BEFORE THE AMERICAN ARBITRATION ASSOCIATION
ARBITRATOR SEYMOUR STRONGIN

IN THE MATTER OF ARBITRATION BETWEEN

THE UNIVERSITY OF DELAWARE CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS	:	CASE NO. 14 390 1935 90 A
and	:	
THE UNIVERSITY OF DELAWARE	:	

POST-ARBITRATION BRIEF OF
THE UNIVERSITY OF DELAWARE

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I. INTRODUCTION

This arbitration was initiated by the University of Delaware Chapter of the American Association of University Professors ("AAUP" or "Union"), which requested binding arbitration regarding the decision of The University of Delaware ("University") to "neither solicit nor accept further financial support from the Pioneer Fund." Specifically, the AAUP has sought arbitration as to whether the University's decision with respect to receipt of Pioneer Fund money violates the faculty's alleged contractual right to academic freedom.

Hearings were held at the University on April 18, 1991 and May 20, 1991. At the arbitration hearings, Professors Linda S. Gottfredson and Jan H. Blits (collectively "grievants") were represented by counsel; however, the AAUP did not make a formal appearance except through one witness, George Cicala, Chairman of the Grievance Committee. At the suggestion of the Arbitrator, the parties agreed to limit the testimony to evidence regarding the alleged breach of contract and to defer the issue of damages until a later date, if necessary. Pursuant to an agreement by the parties and the instructions of the Arbitrator, the University hereby submits this post-arbitration Brief.

II. ISSUE PRESENTED

Whether the University violated Article XVI or Article II of the collective bargaining agreement when the University decided to cease soliciting or accepting grant money from the Pioneer Fund.

III. FACTS

Dr. Linda S. Gottfredson became a faculty member in the Department of Educational Studies at the University in 1987. During the next several years, Professor Gottfredson made three successful grant proposals through the University's Office of Research & Patents to receive money from the Pioneer Fund, a small New York foundation devoted to funding "study and research into the problems of heredity and eugenics". (J.E.-4 at 5).

In her May 25, 1988 proposal to the Pioneer Fund, the first of three, Professor Gottfredson sought funding for producing a special issue of the Journal of Vocational Behavior, planning a conference on g (general intelligence) and education, writing two papers and sending out a large mailing relating to crime and IQ (intelligence quotient). (J.E.-11). The Pioneer Fund approved this proposal and issued a check payable to the University in the amount of $34,000.00. (J.E.-13). Pursuant to her second proposal of November 23, 1988, on December 1, 1988, the Pioneer Fund issued a check in the amount of $40,000.00 to the University for the publishing by Professor Gottfredson of scientific debates about the merits of objective tests for hiring workers. (J.E.-12, 13). On June 12, 1989, the Pioneer Fund issued a check in the amount of $100,000 payable to the University for the distribution by Professor Gottfredson of scientific publications and a conference on "Ability Differences and Educational Policy," in accordance with Professor Gottfredson's proposal of May 22, 1989. (J.E.-13).

Each of Professor Gottfredson's proposals to the Pioneer Fund 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. (J.E.-11).

The University has long had a strong commitment to racial and cultural diversity. Judith Gibson, the University's Assistant Vice President for Affirmative Action and Multicultural Programs, testified how the University has demonstrated this commitment on a number of fronts. An outgrowth of that commitment was the establishment of the President's Commission to Promote Racial and Cultural Diversity ("Commission") in 1988. The President's charge to the Commission states in part:

> The University of Delaware is committed to creating an educational community that is intellectually, culturally, and socially diverse, enriched by the contributions and full participation of people from different backgrounds. Toward that end, the University is further committed to . . . creating a climate that expects and encourages all members of the University community to respect and appreciate individual and cultural differences. . . .

(Univ.-3).

In accordance with the requirements of federal law, the University also has 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. (Univ.-4).

In the fall of 1989, members of the University community made inquiries to Dr. E. A. Trabant, then President of the University, regarding the propriety of the University's solicitation and acceptance of Pioneer Fund monies. By letter dated November 22, 1989 to Dr. Lawrence P. Nees, Jr., chair of the Faculty Senate Committee ("Committee"), President Trabant requested that the Committee examine the issue of the University's relationship with the Pioneer Fund and report back to the President.[1/] (J.E.-5). Specifically, President Trabant asked the Committee: ". . . has 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?"

1/ The Faculty Senate Committee on Research is a standing faculty committee of eight members. The Committee's function is to deal with policy issues relating to faculty research and grant administration. One of the Committee members was Barbara Settles, President of the University of Delaware AAUP chapter.

As a corollary, President Trabant asked the Committee to address the question of whether the University should refuse to accept funds from the Pioneer Fund in the future, recognizing 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." (J.E.-5).

The Committee considered President Trabant's charge over the next five months. It considered the particular issues raised by President Trabant, solicited and received information and opinions from individuals and organizations both inside and outside the University and met with individuals who wished to be heard on the matter, including Professor Gottfredson and Harry Weyher, President of the Pioneer Fund. On April 19, 1990, the Committee issued its report ("Report"), concluding that "[t]he University of Delaware 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." (J.E.-4 at 1).

In the Abstract section of its Report, the Committee summarized the Report as follows:

> The President of the Pioneer Fund has explicitly asserted his belief that the Fund should continue to be guided by the intentions of its founders. A preponderant portion of the activities supported by the Fund either seek to demonstrate or start from the assumption that there are fundamental hereditary differences among people of different racial and cultural backgrounds, and the procedures of the Pioneer Fund offer no assurances that financial support is extended without prejudice and according to academic merit. Academic freedom does not require that the University approve and forward every application for external funding generated by members of the faculty. The University has a right to set its own priorities for support of scholarly activity. The University's commitment to racial and cultural diversity is an essential part of, not a rival principle in conflict with, the University's commitment to the right of all people to participate in an environment of free and open inquiry.

(J.E.-4 at 1).

In determining that the Pioneer Fund is committed to views and activities incompatible with the University's mission to promote free and unbiased inquiry and its

commitment to racial and cultural diversity, the Committee focused on the Pioneer Fund's charter, its pattern of funding and its grant procedures. The Committee found that the Pioneer Fund remained committed to the objectives and intent of the original 1937 charter, an explicitly "for whites only" document.[2/] With respect to the Pioneer Fund's pattern of funding, the Committee found that a "substantial, even 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." The Committee further determined that, on the basis of this premise, "the Fund seeks to influence public policy according to a eugenic program." (J.E.-4 at 6). Finally, with respect to the Pioneer Fund's grant procedures, the Committee found that "[t]he procedures of the Pioneer Fund offer no assurances that financial support is extended without prejudice and according to academic merit." (J.E.-4 at 8).

While the Committee reviewed the type of publications and nature of the funding process as it related to Professor Gottfredson's work, the purpose of its inquiry was to determine the relationship between the University and the Pioneer Fund, and not to conduct an ad hoc inquiry into Professor Gottfredson or her work. The Committee emphasized that Professor Gottfredson's work "enjoys the full protection of academic freedom extended to all faculty members of this University" and that her work "is not at issue." (J.E.-4 at 2).

By letter of April 24, 1990, President Trabant accepted the Committee's report. President Trabant noted in particular that "academic freedom does not require that the University approve and forward every application of external funding generated by members of the faculty" and that the "University has a right to set its own priorities for support of scholarly activity." President Trabant stated that the University "should neither seek nor accept any further financial support from the Pioneer Fund as long as the Fund

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2/ The Committee based this determination on, among other things, the testimony of Harry Weyher, President of the Pioneer Fund. (J.E.-4 at 5-6). Mr. Weyher testified before the Committee that "I didn't think it was up to me to try to change a thing like that [the organization's charter] that somebody else had written in and they had put their money in there. I don't believe in changing somebody else's objectives, somebody else's targets if he's the one that paid for the whole thing." (A.-2 at 34).

remains committed to [the] intent of its original charter and to a pattern of activities incompatible with the University's mission." (J.E.-6).

The Executive Committee of the University's Board of Trustees subsequently declined Mr. Weyher's suggestion that the Board override the conclusion of the Committee and the University administration. By letter of July 2, 1990, Andrew B. Kirkpatrick, Jr., chairman of the Board of Trustees, informed Mr. Weyher that "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. This decision simply signifies that the University does not at present find its participation consistent with the University's overall interests." (J.E.-7 at 2).

