Research in New York. His research has concentrated on "the politicization of American science and, more generally, American universities." Professor Blits has co-authored two articles with Professor Gottfredson challenging the scientific basis for "race-norming," the practice of adjusting intelligence test scores to take into account an applicant's race.

The University is committed to the promotion of racial and cultural diversity. To that end, the University established, among other things, the President's Commission to Promote Racial and Cultural Diversity in 1988. The University also has complied with the requirements of federal law, establishing a comprehensive Equal Employment Opportunity Policy and Affirmative Action Program. The Affirmative Action Program reaffirms that the University will take affirmative action through its personnel policies and practices to increase campus diversity.

Inquiries from members of the University community arose concerning the propriety of the University's ongoing relationship with the Pioneer Fund in light of the University's stated commitment to racial and cultural diversity, particularly the suggestion of a faculty member that the Pioneer Fund is "an organization with a long and continuous history of supporting racism, anti-Semitism, and other discriminatory practices." The University's President, E.A. Trabant, on November 22, 1989, responded by directing the Faculty Senate Committee on Research ("Committee") to consider the following questions and advise him of the Committee's recommendations:

**"[H]as the University compromised its stated position of supporting a multi-cultural and multi-racial environment by acceptance of funding from the Pioneer Fund in**

support of research by a faculty person?" As a corollary, should the University refuse to accept research funding from the Pioneer Fund in the future?

In his charge to the Committee, President Trabant reminded the Committee of its obligation to "recognize the fundamental right of a faculty member to pursue research in a field of the faculty member's choice, even if that research is unpopular."

The Committee is a standing faculty committee of eight members. The Committee's function is to oversee policy issues relating to faculty research and grant administration. After a five-month investigation into the Pioneer Fund's Charter, pattern of funding, and grant procedure, the Committee issued its Report of the Faculty Senate Committee on Research on the Issue of the University of Delaware's Relationship with the Pioneer Fund ("Report"). As a preamble to its Report, the Committee stated the following:

[T]he Committee wishes to make clear that Professor Linda Gottfredson, the principal investigator and recipient of Pioneer Fund support through the University, has not been the focus of this investigation. The University has established procedures for periodic peer review of the scholarship and other activities of its faculty, and this Committee would reject any charge to conduct an ad hoc inquiry into a faculty member's work. That work enjoys the full protection of academic freedom extended to all faculty members of this University. . . . The work performed under the grant, whether research or service activities, is not at issue.

Apparently, during the course of the Committee's deliberations, some faculty members perceived that the Committee's activities with respect to the Pioneer Fund were a threat to their contractual right to academic freedom. To address these concerns, the Committee stated that, "[i]n considering the questions raised in relation to the Pioneer Fund the Committee has never directed its attention to the content or method of any faculty member's research or teaching, and would oppose any attempt to restrict a colleague's rights in these protected areas."

The Committee reviewed the Pioneer Fund's Charter, its pattern of funding, and its grant procedures and concluded that "the Pioneer Fund is committed to the proposition that people of different ethnic and cultural backgrounds are on the basis of their heredity inherently unequal and can never be expected to behave or perform equally. According to this view, which the

activities supported by the Fund propagate, affirmative action plans are unjust and doomed to failure, and should be abandoned." The Committee found this to be in "sharp conflict" with the University's "express commitment to the equal treatment and consideration due to people of whatsoever ethnic and cultural background, and its commitment to affirmative action policies." Therefore, the Committee recommended to President Trabant that the University "should neither seek nor accept any further financial support from the Pioneer Fund as long as the Fund remains committed to the intent of its original charter and to a pattern of activities incompatible with the University's mission."

President Trabant accepted the Committee's conclusion in a letter to Professor Nees, Chair of the Committee, dated April 24, 1990. In that letter, President Trabant stated that "by copy of this letter it will be University policy as stated in your report. The University of Delaware should neither seek nor accept any further financial support from the Pioneer Fund as long as the Fund remains committed to [sic] intent of its original charter and to a pattern of activities incompatible with the University's mission." The University's Board of Trustees affirmed President Trabant's decision in a letter to Harry Weyher, President of the Pioneer Fund, dated July 2, 1990. In that letter, the Chairman of the University's Board of Trustees wrote that:

An important finding of the Faculty Senate Committee's Report is that "[a] preponderant portion of the activities supported by the [Pioneer] Fund either seek to demonstrate or start from the assumption that there are fundamental hereditary differences among people of different racial and cultural backgrounds, . . ." . . . . No matter whether that is in fact the orientation of Pioneer Fund or not, that is perceived as the orientation of the Fund by at least a material number of our faculty, staff, and students.

Without judging the merits of this perception, the Board's objective of increasing minority presence at the University could in the view of our Executive committee be hampered if the University chose to seek funds from the Pioneer Fund at this time. . . .

