

Matter of Lipsky v New York Inst. of Tech.

2008 NY Slip Op 30357(U)

January 29, 2008

Supreme Court, Nassau County

Docket Number: 6296-07/

Judge: Thomas A. Adams

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SHORT FORM ORDER**SUPREME COURT - STATE OF NEW YORK***Present:*

HON. THOMAS A. ADAMS,
Acting Supreme Court Justice

TRIAL/IAS, PART 37
 NASSAU COUNTY

In the Matter of the Application of
 PAUL LIPSKY for Judgment pursuant to
 CPLR Article 78,

Petitioner(s),

MOTION DATE: 11/14/07

INDEX NO.: 16296/07

-against-

SEQ. NO 1&2

NEW YORK INSTITUTE OF TECHNOLOGY, AND
 BOARD OF TRUSTEES OF THE NEW YORK
 INSTITUTE OF TECHNOLOGY,

Respondent(s)

The petitioner's application, pursuant to CPLR Article 78, to reverse and annul the respondent Board of Trustees of the New York Institute of Technology's 5/18/07 determination denying him tenure as arbitrary and capricious and the respondents' cross motion, pursuant to CPLR §7804(f), to dismiss the petition are determined as hereinafter provided.

On or about 7/23/99 the petitioner was appointed as an Assistant Professor of Communications Arts- a tenure track position- at the respondent New York Institute of Technology. In accordance with the parties' applicable collective bargaining agreement, he became eligible for tenure after six years of full-time employment. On 5/20/05 the Board of Trustees denied his application for tenure and promotion to Associate Professor (see petitioner's exhibit 15).

However, on 10/16/05 the Faculty Appeals Board (FAB) issued a memorandum concluding "that the evidence on record does not support the reasons stated by the administration in denying tenure to [the petitioner]. Further the FAB believes that there is a procedural error in this case (the inappropriate selection of faculty for the SPC [School Personnel Committee]) and recommends that a more representative SPC should be elected to conduct a reexamination of [the petitioner's] portfolio. The new report

should be forwarded to Dr. Yu [Dean, School of Arts, Science and Communications] and ultimately to Dr. Alexandra Logue [Provost] for consideration of [the petitioner's] tenure" (see petitioner's exhibit 16). Thereafter, on 8/31/06 the petitioner's probationary employment was extended for an additional year or through the 2006-2007 academic year until 8/31/07.

More specifically, that agreement (see exhibit to 10/15/07 affidavit of respondents' General Counsel and Secretary, Stephen J. Klopepfer, Esq.), drafted by the respondents, provides, inter alia, that he would be reconsidered for tenure in the 2006-2007 academic year pursuant to the terms of the collective bargaining agreement "as modified by [the] agreement." The "re-review" would be conducted by "the new Vice President for Academic Affairs and Provost, with a recommendation to the President, and a final determination by the Board of Trustees" but would "not involve the Departmental Personnel Committee, the School Personnel Committee, or the Dean, unless the President, at his sole discretion, and without precedential value, chooses to consult with either committee or the Dean."

Moreover, the parties agreed that "[i]n the event that [the petitioner] is not granted tenure, his employment with NYIT will terminate effective August 31, 2007; he will not be entitled to appeal the tenure denial to the Faculty Appeals Board, and expressly waives those rights; and he will not be entitled to grieve or arbitrate the tenure denial and expressly waives those rights." Finally, on 5/18/07 the Board of Trustees once again voted to deny the petitioner tenure prompting this application (see petitioner's exhibit 18). His petition alleges, in sum, that the respondents violated the criteria and procedures to determine tenure applications delineated within the collective bargaining agreement, as modified on 8/31/06 (see petition, para.24).