In the meantime, on June 4, 1990, Professor Blits, also a faculty member in the Department of Educational Studies at the University, applied to the Pioneer Fund through the University for support for his research "on the growing politicization of science in general and the suppression, distortion, and stigmatization of the study of race in particular." In accordance with its decision not to solicit monies from the Pioneer Fund, the University refused to process Professor Blits' proposal. (J.E.-9).

Similarly, on July 11, 1990, Professor Gottfredson prepared a proposal to the Pioneer Fund for a grant to complete work in progress, specifically to edit a book based on a colloquium series organized by Gottfredson and sponsored by the College of Education. On July 18, 1990, the University returned the proposal to her, stating that soliciting Pioneer Fund monies "is not in accordance with University policy." (J.E.-10).

By letter dated September 26, 1990, Barbara H. Settles, President of the University of Delaware AAUP chapter, requested binding arbitration "regarding the policy, articulated by the President of the University of Delaware, to 'neither solicit nor accept further financial support from the Pioneer Fund.'" The Union requested arbitration on the specific question of whether the University policy "violates faculty's contractual right to academic freedom." (J.E.-2 at 1).

The AAUP brought the grievance under Article XVI (Maintenance of Practices) of the collective bargaining agreement. Section 16.1 states as follows:

> The parties agree that there is a body of written policies, of practices and interpretations of those policies which govern: administrative decisions concerning wages, salaries, hours, workload, sick leave, vacations, grievance procedures, appointment, reappointment, promotion, tenure, dismissal, termination, suspension, evaluation, sabbatical leave, maternity leave, and alcoholism treatment which are not covered by the terms of this Agreement. Such policies and practices, except as changed by procedures agreed to in Article 16.3 below, shall be continued for the term of this Agreement. In the event of a conflict of any such policies or practices with the terms of this Agreement, the Agreement shall prevail.
>
> An administrative action not in accordance with the past application or interpretation of the above policies shall be grievable.

(J.E.-1 at 30-31) (emphasis added).

Section 16.2 states that "[t]he Faculty Handbook shall contain a complete copy of each University-wide policy that governs the practices enumerated in section 16.1 of this Article." (J.E.-1 at 31). Academic freedom is not one of the policies, practices or interpretations enumerated in section 16.1.

At the April 18 arbitration hearing, counsel for Professors Blits and Gottfredson sought to amend the AAUP's request for arbitration to bring the grievance under Article II of the collective bargaining agreement, as well as Article XVI. Article II states, in pertinent part, that "[t]he purpose of this Agreement is to promote harmonious relationships between the faculty and the administration of the University and to improve the quality of education and to maintain the high standards of excellence at the University. . . ." That section further states that "[i]n the furtherance of the purpose of this Agreement, the parties agree to adhere to the Statement on Academic Freedom as approved by the Board of Trustees of the University, May 31, 1979." (J.E.-1 at 1). The 1979 Statement on Academic Freedom states that "[t]he teacher is entitled to full freedom in research and in the publication of results. . . ." (J.E.-3 at III-B-1).

With respect to the continued ability of Professors Gottfredson and Blits to pursue their research, Professor Nees, Frank Murray, Dean of the College of Education, and University President David Roselle all testified that this has not been denied. The University has simply decided that it will no longer join with the professors in seeking grants

from the Pioneer Fund. The professors remain free to seek monies from the Pioneer Fund on their own and to pursue any other potential funding sources. The professors continue to have access to all University facilities in support of their research. Dean Murray testified that he has encouraged Professor Gottfredson to seek alternate funding sources and that he has offered his assistance in this effort.

IV. ARGUMENT

A. The Issue Of Academic Freedom Is Not An Appropriate Subject For Arbitration.

The right of professors at the University to organize is governed by the State of Delaware's Right of Public Employees to Organize Act, Del. Code Ann. tit. 19, § 1301 et set. Section 1302 grants public employees the right to "organize and designate representatives of their own choosing for the purpose of collective bargaining with public employers." Collective bargaining is defined by section 1301(5) as follows:

> The performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith and to execute a written agreement with respect to employment relations. . . .

Del. Code Ann. tit. 19, § 1301(5). Section 1301(3) defines employment relations to mean "matters concerning wages, salaries, hours, vacations, sick leave, grievance procedures and other conditions and terms of employment." Del. Code Ann. tit. 19, § 1301(3) (emphasis added).

Consistent with the Delaware statute, the recognition clause of the parties' collective bargaining agreement, Article III, recognizes the AAUP "as the sole and exclusive bargaining representative . . . in respect to matters concerning wages, salaries, hours, vacations, sick leave, grievance procedures, sabbatical leaves and other terms and conditions of employment as specifically set forth in the Agreement." (J.E.-1 at 2). Notably, academic freedom is not one of the subjects listed in section 3.1 and is not identified elsewhere in the Agreement as being included within the phrase "other terms and conditions of employment." Furthermore, the nature and tradition of academic freedom is such that it is not generally considered to be a term or condition of employment, but rather a privilege or right that

emanates from the very nature of the academic community. As such, there is no obligation to arbitrate the issue of academic freedom raised by the grievants.

While we are unaware of any Delaware cases which are directly on point, cases elsewhere dictate this conclusion.[3/] In Rutgers University, 9 NJPER ¶ 14286 (1983) (copy attached as Exh. 1), the collective bargaining agreement between the faculty union and the university incorporated a broad statement regarding academic freedom. The union filed a grievance under the collective bargaining agreement concerning the university's failure to publish a professor's report. The union argued that the university's decision violated the contractual guarantee of academic freedom. The university denied the grievance, arguing that the academic freedom clause was not negotiable and that the grievance was not subject to binding arbitration.

The New Jersey Public Employment Relations Commission agreed with the university that a dispute concerning the relationship between what a university publishes and what guarantees of academic freedom exist "predominantly implicates matters of fundamental educational policy which cannot be submitted to negotiations or arbitration process." The Commission thus restrained binding arbitration of the grievance.

Similarly, in North Hunterdon Board of Education, 11 NJPER ¶ 16090 (1985) (copy attached as Exh. 2), the New Jersey Public Employment Relations Commission held that a proposal of the teachers' union that would guarantee teachers' academic freedom affected matters of major educational policy and was not a mandatory subject of negotiations.

3/ At least one Delaware court opinion tangentially supports this non-arbitrability argument. In Seyfried v. Walton, 512 F. Supp. 235 (D. Del. 1981), students who attended a public secondary school and their parents brought a civil rights action contending that their first amendment rights were violated when the district superintendent determined that a proposed production of a certain broadway musical would be inappropriate as a school-sponsored production. The court ruled in favor of the school district, noting that conflicts which arise in the daily operation of school systems "should not be the occasion for federal court intervention in the school community." Id. at 239 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)). Similarly, in the instant case, it is inappropriate for an arbitrator to interfere with a funding decision so intertwined with university administration.

These cases stand for the principle 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.

B. An Alleged Violation Of Academic Freedom Is Not Grievable Under Section 16.1 Or Article II Of The Parties' Collective Bargaining Agreement.

Section 16.1 of the Agreement, the section upon which the AAUP originally based its grievance, makes grievable only those administrative actions "not in accordance with the past application or interpretation of the above policies." (J.E.-1 at 30-31) (emphasis added). The "above policies" are those specifically enumerated in Section 16.1. Conspicuously absent from the "above policies" is any mention of academic freedom. Section 16.2 of the Agreement states that "[t]he Faculty Handbook shall contain a complete copy of each University-wide policy that governs the practices enumerated in section 16.1 of this Article." However, the Agreement does not incorporate every policy included in the Faculty Handbook. The grievants cannot escape this deficiency by arguing that the collective bargaining agreement incorporates all of the policies in the Faculty Handbook in toto. If the parties had intended this result, there would be no need to detail the policies and practices enumerated in Section 16.1.

No doubt realizing this deficiency, counsel for Professors Blits and Gottfredson sought to amend the AAUP's request for arbitration at the outset of the hearing by seeking to proceed under Article II (Purpose) of the Agreement as well. However, a close reading of Article II indicates that it merely sets forth the parties' collective bargaining purpose and philosophy and does not purport to establish substantive rights subject to the grievance procedure. Article II appears by way of preamble and is merely introductory to the succeeding substantive sections of the Agreement. The language of Article II does not in itself create an employment term or define a grievable term or condition of employment.

Because neither Section 16.1 nor Article II provide for a grievance of an academic freedom dispute, this grievance cannot properly be maintained under either section.

C. The Report Of The Faculty Senate Committee On Research Was A Reasoned Determination By An Independent Group of Faculty.

