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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Omansky Justice PART 47

MATTER OF CUNY

- v -

RITA AIELLO

INDEX NO. 404871/08

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Petition granted in accordance with accompanying memorandum.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 3/13/09

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

----------X

In the Matter of the Application of
CITY UNIVERSITY OF NEW YORK

Petitioner,

For Relief Pursuant to Article 75
of the Civil Practice Law & Rules,

-against-

RITA AIELLO

Respondent.

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ORDER AND JUDGMENT

404871/08

PAULA J. OMANSKY, J.:

Petitioner (CUNY) seeks to vacate in part an arbitrator's award on grounds that the arbitrator exceeded his powers; respondent cross-moves to dismiss the petition and to confirm the award.

FACTS

Respondent Rita Aiello, an associate professor of music at Queens College, submitted her greivance to arbitration pursuant to a collective bargaining agreement (CBA) after she was denied reappointment to a fourth year. The arbitrator ruled in respondent's favor, and directed that she be reappointed for one academic year. The arbitrator further directed that all future reappointment decisions be made by a Select Faculty Committee (SFC). CUNY seeks to vacate only the latter directive of the remedial order issued by the arbitrator.

DISCUSSION

In his exhasustive 49-page opinion, after reviewing all of the well-documented departures from accepted procedure made by

Aiello's supervisors (see, Award and Opinion pp 33-47, Ex B to moving papers), arbitrator Robert L Douglas directed reappointment of Aiello for one year and further directed that all future re-appointment decisions be made by a Select Faculty Committee since

> a "likelihood exists that a fair academisc judgment may not be made on remand if normal academic procedures are followed...." The Award therefore shall provide that a Select Faculty Committee shall be established to determine any future reappointments of the Greivant.

CUNY argues in essence that the arbitrator "rewrote" the CBA in directing that future appointments be made by a Select Faculty Committee, thus "creating a remedy to address [respondent]'s future appointments, an issue that was not the subject of the arbitration and for which no grievance had been filed." .

Aiello argues in opposition that two other arbitrators made provisions for similar remedies in CUNY cases, and that in neither case did CUNY seek to vacate the award on grounds that the arbitrator exceeded his authority; that in any case, the awards in all three cases fashioned remedies "in conformity with the essence of the contract".

In its reply memorandum of law, CUNY cites the provision of the CBA which states

> The authority of the SFC is limited to rendering academic judgment on the action from which the greivance arose

and argues that pursuant to the stipulated issues presented, the only issues before the arbitrator were as follows:

> Was the decision of Queens College not to reappoint

> Grievant, Rita Aiello, as Associate Professor in the Aaron Copland School of Music, without tenure, effective September 1, 1999, either a breach, misrepresentation, or improper application of named sections of the CBA or an arbitrary or discriminatory application of either two written policies concerning reappointment and tenure

and that thus, an award dealing with future decisions exceeded the scope of the current grievance.

In *Matter of the Town of Newburgh v Civil Service Employees Association, Inc.* (204 AD2d 464, 466 [2d Dept 1994]), the court held that in a case in which an agreement is not silent on the remedy for a breach, and arbitrator "is not free to fashion a remedy outside the scope of the limiting language of the agreement".

Here, the CBA provides in pertinent part that the arbitrator may not make a decision regarding an academic appointment unless he or she finds that the academic appointment cannot be made through normal academic procedures at the college (CBA Article 20.5(c)(1)). In such a case, the arbitrator may send the matter of the appointment to a SFC for reconsideration (CBA Article 20.5(c)(1)). That section further provides that "[t]he authority of the committee is limited to rendering the academic judgment on the action from which the grievance arose". In the most egregious cases, if the arbitrator should find that because of failure to follow mandated procedures, or in a case of arbitrary or discriminatory application of said procedures, the result is "such that no academic judgment could have been made with respect to the reappointment of such employee, and a further period is necessary"

to correct the prior non-compliance with mandated porocedures, the arbitrator may direct a reappointment for a period of up to one year without a further reference to the institution (CBA Article 20.5(d)(1).

Article 20.6 states:

> In no case shall the arbitrator have the authority to add to, subtract from, modify or amend the provisions of this agreement or the bylaws of the board

Under the circumstances here, the arbitrator had no authority to direct remedial action regarding future appointment decisions since the CBA set out very specific enumerated remedies in the event of the finding of a breach and the remedy directed here is not included in the CBA. As the court held, an arbitrator "is not free to fashion a remedy outside the scope of the limiting language of the agreement" (see, *Matter of the Town of Newburgh v Civil Service Employees Association, Inc.*, supra). That the stipulation of issues to be decided by the arbitrator ended by posing the question, "If so [i.e., that discrimination were found], what shall be the remedy?", does not, in the opinion of this court, give license to the arbitrator to fashion a non-enumerated remedy (see, *Matter of the Town of Newburgh v Civil Service Employees Association, Inc.*, supra), but rather, asks the arbitrator to chose from amongst the permissible remedies. Nor can CUNY's failure to move to vacate awards in two other cases be construed as a waiver of CUNY's right to insist on compliance with the CBA. As CUNY indicates, in the 1998 *Kalia* case, CUNY argued that the prior 1983 *Gologor* case had been wrongly decided.

Accordingly, CUNY's motion to vacate that part of the award which directs future reappointment decisions to be made by a Select Faculty Committee is granted, and the cross-motion to confirm that part of the award is denied, and the award is otherwise confirmed. Aiello is not damaged in any way by this determination. Should future tainted decisions ensue, she is free to grieve those and to be vindicated, as she has been is this case, without the arbitrator's resorting to remedies *dehors* the CBA.

This constitutes the order and judgment of the court.

DATED: MARCH 17, 2001

PAULA J. OMANSKY
J.S.C.