That agreement explicitly states, inter alia, that "[t]he decision of the Board on all matters of tenure and terminal contracts shall be final and binding and shall not be subject to arbitration." (Article XIV, paragraph 8[h]). Section 10(b) of Article XVIII, "Personnel Procedures," reiterates that "the decision of the Board shall be final and binding and shall not be subject to arbitration." It also contains a broad grievance provision which defines grievance as "any dispute between a member or members of the bargaining unit or the [union] and the institute involving the application and/or interpretation of the specific terms of [the] Agreement" (Article XXIII, section 2[b]). However,

even assuming, arguendo, that the respondents' 5/18/07 denial of the petitioner's reconsidered tenure application can be fairly characterized as a "termination" subject to that provision, the third step of the three step grievance procedure is arbitration before the American Arbitration Association (Article XXII, section 5) and, as noted, arbitration of a denial of tenure is prohibited by both the collective bargaining agreement and 8/31/06 agreement.

The respondents argue that as the result of the petitioner's express waiver of the right to grieve or arbitrate the Board of Trustees' determination, he lacks standing "to challenge the decision denying tenure in this forum, or any other forum" (see respondents' 10/15/07 memorandum of law, p.4). Rather, they contend that the modification agreement constituted "an accord and satisfaction" pursuant to which, in consideration of an additional year of employment, he, in effect, surrendered the right to contest the Board's denial of tenure following the "re-review" (see respondents' 11/12/07 reply memorandum of law, pp. 3 & 8). In the alternative, notwithstanding the collective bargaining agreement and 8/31/06 agreement's mutual prohibitions against arbitration of the Board of Trustees' decision, the respondents seek an order, pursuant to CPLR §7503(a), compelling that remedy. Indeed, despite the restriction in the collective bargaining agreement, a number of other professors who were previously denied tenure reportedly filed grievances which culminated in arbitration proceedings (see Mr. Kloepfer's 11/12/07 reply affirmation, paras. 4-6). At least one member (i.e., Professor Synder's) grievance was allegedly filed after a comparable "reconsideration" by the Board (id at para.9).

"It is well settled that judicial review of a determination of an educational institution with respect to the appointment, promotion and retention of faculty is limited" (Perinpanayagam v University at Buffalo, 39 Ad3d 1220,1221; see Berkeley-Caines v St. John Fisher College, 11 AD3d 865). However, "[a] university 'having accepted a state charter, can be compelled in an Article 78 proceeding to fulfill not only obligations imposed upon [it] by state or municipal statute's but also those imposed by [that institution's] internal rules'..... Thus, 'an appropriate inquiry may be made, not for the purpose of substituting the judgment of the court for the judgment and discretion of the respondent[s], but to determine whether respondent[s'] actions... violated the [university] rules and w[ere] arbitrary and capricious" (Pepinpanayagam supra at 1222 quoting Gertler v Goodgold, 107

AD2d 481,486, affd. for reasons stated at Appellate Division 66 NY2d 946; see Matter of Berkeley-Caines supra at 896). Simply stated, "[i]t is now well established that a party aggrieved by the denial of tenure may maintain a CPLR Article 78 proceeding to test whether a college's denial of tenure violated college rules and was arbitrary and capricious " (Roufaiel v Ithaca College, 241 AD2d 865,867; see Matter of Gray v Canisius College, 76 AD2d 30,33; Matter of Skorin-Kapov, 281 AD2d 632). The respondents' reliance upon Matter of Postel v St. Joseph's College, 8 AD3d 289,290 is misplaced. In that instance, unlike here, where the filing of a grievance and arbitration of the petitioner's claim is explicitly precluded, the faculty handbook mandated that the allegations be addressed under the grievance procedure.

Accordingly, the respondents' cross motion, pursuant to CPLR §7804(f), to dismiss the petition is denied and they shall therefore interpose their verified answer within thirty(30) days of this order.

The Court hereby schedules a 3/5/08 (9:30am) preliminary conference in this matter to be held in the Preliminary Conference Part (lower level).

Dated: _____

1-29-08



A.J.S.C.

ENTERED

FEB 04 2008
NASSAU COUNTY
COUNTY CLERKS OFFICE