The Union's chief attack on the University's decision with respect to the Pioneer Fund was an attempt to discredit the Committee's Report. Two full days of arbitration hearings showed this attempt to be completely without factual support. The Committee itself was an independent group of eight diverse faculty members who had no previous connection to the Pioneer Fund matter. The Committee had no particular political or philosophical orientation, and it was given complete discretion by President Trabant with respect to its findings. There was no oversight of the Committee's deliberations by the President or the Board of Trustees. The Committee members, all peers of Professors Gottfredson and Blits, made a unanimous determination that the University should no longer solicit or accept money from the Pioneer Fund.

While counsel for Professors Gottfredson and Blits sought to imply otherwise, there was no evidence whatsoever that bias against Professor Gottfredson and her academic pursuits influenced the conclusions of the Committee. As Professor Nees and Dean Murray made clear in their testimony, and as demonstrated by listening to the tape of Dean Murray's statements to the Committee, to the extent the Committee sought evidence from or questioned Professor Gottfredson about her work, it did so solely in an effort to learn more about the Pioneer Fund and its relationship to the University. Indeed, Professor Gottfredson herself testified before the Committee that she had received fair treatment from the Committee. (A.-3 at 8-9).

The actions of the University since the time that President Trabant commenced the Pioneer Fund inquiry further belie the suggestion that the University sought to interfere with Professor Gottfredson or her work. The University has granted Professor Gottfredson tenure. She continues to teach a full course load and has the same access to all University facilities as does any other faculty member. Also, the University has sought

to encourage Professor Gottfredson to complete activities for which financial support from the Pioneer Fund has already been received.[4/] As Drs. Murray and Roselle testified, the University has offered its full support for those activities. That support is illustrated by the October 22, 1990 letter of Dean Murray to Professor Gottfredson, in which he offered assistance in funding Professor Gottfredson's follow-up conference. (Univ.-6). Thus, the University has demonstrated that it values Professor Gottfredson and her continued contributions to the University community.

In sum, the Committee was not engaged in a "witch-hunt" to discredit Professor Gottfredson or her work. Rather, the Committee's Report was the product of careful consideration by and the reasoned judgment of an independent group of her peers.

In addition to their attack on the purpose and focus of the Committee, much of the grievants' energies were devoted to an unsuccessful attempt to prove that the Committee erred in its factual determinations regarding the Pioneer Fund. Surprisingly, what the testimony of Professors Nees and Gottfredson demonstrated was that neither could articulate the details of research performed by other Pioneer Fund grantees. However, it is not significant to the resolution of the issue before the arbitrator. The University believes that the conclusions reached by the Committee are reasonably supported by the material and testimony presented to it. However, the important point is that it simply may not matter whether the Committee's factual observations were absolutely correct -- whether the Pioneer Fund is or is not a racist organization is not the issue. What is equally important, from the University's perspective, is the public's perceptions regarding the Pioneer Fund. It is these negative perceptions, which the grievants did not dispute, that make it impossible for the University to fulfill its commitment to racial and cultural diversity while at the same time soliciting and accepting money from the Pioneer Fund.

The Committee determined that "[a] preponderant portion of the activities supported by the [Pioneer Fund] either seek to demonstrate or start from the assumption

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4/ As of July 18, 1990, when the University returned to Professor Gottfredson her grant proposal seeking additional money from the Pioneer Fund, her Pioneer Fund account at the University had in excess of $40,000, which currently is available for her use. (J.E.-10).

that there are fundamental hereditary differences among people of different racial and cultural backgrounds. . . ." (J.E.-4 at 1). As the Executive Committee of the Board of Trustees subsequently noted, "[n]o matter whether that is in fact the orientation of [the] 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." (J.E.-7). Whether that public perception is justified is one matter, but the grievants cannot dispute that such a perception exists. Because of that perception, continued acceptance of Pioneer Fund money by the University was deemed contrary to the University's mission.

D. Academic Freedom Does Not Include The Right To Have Every Grant Proposal Processed By The University.

A University faculty member has no right to have every grant application for external funding processed by the University. As the Faculty Senate Committee correctly determined, "[a]cademic freedom does not require that the University forward every grant application for external funding generated by members of the faculty." (J.E.-4 at 1).

Our research has not revealed any arbitration opinions dealing with the issue of whether a contractual academic freedom provision includes a right to have a grant application for external funding processed by a university. However, the few academic freedom arbitration opinions that do exist indicate that academic freedom is not limitless. For instance, in Jefferson County School District R-1 and Jefferson County Education Association, 86-2 ARB ¶ 8478 (CCH) (1986), the arbitration panel determined that a contractual academic freedom provision did not entitle a tenured high school social studies teacher to absolute discretion with regard to showing an R-rated commercial film to his class. Similarly, in Crawford Central School District and Crawford Central Education Association, 12 LAIS 2139 (1985), the arbitrator found that the employer school district did not violate the academic freedom provision in the parties' contract by refusing the grievant's request to use a specific guest lecturer in his classroom. In reaching this conclusion, the arbitrator acknowledged that academic freedom is not absolute. See also Los Angeles Community College District and American Federation of Teachers, 17 LAIS 2009 (1989) (construing academic freedom clause in contract and noting that "academic freedom is not

absolute"); Tri-County Area Schools and National Education Association, 16 LAIS 3560 (1988) (school board's directive regarding attendance policy did not violate contract's provisions on academic freedom).

Professor Blits grossly misrepresented the true nature of academic freedom in his testimony at the arbitration hearing. Receipt of grant money from outside grantors through the University is a privilege, not a right. As the Committee correctly stated in its Report, "[i]t is important to distinguish between a faculty member's right to pursue research and a faculty member's privilege to seek funding for that research through the University." (J.E.-4 at 2) (emphasis added). Like the Committee, counsel for the University has been able to find no authority for the proposition that a faculty member has an absolute right to seek funding through the University from any source whatsoever.

To the contrary, commentators who have considered this question have concluded that professors have no such inherent right. See, e.g., Delgado, et al., Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions on Race-IQ Research, 31 U.C.L.A. L. Rev. 128, 171-72, 177 (1983) ("although the researcher certainly has the right to speak freely as a citizen, [the] cases do not support the proposition that the researcher enjoys, as a citizen, a right to conduct state-funded research"; "right to engage in scientific inquiry is a right against government interference, not an entitlement to a particular allotment of public funds"); Robertson, The Scientist's Right to Research: A Constitutional Analysis, 51 S. Cal. L. Rev. 1203, 1272 (1978) ("Because . . . research grant decisions involve resource allocation and there is no right to have the institution provide those resources to a particular individual or project, the institution may allocate its research funds according to content and manner criteria that it chooses.").

While Professor Blits was correct in stating that free and open inquiry is a mission of the University, he erred in suggesting that it is the University's sole mission. As the evidence made clear, the University is also committed to promoting racial and cultural diversity. The Committee acknowledged these dual goals in stating that they are an essential part of one another, rather than rival principles in conflict. (J.E.-4 at 1.) The University's decision as to the Pioneer Fund was a good faith effort to reconcile these two ideals.

Recent case law regarding academic freedom demonstrates that it is not absolute, and that, under appropriate circumstances, it must yield to the interests of the university. For instance, in Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991), the Court of Appeals for the Eleventh Circuit held that a university's restriction on a professor's classroom conduct, issued under its authority to control curriculum, did not infringe the free speech or free exercise rights of the professor. The plaintiff/professor was an assistant professor in the College of Education at the University of Alabama, a public university. The professor occasionally referred to his religious beliefs during instructional time, remarks which he prefaced as personal "bias." He also organized an after-class meeting for his students and other interested persons where he lectured on and discussed "Evidences of God in Human Physiology." After several students complained about his conduct, the professor's supervisor directed him to cease interjecting his religious beliefs into his instruction. Upon the university's refusal to rescind the order, the professor brought suit under 42 U.S.C. § 1983 seeking declaratory and injunctive relief for violations of his free speech rights. Id. at 1068-70.

In analyzing the professor's free speech claim in Bishop, the court balanced the state's "interest as an employer in regulating the speech of its employees" and "in promoting the efficiency of the public services it performs through its employees" against the professor's free speech rights. The court found this balance to tip in favor of the university. While acknowledging the professor's academic freedom rights, the court emphasized that it "should honor the traditional 'reluctance to trench on the prerogatives of state and local educational institutions.'" Id. at 1075 (quoting Regents of University of Michigan v. Ewing, 474 U.S. 214, 226 (1985)). The court explained that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself." Id.