Subsequently, both Professors Gottfredson and Blits submitted applications for research grants from the Pioneer Fund through the University. In accordance with new University policy, the University refused to process those applications. On September 26, 1990, the American Association of University Professors requested binding arbitration on the question of the policy of the

University of Delaware to neither solicit nor accept further financial support from the Pioneer Fund.

The dispute at issue before the Arbitrator is largely based on the recommendations of the Committee, and the subsequent acceptance by the President of those recommendations. It is therefore necessary to review the actions of the Committee in some detail.

The Committee considered the Pioneer Fund's Charter at length, including its 1985 revision. In relevant part, the Charter provides:

A. [Recipients of Pioneer Fund scholarships] shall be children of parents who are citizens of the United States, and in selecting such children, unless the directors deem it inadvisable, consideration shall be especially given to children who are deemed to be descended predominantly from white [in 1985 "white" was deleted] persons who settled in the original thirteen states prior to the adoption of the constitution [sic] of the United States and/or from related stocks. . . B. To conduct or aid in conducting study and research into the problems of heredity and eugenics in the human race generally . . . .

On the basis of the express language of the Charter excerpted above, and the testimony of Pioneer Fund President Harry Weyher at his March 20, 1990 meeting with the Committee, the Committee concluded that the Charter was a "for whites only" document.

The Committee reviewed the work of Pioneer Fund grant recipients, and concluded that most of the activities supported by the Pioneer Fund concern efforts to shape public policy in the area of racial and ethnic differences as a function of heredity and eugenics, and was successful in doing so. As an example of such work, the Committee cited, among other works, Johns Hopkins University Professor Robert Gordon's research "extending the analysis of hereditary racial differences in intelligence into the area of crime." Further, during the course of its investigation, the Committee requested copies of Professors Gottfredson's and Blits' Pioneer Fund-supported work. Professors Gottfredson and Blits' complied with that request, but informed the Committee of their concern that the Committee's investigation had shifted to an inquiry into their work.

After its investigation into the Pioneer Fund's grant procedures, including its application review, acknowledgment of funding, refusal to make

grants to individuals but only to universities and other organizations, and its requirement that universities bear the indirect costs of research, the Committee found that "the procedures of the Pioneer Fund offer no assurances that financial support is extended without prejudice and according to academic merit." The Committee noted, however, that "[t]he procedures of the Pioneer Fund in making grants and administering financial support are not in and of themselves either singly or even taken all together sufficient grounds for the University to refuse to accept funds from that organization."

As a preliminary matter, the Union contends that "the language of the contract and the understanding of the parties demonstrates that academic freedom is an enforceable contract right." The Union argues that insofar as Article II of the Agreement incorporates the Statement on Academic Freedom as approved by the Board of Trustees of the University, May 31, 1979, providing members of the faculty with "full freedom in research," the University's refusal to process the grievants' research grant applications from the Pioneer Fund constitutes a violation of the grievants' contractual right to academic freedom. Under Article VIII of the Agreement (Grievance Procedure), the Union contends that the alleged violation is enforceable through this arbitration. In support of its argument, the Union states that prior to the hearing the University never took the position that the Agreement did not provide for a binding right to arbitrate the issue of academic freedom.

On the merits, the Union principally contends that the right to academic freedom precludes the University from banning a professor's source of research funds on "political or ideological" grounds. The Union argues that the "Committee in fact intended to interfere with professor Gottfredson's research by the expedient of banning the receipt of Pioneer Fund monies." The Union asserts four factors in support of its argument:

First, the Union points to the testimony of Professor Nees at the hearing before this Arbitrator that in the course of its investigation into the Pioneer Fund's pattern of funding, the Committee concluded that Professor Gottfredson's work was incompatible with the University's mission.

Second, the Union argues that the Committee's Report deliberately covered-up its examination into Professor Gottfredson's work in reaching its conclusion that the University should no longer accept monies from the Pioneer Fund. As proof, the Union states that testimony before the Committee demonstrates that the Committee did focus on Professor Gottfredson's research

despite the fact that the preamble to the Report expressly states that it did not, and that the Committee could not have concluded that Professor Gottfredson's research was incompatible with the University's mission unless it had investigated the content of her work.

Third, the Union argues that the Committee knowingly wrote a false report that fabricated a case against the Pioneer Fund. As support, the Union argues that the Pioneer Fund's Charter is not a "white's only" document; rather, the Charter states only a preference for certain children, not a hard and fast restriction. With respect to the Committee's review of the Pioneer Fund's pattern of funding, the Union points to Professor Nees' inability, despite the finding of the Committee, to point to a single Pioneer-funded activity listed in his Committee's Report that dealt with racial and ethnic differences as a function of heredity and eugenics. The Union asserts that this inability demonstrates the Committee's indifference to the truth.