The Eleventh Circuit concluded that the university's directives about course content "must be allowed to hold sway over an individual professor's judgments." The university, acting in its capacity as an employer and educator, could thus direct the professor

to refrain from expression of religious viewpoints in the classroom and like settings. Id. at 1077.

As was the case in Bishop, the University "has not suggested that [Professors Blits and Gottfredson] cannot hold [their] particular views; express them . . . far and wide to whomever will listen; or write and publish, no doubt authoritatively, on them; nor could it so prohibit [them]." 926 F.2d at 1076. Rather, the University has simply determined that it will not act as a partner in seeking grant money from the Pioneer Fund.

In another recent academic freedom case, Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989), the Court of Appeals for the Sixth Circuit took pains to explain the delicate balance between university autonomy and academic freedom. The court noted that "the term academic freedom is used to denote both the freedom of the academy to pursue its end without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy; and these two freedoms are in conflict." Id. at 826. Contrary to the misleading statements of Professor Blits at the hearing, the court in Parate acknowledged that academic freedom is not absolute but has two parts -- the freedom of the institution and the freedom of the professors -- and that commentators and the courts have struggled to clarify this distinction. Id.

In attempting to reconcile these two competing "freedom" principles, legal commentators have consistently noted that the individual's academic freedom is not absolute and that in certain circumstances it must yield to the autonomy of the institution. See Comment, Parate v. Isibor: Resolving the Conflict Between Academic Freedom of the University and the Academic Freedom of University Professors, 16 J. Col. & Univ. L. 713, 717 (1990) (academic freedom is qualified rather than absolute right; courts are reluctant to intrude on autonomy of educational institutions); Fishbein, New Strings on the Ivory Tower: The Growth of Accountability in Colleges and Universities, 12 J. Col. & Univ. L. 381, 382 (1985) (academic freedom insulates management of university's internal affairs from legislative and judicial intrusion; decisions regarding such matters as what research to pursue are left wholly to discretion of university); Leslie, Academic Freedom for Universities, 9 Rev. Higher Educ. 135 (1986) (tracing origin of concept of institutional academic freedom); Eisenberg, Academic Freedom and Academic Values in Sponsored

Research, 66 Tex. L. Rev. 1363 (1988) (noting that most universities set limits on permissible terms of sponsored research through institutional research policies and suggesting that professors are not entitled to command scarce university resources for every research project of their choice).

Notably, both the Faculty Handbook provision regarding academic freedom and the May 31, 1979 Statement on Academic Freedom on which the grievants rely are silent on the issue of the solicitation and acceptance of grant money by the University. Similarly, the AAUP's 1940 Statement of Principles on Academic Freedom and Tenure, referenced by Professor Blits in his testimony, says nothing about the right of professors to receive grant money. None of these documents defines academic freedom with the unreasonable breadth sought by the grievants.

The inherent right of a university to determine from whom it solicits and accepts grant money stems from the tripartite relationship between the grantor, the university and the professor seeking funds. As Dr. Ray Bowen of the National Science Foundation testified, receipt of grant money by a university forms a contract between the university and the grantor. Both Dr. Bowen and Dr. Roselle characterized this grantor-grantee relationship as a "partnership." This is reflected by the fact that the grant is made directly and solely to the university, and not to a particular professor who will use the funds. As with any contract, potential liability exists for the University. If there is a failure to perform or problems arise in the expenditure of the grant money at the university level, any liability runs to the university.

Because of a university's administrative and legal responsibilities and its potential liability in connection with receipt of grant money, it is not at all uncommon for a university to place restrictions on the solicitation and receipt of grant money by its professors. For instance, the University's Faculty Handbook states that "[p]reference is given to projects that are directly related to the educational work of the faculty" and that the "University does not undertake research that cannot be published or is militarily classified, nor does it house research that bears no relationship to its educational activities." (J.E.-3 at ¶ 9). Likewise, there exist numerous limitations on professors' conflicts of interest in

research. (See id. at ¶ 14). Thus, the University's right to restrict possible funding sources is already well established.

Similarly, the entire grant administration procedure at the University is set up so that the University retains a substantial degree of control over research priorities and grant expenditures. Before receiving funds from an outside grantor, a professor ("principal investigator") is required to complete a Contracts and Grants Proposal form that must be processed through the University's Contracts and Grants Department. The grant proposal is subject to numerous levels of review, and it must be approved by the professor's department, dean and the Contracts and Grants Department. (See J.E.-8.) This multiple review is intended to ensure that the University does not commit to accept funds that are contrary to its mission or that would otherwise create unforeseen and unrealized burdens, financial or otherwise, for the institution.[5/]

E. Professors Blits and Gottfredson Are Not Precluded From Receiving Pioneer Fund Money Or Using University Facilities To Do Research Funded By The Pioneer Fund.

Professors Blits and Gottfredson suggest that they are now precluded from receiving Pioneer Fund money or from using University facilities for certain purposes. To the contrary, the University has merely decided that, because of its commitment to racial and cultural diversity, it will no longer be a partner with the professors in their pursuit of Pioneer Fund money. There has been no "ban" on their personal receipt of Pioneer Fund money and no limitation on their use of University facilities. These faculty members remain free to seek Pioneer Fund grants outside of the University and to use University facilities in the same manner as any other professor.

Whatever ambiguity was created in the correspondence by Professor Gottfredson and by Dr. Robert Varrin, Associate Provost for Research (J.E.-17, 18), was

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5/ Dean Murray testified that one of the chief criteria for administrative approval of a professor's grant application in the College of Education is that the research for which the money is sought be consistent with the mission of the College of Education. (See J.E.-21 at 2).

dispelled at the arbitration hearing when the two individuals with ultimate authority to make such decisions, David Roselle, President of the University, and Frank Murray, Dean of the College of Education, testified that Professor Gottfredson remains free to use all University facilities for her research, regardless of whether that research is accomplished with Pioneer Fund money. Indeed, Dean Murray testified that he had discussed this very issue with Professor Gottfredson shortly after her receipt of Dr. Varrin's response. He told her that Dr. Varrin did not make policy decisions of this sort for the College and that there were no special restrictions on her use of University facilities. Thereafter, he frequently encouraged her to seek additional funding and to continue to plan her second conference, which she declined. Thus, Professor Gottfredson continues to enjoy complete access to and use of University office space, copying machines, telephones, library, computers, secretaries, etc. with the expectation that she pay for excessive use on the same basis as any other professor.

In addition to Pioneer Fund money, other grant sources, both inside and outside the University, are potentially available to Professors Gottfredson and Blits to fund their research. Both Professor Nees and Dean Murray testified that numerous other potential grantors exist. Among the potential University sources are the University of Delaware Research Foundation, Inc. (UDRF) and the General University Research and Professional Development Fund (GURPDF).

Additionally, Dean Murray testified that he had money currently available within the College of Education for the second conference that Professor Gottfredson sought to organize and that he would offer other University funds and assistance for her work to supplement the funds on hand from her previous Pioneer Fund grants. The Dean emphasized the availability of these funds and his willingness to assist Professor Gottfredson in a memorandum to her of October 22, 1990. (Univ.-6).

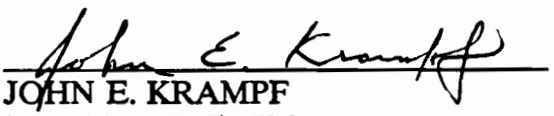
With respect to outside sources, Dean Murray testified to a number of possibilities, including the Spencer and Guggenheim Foundations. In his June 7, 1990, letter to Professor Gottfredson, Dean Murray noted Professor Gottfredson's reference to another potential grantor whose name she would not reveal. (Univ.-7). Notably, Dean Murray, as well as Professor Nees and Dr. Bowen, testified that a professor seeking funds typically has to apply to many funding organizations and agencies before receiving a grant. As to the

general availability of funds, Dean Murray wrote to Professor Gottfredson that it had been his experience that "the foundations with whom I deal are desperately looking for good projects to support." (Univ.-7).

Incredibly, despite the potential availability of grant money from other sources, Professor Gottfredson testified that, since the University's decision regarding Pioneer Fund grants, she has written to not one potential grantor seeking funds for her work. Instead, Professor Gottfredson merely assumes that alternative funding is not available. Her assumption falls far short of demonstrating the lack of alternative funding sources.

V. CONCLUSION

The University of Delaware made a reasonable, considered decision to cease doing business with the Pioneer Fund. However, this does not place any limitation on Professors Gottfredson's and Blits' ability to pursue their academic interests, to receive money from the Pioneer Fund outside of the University and to seek money for their research from other sources. To the extent that academic freedom is implicated in this case, it is well established that academic freedom is not an absolute right, and that it does not include the power to compel a university to process every application for grant money. For all of the above reasons, the University of Delaware respectfully requests that the grievance be denied.



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DATE: June 20, 1991

¶14286

RUTGERS UNIVERSITY
Decision of New Jersey PERC

In the Matter of Rutgers Council of the American Association of University Professors Chapters, Petitioner, and Rutgers, The State University, Respondent.

Docket No. SN-83-92, P.E.R.C. NO. 84-44
October 20, 1983

Before Mastriani, Chairman; Butch, Graves, Hartnett, Hipp, Newbaker and Suskin, Commissioners

Scope Of Arbitration— Academic Freedom— Refusal To Publish Professor's Study Report— 43.611

Faculty union's grievance, alleging that university violated academic freedom provision of collective agreement by refusing to publish study report of certain professor, was not arbitrable. Dispute concerning relationship between what university publishes and what guarantees of academic freedom exist predominantly implicates matter of fundamental educational policy that cannot be submitted to negotiations or arbitration process.

APPEARANCES:

For the Petitioner, Reinhardt & Schachter, P.C. (Denise Reinhardt, of Counsel)

For the Respondent, Carpenter, Bennett & Morrissey (John J. Peirano, of Counsel)

DECISION AND ORDER

On March 22, 1983, the Rutgers Council of the American Association of University Professors Chapters ("Association") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The Association seeks a determination as to the arbitrability of a grievance the Association filed against Rutgers, The State University ("University"). The grievance alleged that Rutgers violated an academic freedom clause in its collective nagotiations agreement when it refused to publish a professor's report in a format and quantity similar to that accorded reports by other faculty members. In addition, the Association seeks a determination as to whether the academic freedom clause is mandatorily negotiable.

The parties have filed extensive briefs, affidavits and documents. The following facts appear.

The Association is the majority representative of the University's faculty members, teaching assistants and graduate assistants. The University and the Association have entered a collective negotiations agreement effective from April 7, 1982 through June 30, 1983. Article II incorporates the principles of academic freedom which the University's Board of Governors has adopted.[1] The agreement's grievance procedure culminates in binding arbitration.

In or about the year 1980, Dr. Melvin S. Finstein, a professor in the University's Cook College Environmental Science Department, and four others wrote a report entitled "Sludge Composting and Utilization: Rational Approach to Process Control." This report was one of a series, known as the Camden Composting Project, dealing with sludge composting and utilization. The Rutgers University Press published other reports in this series, but not Finstein's report. Finstein then published his privately. The University refused to add his privately published report to the series.

In November, 1981, Finstein wrote the Cook College Committee of Review complaining about the treatment his report received. In December, 1981, the Committee of Review convened to investigate Finstein's complaint and subsequently recommended that Finstein be reimbursed for the cost of publishing 100 copies of his report and that the report be printed in a style and quantity similar to other reports in the series. The Committee expressed its belief that some of the conflicts involved in this matter were related to differences of opinions over technical matters.

In November, 1982, the Dean and Director of the New Jersey Agricultural Experiment Station, Cook College, reviewed the Committee's report. He determined that Finstein should be reimbursed for the cost of 100 copies of his report, but that the report should not be republished.

In December, 1982, the Association filed a grievance alleging that the refusal of the University to publish Finstein's report violated the contractual provision guaranteeing academic freedom. As a remedy, the Association sought to have the report published.

In February 1983, the Assistant Provost for Personnel denied the grievance. She asserted that the academic freedom clause was not negotiable and that the grievance was not subject to binding arbitration. She also stated that since Finstein's report had been produced and disseminated, no violation of academic freedom had occurred and that any issue of publication format was now moot. The Association then filed the instant petition.[2]

The Association argues that the University has delegated the power to exercise and enforce academic freedom to the faculty. It also argues that the parties' agreement provides for binding arbitration of grievances involving academic freedom and that academic freedom involves constitutional issues, including freedom of speech, which compel submission of grievances alleging violations of academic freedom to binding arbitration. In addition, the Association contends that the University is sufficiently different from other public educational institutions so that what is otherwise non-negotiable is negotiable with the University.

The University argues that the principles of academic freedom are at the heart of educational policy and are therefore non-negotiable. It stresses that delegation of authority to the faculty to consider issues of academic freedom does not make these issues mandatorily negotiable. The University therefore requests that we restrain arbitration of the instant grievance.

At the outset of our analysis, we emphasize the limits of our jurisdiction. As we stated in *In re Hillside Bd. of Ed.*, P.E.R.C. No. 76-11, 1 *NJPER* 55, 57 (1975):

> 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.

See also *Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n*, 78 *N.J.* 144, 154 (1978) ("*Ridgefield Park*"). Accordingly, we will concentrate our attention upon the principles contained in the New Jersey Employer-Employee Relations act, *N.J.S.A.* 34:13A-1 *et seq.* ("Act") and applicable judicial and Commission decisions and will not address ourselves to the constitutionality of the University's actions.[1] Further, we will not consider whether the grievance is contractually arbitrable or meritorious.

In *IFPTE Local 195 v. State*, 88 *N.J.* 393, 404-405 (1982), the Supreme Court summarized the test for determining when a subject matter is mandatorily negotiable:

> ...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.

See also *Bd. of Ed. of Woodstown-Pilesgrove Reg. Sch. Dist. v. Woodstown-Pilesgrove Reg. Ed. Ass'n*, 81 *N.J.* 582, 589 (1980); *Ridgefield Park*.

In the instant case, the grievance predominantly involves a claim that the University violated Finstein's right to academic freedom when it refused to publish his report. We recognize that the opportunity of professors to have their written work published may directly and intimately affect their career prospects.[4] Further, there is no statute or regulation partially or wholly preempting negotiation over the relationship between principles of academic freedom and the publication process. Nevertheless, we believe that this dispute concerning the relationship between what a University publishes and what guarantees of academic freedom exist predominantly implicates matters of fundamental educational policy which cannot be submitted to the negotiations or arbitration process. See *In re Edison Twp. Bd. of Ed.*, P.E.R.C. No. 83-100, 9 *NJPER* 100 (¶14055 1983) ("*Edison*"); *New Milford*. Accord *In re Adirondack Comm. College*, ___ PERB ___ (N.Y. 4/29/83); and *In re Anaheim Union H.S. Dist.*, ___ PERC ___ (Calif. 4/19/79). *Cf. Assoc. of N.J. State College Faculty v. Dungan*, 64 *N.J.* 338, 355 (1974); *In re Middlesex County College*, P.E.R.C. No. 78-13, 4 *NJPER* 47, 49 (¶4023 1977).

We specifically disagree with the Association's contention that the University is different enough from other public institutions so that cases such as *Ridgefield Park*, *Edison*, and *Milford* should not control. We have recognized that under the University's system of collegiality, certain functions generally performed by management are shared with or delegated to faculty members. *In re Rutgers*, P.E.R.C. No. 82-47, 7 *NJPER* 671 (¶12303 1981); *In re Rutgers*, P.E.R.C. No. 76-13, 2 *NJPER* 13 (1976). See also *In re Board of Trustees of Middlesex County College*, P.E.R.C. No. 78-13, 4 *NJPER* 47 (¶4023 1977). However, these cases also hold that the concept of collegiality does not make mandatorily negotiable those matters which are otherwise not mandatorily negotiable. Accordingly, we restrain binding arbitration of the instant grievance.

ORDER

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

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[1] University regulation 3.91 sets forth these principles and is attached as an Appendix.

[2] Arbitration of this dispute has been postponed pending the issuance of this decision. On April 20, 1983, the University filed a Motion to Consolidate the instant case with *In re Rutgers University*, Docket No. SN-83-59. On April 25, 1983, the Commission Chairman, after having found that the two cases involved different issues, determined that the two cases should not be consolidated. Docket No. SN-83-59 was withdrawn on September 26, 1983.

On April 26, 1983, the Association filed a request for a hearing. The Association wanted to introduce further evidence on the nature of the Camden Composting Project, the understanding concerning publication participants had, the review, publication, and dissemination of project reports, the treatment of Finstein's report, and the cost of rectifying any discrimination in the treatment of reports. The University opposed this request, asserting that these allegations were neither relevant nor specific enough to satisfy *N.J.A.C.* 19:13-3.6(a). We deny the request because the parties' submissions make the nature of the negotiability dispute clear and no further evidence is needed for a determination.