Finally, the Union argues that the false and misleading Report was a material cause of the University's decision to ban the Pioneer Fund, and should not be entitled to stand.

Alternatively, the Union argues that even if the Committee did not deliberately attempt to suppress Professor Gottfredson's research, the Pioneer Fund ban nevertheless constitutes, for all practical purposes, suppression of Professor Gottfredson's research on purely ideological grounds, and thereby violates her right to full freedom in research. The Union concedes that the right to academic freedom is not absolute, however, it argues that academic freedom includes a scholar's right to be protected against any political (and other improper) interference in his work. The Union takes issue with the University's attempt to distinguish between the right to academic freedom and the privilege to seek funding, arguing that money is the "lifeblood" of research. The Union argues that if the University has an unfettered right to limit a professor's funding sources, it could render meaningless a faculty member's right to pursue research in any discipline where research requires money. For full freedom in research to have any meaning, the Union argues it must include the ability to seek and obtain funding, as well as the thinking and writing itself.

As a threshold issue, the University asserts that the question of academic freedom is not an appropriate subject for arbitration. It states that the Agreement does not identify academic freedom as a term or condition of employment. Rather, academic freedom is a "right or privilege that emanates



from the very nature of the academic community." The University relies on two New Jersey Public Employment Relations Commission decisions, standing for the proposition that a "dispute regarding an academic freedom provision in a collective bargaining agreement is not arbitrable because decisions regarding academic freedom are central to a university's ability to govern itself and set educational policy and are not traditional subjects relating to terms or conditions of employment." Furthermore, the University argues that Article II does not purport to establish substantive rights subject to the grievance procedure.

On the merits, the University contends that the Committee's Report was the product of careful consideration by, and the reasoned judgment of, an independent group of Professor Gottfredson's peers. The University argues that to the extent that the Committee sought evidence from the grievants about their work, the Committee sought only to learn more about the Pioneer Fund. Furthermore, the University states that its dealings with Professor Gottfredson on the issues of her promotion and tenure since the time that the inquiry into the Pioneer Fund began refute any suggestion that the University sought to interfere with her work. The University argues in the alternative that the public's perception of the Pioneer Fund, justified or not, warrants the banning of Pioneer Fund monies.

Next, the University argues that the ability of a faculty member to seek research grants from external sources is a privilege, and not a right that must be balanced against the University's mission to promote racial and cultural diversity. The University states that its decision not to seek or accept Pioneer Fund money was a good faith effort to reconcile the University's commitment to racial and cultural diversity with its commitment to the right of all people to participate in an environment of free and open inquiry. The University emphasizes that the Pioneer Fund ban in no way suggests that Professors Blits and Gottfredson cannot hold, write, publish, or otherwise express their particular views. Rather, the University has simply determined that it will not act as a partner in seeking grant money from the Pioneer Fund. Noting that neither the Faculty Handbook nor the May 31, 1979 Statement on Academic Freedom address the issue of a professor's ability to seek funding from an external source through the University, the University argues that legal responsibilities and potential liability in connection with the receipt of grant money justify the limitation of a professor's ability to seek funding. For example, the University already prohibits research that cannot be published or is militarily classified, nor

does it house research that bears no relationship to its educational activities. Moreover, the University notes that faculty members' grant proposals are subject to the approval by the faculty members' department, dean and the Contracts and Grants Department. Thus multiple review is intended to ensure that the University does not accept funds that are contrary to its mission or that would otherwise create burdens for the institution.

As a preliminary matter, the Arbitrator has considered the arguments for and against the arbitrability of the instant claim, and has reviewed the relevant provisions of the Agreement. In his judgment Article II of the collective bargaining agreement, incorporating the May 31, 1979 Statement on Academic Freedom, is sufficiently broad to support this Arbitrator's jurisdiction. The University does not dispute that the grievants amended their grievance at the April 18, 1991 hearing to include an academic freedom claim under Article II. Further, the University does not assert that it has been surprised or prejudiced in any way by that amendment.

Turning to the merits, it is clear that the University's decision to deny the grievants' requests for research grants from the Pioneer Fund through the University relies essentially upon the Committee's Report. The narrow question presented is whether the University wrongfully refused to process the grievants' applications for research grants from the Pioneer Fund, thereby violating rights granted by the 1979 Statement on Academic Freedom, and protected by Article II of the Agreement. The parties have raised numerous important and difficult questions as to the nature and extent of a faculty member's right to academic freedom under the controlling Agreement. The parties agree, however, that the right to academic freedom is not absolute. The Union concedes that under certain conditions the University may properly limit that right. It must follow that the ability to seek external funding for research through the University, whether deemed a right or privilege, is at least similarly limited.