On May 25, 1983, the University filed a Motion to Strike a Portion of [the Association's] Reply Brief, or, in the alternative, a Motion for Leave to Respond to [the Association's] Reply Brief. In an affidavit in support of its motion, the University argues that in its reply brief the Association impermissibly raised for the first time the allegation that the University's action with regard to Finstein's report was a form of discipline. While we do not believe that it is technically proper to strike that portion of the timely-filed reply brief, we agree with the University that the gravamen of this dispute does not involve a disciplinary determination. see *In re South River Bd. of Ed.*, P.E.R.C. No. 83-135, 8 *NJPER* 274 (¶14126 1983), appeal pending App. Div. No. A-4669-82T2. Thus, we leave for another day consideration of whether a disciplinary determination involving a claimed violation of academic freedom could be submitted to binding arbitration.

[3] In *Hunterdon Central H.S. Teachers Ass'n v. Hunterdon Central H.S. Bd. of Ed.*, P.E.R.C. No. 80-4, 5 *NJPER* 289 (¶10158 1979), aff'd 174 *N.J. Super.* 468 (App.Div. 1980), aff'd o.b. 86 *N.J.* 43 (1981), the Supreme Court held that the Commission properly found that an otherwise mandatorily negotiable term and condition—paid leaves of absence for religious purposes—was not negotiable because of constitutional considerations prohibiting religious favoritism. *Hunterdon* establishes that the Commission may consider constitutional guarantees in determining whether negotiation over a particular proposal has been preempted, thus narrowing the scope of negotiations. The converse does not follow: an otherwise non-negotiable educational policy decision does not become negotiable and arbitrable because it is or may be unconstitutional. Instead, the parties aggrieved by the educational policy decision must challenge that decision in court of a proper administrative forum. See *In re New Milford Bd. of Ed.*, P.E.R.C. No. 81-36, 6 *NJPER* 451 (¶11231 1980) ("*New Milford*"). Compare *Teaneck Ed Ass'n v. Teaneck Bd. of Ed.*, ___ *N.J.* ___ (July 15, 1983) (while there is no managerial prerogative to discriminate based on race in making appointments, grievances alleging such

racial discrimination may not be submitted to binding arbitration and instead must be submitted to an administrative or judicial forum).

We do note, however, that the University's willingness to reimburse Finstein for the costs he incurred reproducing his report and the absence of any direct economic harm somewhat weaken the employees' side of the balance of interests.

APPENDIX

3.90 Academic Freedom.

3.91 Since the very nature of a university and its value to society depend upon the free pursuit and dissemination of knowledge and free artistic expression, every member of the faculty of this University is expected, in the classroom and studio, in research and professional publication, freely to discuss subjects with which he is competent to deal, to pursue inquiry therein, and to present and endeavor to maintain his opinion and conclusions relevant thereto. In expressing those ideas which seem to him justified by the facts, he is expected to maintain standards of sound scholarship and competent teaching. He shall conduct himself in accordance with the standards of professional ethics set forth in paragraphs I to V, inclusive, of the Statement on Professional Ethics adopted by the American Association of University Professors at its annual meeting, April 1966.

Statement on Professional Ethics

I. The professor, guided by a deep conviction of the worth and dignity of the advancement of knowledge, recognizes the special responsibilities placed upon him. His primary responsibility to his subject is to seek and to state the truth as he sees it. To this end he devotes his energies to developing and improving his scholarly competence. He accepts the obligation to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge. He practices intellectual honesty. Although he may follow subsidiary interests, these interests must never seriously hamper or compromise his freedom of inquiry.

II. As a teacher, the professor encourages the free pursuit of learning of his students. He holds before them the best scholarly standards of his discipline. He demonstrates respect for the student as an individual, and adheres to his proper role as intellectual guide and counselor. He makes every reasonable effort to foster honest academic conduct and to assure that his evaluation of students reflects their true merit. He respects the confidential nature of the relationship between professor and student. He avoids any exploitation of students for his private advantage and acknowledges significant assistance from them. He protects their academic freedom.

III. As a colleague, the professor has obligations that derive from common membership in the community of scholars. He respects and defends the free inquiry of his associates. In the exchange of criticism and ideas he shows due respect for the opinions of others. He acknowledges his academic debts and strives to be objective in his professional judgment of colleagues. He accepts his share of faculty responsibilities for the governance of his institution.

IV. As a member of his institution, the professor seeks above all to be an effective teacher and scholar. Although he observes the stated regulations of the institution, provided they do not contravene academic freedom, he maintains his right to criticize and seek revision. He determines the amount and character of the work he does outside his institution with due regard to his paramount responsibilities within it. When considering the interruption or termination of his service, he recognizes the effect of his decision upon the program of the institution and gives due notice of his intentions.

V. As a member of its community, the professor has the rights and obligations of any citizen. He measures the urgency of these obligations in the light of his responsibilities to his subject, to his students, to his profession, and to his institution. When he speaks or acts as a private person he avoids creating the impression that he speaks or acts for his college or university. As a citizen engaged in a profession that depends upon freedom for its health and integrity, the professor has a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom."

¶14287

RUTGERS UNIVERSITY
Decision of New Jersey PERC

In the Matter of Rutgers, The State University, Petitioner, and AFSCME, Council 52, Local 888, Respondent.

Docket No. SN-83-115, P.E.R.C. NO. 84-45
October 20, 1983

Before Mastriani, Chairman; Butch, Graves, Hartnett, Hipp, Newbaker and Suskin, Commissioners

Scope Of Arbitration— Assignment Of Duties Within Unit— Managerial Prerogative— 43.42,43.98

Employee's grievance, alleging that university violated collective agreement by assigning certain electrical work to

The union challenged the suspension by way of a grievance filed on behalf of Metros. There was a grievance meeting between the Board representative, Mason, the President of TWU Local 225, Frank Calazzo and Metros. The grievance was denied and Metros, by way of a letter to Calazzo, requested that the union bring the matter to arbitration.

Pursuant to the by-laws of the Association, Calazzo referred this request to the local's grievance committee to decide whether to demand arbitration. (This is the union's regular procedure.) Calazzo discussed the matter with the members of the grievance committee and, further, discussed Metros' letter which outlined his complaint both against the School Board and Reed. The committee decided not to proceed to arbitration in this matter.

At the Unfair Practice Hearing, I granted the TWU Motion to Dismiss the Unfair Practice concerning all allegations of the union's failure to properly represent Metros before the employer.

Although Metros, in his arguments, relied on Reed's dual position as Board Head Custodian and Union Section Chairman, the Charging Party failed to demonstrate a prima facie case.[1] There was no evidence that Reed ever participated in any manner in this entire controversy in his capacity of union representative. He acted solely as Head Custodian.

Metros testified that a union representative, Leroy Walsh, represented him at the Board's disciplinary hearing and Metros was satisfied with Walsh's representation. Metros also was satisfied with Calazzo's representation of him at the grievance meeting. Finally, Reed took no part in the union's decision not to bring this matter to arbitration.

I declined to grant the Motion to Dismiss as to certain alleged misconduct by Reed at union meetings. Specifically, there was a motion made at a section union meeting to have Reed removed from office because he brought the complaint against Metros to the Board. Reed was conducting the meeting and refused to entertain such a motion. At the hearing, Reed testified that he had consulted with Calazzo about the motion. It was Calazzo's opinion that such a motion is an improper one, for under the union by-laws, a union official cannot be removed by motion at a section meeting. It is not for this Commission to determine. If Reed was acting properly in refusing to entertain the motion, such procedures are purely internal matters and are not within the jurisdiction of the Commission. Internal matters can shed light on improper motivations and I did consider this conduct as to question of credibility and motivation.

Metros also alleged that Russell threatened him by stating that: "If you (Metros) keep pushing this then you're dead with the union."

Russell, who no longer holds a position in the union, testified that he never made the alleged threat.

Metros' testimony was disjointed and confused. He testified about the conversation when the threats were allegedly made several times, but only mentioned the threats the third time his testimony touched upon the conversation.

Reed's testimony was more coherent and forthright. Reed was far more credible. Accordingly, I credit Russell's testimony and find that Metros failed to prove that he was threatened.

None of the union conduct testified to at the hearing demonstrated an abrogation of the union's duty of fair representation. (That is, a union cannot act in a manner that is arbitrary, capricious or in bad faith). See *Lawrence Tp. PBA Local 119 and David E. Burns, et al*, P.E.R.C. No. 84-78, 10 *NJPER* 41 (¶ 15023 1983), *In re City of Union City and FMBA Local 12*, P.E.R.C. No. 82-65, 8 *NJPER* 98 (¶ 13040 1982), *Hamilton Twp. Ed. Assoc. and Hamilton Twp. School Social Workers Assoc.*, P.E.R.C. No. 79-20, 4 *NJPER* 476 (¶ 4215 1978).

Accordingly, I recommend that the complaint in this matter be dismissed in its entirety.

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[1] All inferences were resolved in favor of the Charging Party.

¶16090
NORTH HUNTERDON BOARD OF EDUCATION
Decision of New Jersey PERC

In the Matter of North Hunterdon Board of Education, Petitioner, and North Hunterdon Education Association, Respondent.

Docket No. SN-84-131, P.E.R.C. NO. 85-100
March 18, 1985

Before Mastriani, Chairman; Butch, Graves, Hipp, Suskin and Wenzler, Commissioners

Scope Of Bargaining — Employee Evaluations — Procedures And Standards — 43.451,43.624

Teachers' union's proposal concerning employee evaluations was nonnegotiable insofar as it infringed on school board's right to select evaluator and determine qualifications of evaluator. Further, proposal was nonnegotiable as it pertained to standards to be employed in evaluating teachers and nature or purpose of evaluations. Remaining portions of proposal that merely paraphrased N.J.A.C. 6:3-1.21 and 6:3-1.19, concerning tenured and nontenured teaching staff, were negotiable.

Scope Of Bargaining — Personnel Files — Access — 21.17,43.4542

Teachers' union's proposal requiring employee's signature on documents to be placed in his or her

personnel file, or union president's signature if employee refuses to sign, and restricting use of any documents where such procedure is not followed, was mandatorily negotiable.

Scope Of Bargaining — Discipline — Just Cause — 43.23,43.36,43.99

Teachers' union's proposal, providing that no employee shall be disciplined, reprimanded, reduced in rank or compensation without just cause, was mandatory subject of bargaining with proviso that no dispute arising out of disciplinary action against employee with alternative statutory appeal protection could be submitted to binding grievance arbitration under collective agreement.

Scope Of Bargaining — Employee's Right Of Privacy — Personal Life — 43.217,43.452,43.624,43.69

Teachers' union's proposal providing that employee's "personal life" shall not be of concern to school board except as it may directly prevent employee from properly performing "assigned professional functions," was mandatorily negotiable.

Scope Of Bargaining — Academic Freedom — 43.611

Teachers' union's proposal that would guarantee teachers' academic freedom affected matters of major educational policy and was not mandatorily negotiable.

Scope Of Bargaining — Class Size — 43.612

Teachers' union's proposal concerning class size was nonnegotiable. Where proposal is intended merely as "advisory" statement of purpose, it must so state unequivocally.

Scope Of Bargaining — Nonteaching Duties — Collecting For Outside Vendors — 43.46,43.619

Teachers' union's proposal relieving teachers of obligation to make collections for outside vendors of "pictures, insurance and so forth" was mandatorily negotiable where there was no showing that proposal would interfere with educational policy.

Scope Of Bargaining — Hiring Practices — Teacher Aides — 43.211,43.98

Teachers' union's proposal containing nonbinding statement of purpose concerning hiring of teacher aides was mandatorily negotiable.

Scope Of Bargaining — Reduction In Force — Procedures — 43.531

Teachers' union's proposal, stating that any reduction in force will be in accordance with state statutes and judicial decisions, concerned procedures for reductions in force and was mandatorily negotiable. Proposal did not infringe on school board's right to determine when reductions in force were necessary.

Scope Of Bargaining — Home Teaching And Summer Employment — Hiring Qualifications — 43.217

Teachers' union's proposal concerning qualifications for home teaching and summer employment, including priority consideration for high school district employees, was nonnegotiable.

APPEARANCES:

For the Petitioner, Murray & Granello, Esqs. (James P. Granello, of Counsel, Barton L. Knapp, on the Brief)

For the Respondent, Klausner & Hunter, Esqs. (Stephen B. Hunter, of Counsel and on the Brief)

DECISION AND ORDER

On June 15, 1984 the North Hunterdon Board of Education (the "Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The Board seeks a determination that several clauses in its most recent contract with the North Hunterdon Education Association ("Association") are not mandatorily negotiable. The Board filed its petition while the parties have filed briefs and documents.

The Board asserts that all or part of eight articles in the agreement are not mandatorily negotiable. The text of the disputed articles appears in an appendix to this decision.

In *IFPTE, Local 195 v. State*, 88 *N.J.* 383 (1982) (*"Local 195"*), the Supreme Court set forth the tests for determining whether a subject is mandatorily negotiable and arbitrable. The Court stated:

> ...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 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.

Article VIII of the contract concerns evaluations. The Board contends that this article covers matters of educational policy and/or is preempted by portions of the New Jersey Administrative Code covering tenured (*N.J.A.C.* 6:3-1.21) and non-tenured (*N.J.A.C.* 6:3-1.19) teaching staff. The Association asserts that the language either mimics or paraphrases provisions of the administrative code and thus may be included within the parties' agreement.

We have reviewed the entire article and compared its provisions with the cited portions of the administrative code. We find nothing in the article which is inconsistent with the code. However, some articles of Article VIII (specifically B, C, and D3) are nevertheless non-negotiable because they involve matters of managerial prerogative without reference to *Local 195's* preemption test. The remaining sections of the article are mandatorily negotiable. They are either procedural (D1 and 2 and E) or general advisory statements concerning the purpose of evaluations (A).

Article IX C provides that material placed in an employee's personnel file shall be signed by the employee or by a school principal and the Association's president if the employee refuses to sign the document. The article also restricts use of the document if this procedure is not followed. We have held that provisions concerning an employee's right to know the contents of his personnel file are mandatorily negotiable. See *In re West Amwell Township Bd. of Ed.* P.E.R.C. No. 78-31, 4 *NJPER* 23 (Para 4012, 1977). The instant provision is not significantly different and is mandatorily negotiable.

Article X E provides that "No employee shall be disciplined, reprimanded, reduced in rank or compensation without just cause." This language is mandatorily negotiable provided language is added reflecting section 5.3's exclusion from binding arbitration of disciplinary disputes involving employees with statutory protection under the tenure laws or alternate statutory appeal procedures. See *N.J.S.A.* 34:13A-5.3, *CWA v. PERC*, 193 *N.J. Super.* 656 (App. Div. 1984), *In re Edison Tp. Bd. of Ed.* P.E.R.C. No. 83-100, 9 *NJPER* 100 (para 14053 1983), and *In re New Providence Bd. of Ed.* P.E.R.C. No. 83-88, 9 *NJPER* 14038, 1983).

Article XIII A, concerning employees' personal lives, directly affects the personal welfare of employees and generally does not concern educational policy. The article, however, recognizes that in some instances an employee's personal life may affect the performance of his or her duties. See, e.g., *In re Grossman*, 127 *N.J. Super.* 13 (App. Div. 1974). Given this recognition, which protects the employer's right to evaluate employee performance, this article is mandatorily negotiable.

Article XIII C recognizes the teachers' interest in academic freedom and acknowledges the need to protect teachers from censorship and restraints. Academic freedom directly affects teacher work and welfare and restrictions on academic freedom can implicate constitutional rights. See *Riverdell Ed. Ass'n. v. Riverdell Bd. of Ed.*, 122 *N.J. Super.* 350 (L. Div. 1973). On balance, however, provisions guaranteeing academic freedom are matters of major educational policy and are not mandatorily negotiable. *Rutgers University*, P.E.R.C. No. 84-44, 9 *NJPER* 661 (Para. 14286 1983).

Article XV concerns class size and the allocation of class space. It is not mandatorily negotiable. See *In re College of Medicine and Dentistry*, P.E.R.C. No. 81-113, 7 *NJPER* 228 (Para 12099, 1981). We disagree with the Association's assertion that the clause is merely an advisory statement of purpose and note that the last sentence of section A implies that the clause would hinder the flexibility of class size determinations when team teaching or large group instruction is not involved. If a clause is to be considered merely advisory, it should say so unequivocally.

The Board contends Article XVIA (relieving teachers of collecting for outside vendors) is not mandatorily negotiable because it involves only a small amount of work. The Board does not state how relieving teachers of collections would significantly interfere with educational policy other than to compare the task with other non-teaching duties (e.g. bus duty) related to student safety.[1] Since the issue involves an increase in teacher workload by imposing housekeeping duties and does not impede any identifiable educational policy, it is mandatorily negotiable. See *In re Byram Tp. Ed. of Ed.*, 152 *N.J. Super.* 12, 25-26 (App. Div. 1977).