While it is agreed that the University does have some right to limit a professor's funding sources, the Agreement is silent on the nature and extent of that right. The University asserts two distinct justifications for its action, arguing that each is equally valid. First, the University set forth its own standards governing the conditions under which it may properly deny a faculty member's request for funding through the University from an external source. Those standards appear in the Committee's Report and are stated to be fairness,

reasonableness, and consistency. The Committee declared flatly that these standards preclude any inquiry into grievants' work:

[A]s a preamble, the Committee wishes to make clear that Professor Linda Gottfredson . . . has not been the focus of this investigation. . . . [T]his Committee would reject any charge to conduct an ad hoc inquiry into a faculty member's work. That work enjoys the full protection of academic freedom extended to all faculty members of this University. . . . The work performed under the grant, whether research or service activities, is not at issue.

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In considering the questions raised in relation to the Pioneer Fund the Committee has never directed its attention to the content or method of any faculty member's research or teaching, and would oppose any attempt to restrict a colleague's rights in these protected areas.

In the face of these self-imposed restrictions, the Committee clearly violated its own procedures by doing precisely what it said it would not, and should not, do.

First, under any reading of the transcript of the Meeting of Faculty Senate Committee on Research, March 16, 1990, the conclusion that the Committee examined the content of Professor Gottfredson's work is unavoidable (see particularly Joint Exhibit 19 pp. 6-9).

Second, Professor Nees testified, and the Committee Report so states, that the Committee found Pioneer-funded materials provided to it by Professor Gottfredson to be incompatible with the University's mission. The Committee found, and listed, the work of Robert Gordon, a recipient of Pioneer Fund money through Johns Hopkins University, to be an example of work involving racial and ethnic differences as a function of heredity and eugenics, and had the purpose of shaping public policy. The Arbitrator is satisfied that this finding substantially contributed to the Committee's conclusion that was ultimately accepted by the President and the Executive Committee of the University's Board of Trustees to justify the University's refusal to renew its partnership with the Pioneer Fund. It is undisputed that the Committee was aware that Professor Gordon's work was performed jointly with Professor Gottfredson. It follows that the Committee necessarily concluded that Professor Gottfredson's work was also incompatible with the University's mission.

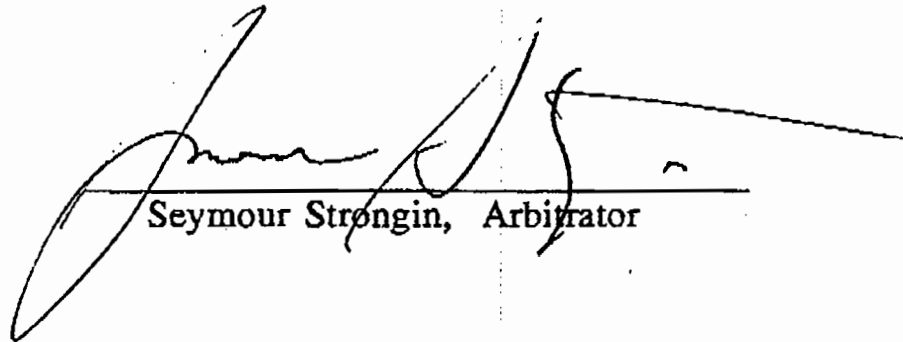
Finally, as the grievants noted, the Committee could not have found Professor Gottfredson's work incompatible with the University's mission unless it had examined the content of her work.

The University's second argument, that public perception of the Pioneer Fund, without regard to the factual underpinnings of that perception, is sufficient to justify the University's policy with respect to the Pioneer Fund cannot stand. Academic freedom is a contractually conferred right, and public perceptions alone, no matter how volatile, cannot suffice to overcome that right. As the University noted, limitations on a faculty member's academic freedom must be fair, reasonable, and consistent. A University policy implemented in response to public perception alone, without regard to the factual underpinnings of that perception, cannot ensure a procedure that is fair, reasonable, and consistent. As the Committee noted, the University's commitment to racial and cultural diversity is an essential part of, and not a rival in conflict with, the University's commitment to academic freedom.

The substantive question whether the ban on Pioneer Fund monies violates the grievants' right to academic freedom is a difficult question. That question, however, need not, and should not, be resolved at this time. Here, according to its own standards for procedural fairness, the University unfairly, thus wrongly, denied the grievants' funding requests by delving into the substantive nature of grievants' work. Unless and until the University fairly applies its own procedural standards, the grievants' applications for funding through the University from the Pioneer Fund must be processed in accordance with established procedures, which do not permit any inquiry into the substantive nature of a faculty member's work.

**DECISION**

To the limited extent indicated  
in the foregoing opinion,  
the grievance is sustained.



Seymour Strongin, Arbitrator

Chevy Chase, Maryland