Article XVI B regarding the hiring of aides does not remove from the Board any prerogatives regarding the type and number of employees it wishes to hire. The language is a nonbinding statement of purpose and is mandatorily negotiable. See *In re Mahwah Bd. of Ed.*, P.E.R.C. No. 83-96, 9 *NJPER* 94 (Para 14051, 1983).

Article XIX A merely recites that any reduction in force will be in accordance with state statutes and judicial decisions. The Board retains complete power to decide when reductions in force will be made. However, once that decision is made, the Board may contractually obligate itself to follow statutory and regulatory procedures and contractual requirements in implementing these reductions. *State v. State Supervisory Employees Ass'n*, 78 *N.J.* 54, 84 (1978).

The language of Article XX B has often been construed and held not mandatorily negotiable. See *In re Byram, supra.*, 152 *N.J. Super.* at 27 and *N. Bergen Tp. Bd. of Ed. v. N. Bergen Fed. Teachers*, 141 *N.J. Super.* 97 (App. Div. 1977).

ORDER

The following articles are mandatorily negotiable: VIII A, D1, D2, E; IX C; X E, to the extent consistent with this opinion; XIII A; XVI A and B; XIX A.

The following articles are not mandatorily negotiable: VIII B, C and D 3; XIII C; XVA and B; XXB.

[1] The fact that one of the outside vendors identified in the article would sell insurance does not make the issue one of student safety.

APPENDIX

ARTICLE VIII

EVALUATION

The Board and the Association recognize that:

A. Evaluation can be useful as an aid for:

1. Improving employee performance.

2. Retention, guidance, and promotion of staff members.

3. Self-improvement.

4. Administrator-staff rapport.

B. Our functional evaluative program presupposes qualified evaluators who shall use

evaluative criteria to be developed in accordance with state guidelines.

C. Evaluation must be diagnostic. It must build personal and professional self-respect and self-image. It must focus on the situation. It must encourage expression, creativity, variation, and development of technical and professional skills.

D. The person being evaluated shall have full knowledge of the procedures, the qualifications of the evaluator and the findings thereof.

1. Every nontenured teaching staff member shall be evaluated as per New Jersey Title 18A.

2. Tenured teaching staff members wil be evaluated in accordance with N.J A.C. 6:3-1.21, the Tenure Teacher Evaluation Act.

3. Teaching staff members shall be evaluated by persons certified by the State of New Jersey to supervise instruction.

E. Procedure:

1. Authorized evaluators will use special evaluation forms for submitting specified numbers of evaluations at designated times.

2. Teaching staff members will be evaluated in accordance with New Jersey statutory requirements.

Article IX

PERSONNEL FILES

C. All materials placed in an employee's personnel file shall be signed by that employee, duplicated, and given to him for his own disposition with the express understanding that his signature in no way indicates agreement with the content thereof. Any material that the employee sees and refuses to sign may be co-signed by the principal and the President of the Association to indicate that they witnessed the reading of the material by the employee in question. Any material not signed by the employee and duplicated may not be used in the grievance or evaluation procedure. However, material co-signed by the principal and the President of the Association indicating that the employee has seen the material may be used in the grievance or evaluative procedure.

ARTICLE X

PERSONNEL EMPLOYMENT

E. No employee shall be disciplined, reprimanded, or reduced in rank or compensation without just cause.

ARTICLE XIII

PERSONAL AND ACADEMIC FREEDOM

A. The personal life of an employee is not an appropriate concern or attention of the Board except as it may directly prevent the employee from properly performing assigned professional functions.

C. The Board recognizes that academic freedom is essential to the fulfillment of the purposes of the North Hunterdon Regional High School District, and acknowledges the fundamental need to protect employees from any censorship or restraint which might interfere with their obligation to pursue true in the performance of their teaching functions.

ARTICLE XV

CLASS SIZE

A. The Board recognizes that the maximum class size should be consistent with the available facilities and resources of the school system and community. The Board recognizes the class size recommendations of the State Department of Education and takes them into consideration in its planning. This shall not be construed in such a way as to hinder the flexibility of the School District in establishing class size involving team teaching, large group instruction, etc.

B. Marginal classrooms should be used only under extreme emergencies.

ARTICLE XVI

NONPROFESSIONAL DUTIES

A. Employees shall not normally be required to make collections for outside vendors of pictures, insurance and so forth.

B. The Board not only recognizes the desirability of employing aides to perform certain duties under the direction of the employee or employees to whom they are assigned, but also that the decision of hiring and stipulating of the assignments rests with the Board. Such aides will be hired when practical.

ARTICLE XIX

SENIORITY

A. Teaching Staff:

Any reduction in force of the teaching staff shall be conducted in accordance with state statutes and judicial decisions.

ARTICLE XX

HOME TEACHING AND SUMMER EMPLOYMENT

B. In filling such positions, the Board shall consider the professional qualifications, background attainments, and other relevant factors, including all applicants' service in the District. Persons employed in the North Hunterdon Regional High School District shall have priority for such assignments. Appointment will be at the discretion of the Board.

¶16091

TOWNSHIP OF WEST ORANGE
Decision of New Jersey PERC

In the Matter of Township of West Orange, Petitioner, and West Orange PBA Local 25, Respondent.

Docket No. SN-84-83, P.E.R.C. NO. 85-101
March 18, 1985

Before Mastriani, Chairman; Butch, Graves, Hipp, Suskin and Wenzler, Commissioners

Scope Of Arbitration — Vacation Time Carryover — Minimum Manning — 43.156,43.56,47.521

Police union's grievance, alleging that township violated collective agreement by implementing policy by which employees were no longer permitted to "carryover" unused vacation time to next calendar year, was arbitrable. Although vacation scheduling must be negotiated within framework of township's nonnegotiable manpower requirements, township's legitimate manpower concerns did not remove carryover provisions from scope of negotiations.

APPEARANCES:

For the Petitioner, Marvin Corwick, Business Administrator

For the Respondent, Schneider, Cohen & Solomon, Esqs. (David Solomon, of Counsel)

DECISION AND ORDER

On April 2, 1984, the Township of West Orange ("Township") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The Township seeks a restraint of binding arbitration of a grievance which PBA Local 25 ("PBA") has filed. The grievance alleges that the Township's institution of a vacation time to the next calendar year violated the parties' collective negotiations agreement.

The following facts are not in dispute. The PBA is the majority representative of all the Township's police officers below the rank of sergeant. The Borough and the PBA are parties to a collective negotiations agreement effective from January 1, 1983 to December 31, 1984. The agreement's grievance procedure culminates in binding arbitration.

On January 25, 1984, the Borough police chief posted the following notice:

> All vacation picks for 1984 shall be submitted to this office by February 8, 1984
>
> All members shall be required to pick their allotted vacation time; however, if a member must change his/her vacation due to unforeseen circumstance, i.e. emergencies, etc., he/she shall submit a request in writing to the proper Divisional Commander requesting said change.
>
> All time shall be accounted for in order that proper deployment of personnel can meet the demands of this department.
>
> Civilian secretarial vacation picks shall be submitted to my office on the above date.

On February 8, 1984, the PBA filed the following grievance:

> This grievance is in regard to the unfair and anti-contractual vacation leave policy and procedure that has occurred on 2/8/84. On this date and also in a memo issued 1/25/84, issued by Dep. Chief DeRosa, the members of this Local were informed that each officer will select (4) four weeks vacation time. I was informed by Capt. Fahey that if I did not pick four weeks the balance of the four weeks would be assigned to me, and I would not be allowed to accumulate and "carry over" more then the remaining time after I selected four weeks. I believe that this policy is in conflict with existing town ordinance and the existing contract between the Local #25 and the Township of W.O., as follows:
>
> > Town Ord. 4-13.5 states that the consent of the appointing authority is only required when accumulating vacation time beyond that earned in a (2) year period.

This grievance was denied. The PBA requested binding arbitration and the instant petition ensued.

The Township contends that to allow officers to carry over vacation days in excess of one year "will result in extreme problems with distribution of manpower in following periods."

At the outset of an analysis, we emphasize the narrow boundaries of our scope of negotiations jurisdiction. As we stated in *Hillside Bd. of Ed.*, P.E.R.C. No. 76-11, 1 *NJPER* 55, 57 (1975):

> The Commission is addressing the abstract issues: is the subject matter in dispute within the scope of collective negotiations. Whether that