

<b>Matter of Lipsky v New York Inst. of Tech.</b>
2008 NY Slip Op 32661(U)
September 25, 2008
Supreme Court, Nassau County
Docket Number: 16296/07
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 a Judgment Pursuant to CPLR  
Article 78,

Petitioner(s),

MOTION DATE: 8/21/08

INDEX NO.: 16296/07

-against-

SEQ. NO. 3

NEW YORK INSTITUTE OF TECHNOLOGY, and BOARD OF  
TRUSTEES OF THE NEW YORK INSTITUTION OF  
TECHNOLOGY,

Respondent(s).

The petitioner's application, pursuant to CPLR article 78, to reverse and annul the respondents' May 18, 2007 determination which, following a "re-review", denied him tenure, as arbitrary and capricious is determined as hereinafter provided.

The factual and procedural history of this contentious dispute is delineated within the court's prior January 29, 2008 and July 30, 2008 orders and therefore need not be repeated at length. Succinctly stated, on or about July 23, 1999 the petitioner was appointed an Assistant Professor of Communication Arts at the New York Institute of Technology and on May 20, 2005 the school's Board of Trustees denied his request for tenure and promotion to Associate Professor.

Approximately five months later, however, on October 16, 2005 the Faculty Appeals Board issued a memorandum recommending a "re-examination of [the petitioner's] portfolio". More specifically, following negotiations, the petitioner's probationary period was extended for an additional (2006-2007) academic year and his application for tenure underwent a "re-review". Pursuant to the parties' July 28, 2006 agreement, the collective bargaining agreement was modified solely to the extent that the Vice President for Academic Affairs and Provost, Richard Pizer, conducted a "re-review" and his recommendation to the school's president, Edward

Guiliano, and Board of Trustees was not to "involve the Department Personnel Committee [DPC], the School Personnel Committee [SPC], or the Dean, unless [President Guiliano], at his sole discretion, and without precedential value, [chose] to consult with either Committee or the Dean". Ultimately, on May 18, 2007 - consistent with Vice President Pizer and President Guiliano's recommendations (after President Guiliano's consultation with the School Personnel Committee) - the Board of Trustees, once more, denied the petitioner's application prompting this special proceeding.

Following the March 28, 2008 joinder of issue, the petition was denied by order and judgment dated May 16, 2008. On July 30, 2008, however, the petitioner's motion, pursuant to CPLR §7804(e), to vacate the May 16, 2008 order and judgment due to the absence of a complete certified record was granted and the motion was, in effect, resubmitted upon the entire record on August 21, 2008.

The petitioner's central argument - reiterated on May 23, 2008 and August 20, 2008 - is that President Guiliano "abdicated his decision making process to [a] prejudiced School Personnel Committee and relied on them to make the determination denying [him] tenure". This determination was, moreover, allegedly made without complying with the relevant procedural requirements of the collective bargaining agreement and therefore characterized as merely "[t]he drumhead of determination of a politically biased committee ungoverned by objective criteria [which] deprived petitioner of a fair hearing" (May 23, 2008 and August 20, 2008 affirmations of John J. Reilly, Esq., pp. 6 & 7 and 5 & 6, respectively).

A review of the certified record reveals, inter alia, that on May 14, 2007 President Guiliano e-mailed a member of the School Personnel Committee, Professor Peter Voci, charging the committee with the task of advising him as if the petitioner's application was "anonymous" instead of the highly charged issue it had become (see Exhibit A).

The Committee's subsequent report (see Exhibit B) contained individual evaluations from each of its six faculty members. Five of the recitations concluded, with varying degrees of emphasis, that the petitioner's scholarly and creative work did not surpass

the requisite threshold. The remaining faculty member, Associate Professor Robert Sherwin, chose merely to highlight an issue that each of the others also referenced, the difficult and emotional context in which the "re-review" was undertaken.

For example, while another committee member, Professor Don Fizzinoglia, opined, inter alia, "that, despite President Guiliano's charge, it [was] impossible to separate [the petitioner's] current application from past rancorous encounters, turf issues, hard personal feelings, and other prejudices that surface often when [his] name comes up", he concluded that the petitioner had performed strongly in the areas of "service" and "teaching" but "still has a way to go to count himself a strong candidate with regard to 'scholarship'". For his part, Associate Professor Sherwin, unlike his colleagues, did not offer a specific recommendation and simply stressed the "intense and sometimes venomous feelings [that] were brought to bear on [the petitioner's] evaluation".

On May 17, 2007 Vice President for Academic Affairs and Provost Pizer agreed with the School Personnel Committee's findings and recommended to President Guiliano that the petitioner be denied tenure (see Exhibit E). On May 18, 2007 the Board of Trustees voted, for a second time, against his reappointment with tenure (see Exhibit F).

As discussed at length in the January 29, 2008 order, "[i]t 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 New York Institute of Technology v State Div. Of Human Rights, 40 NY2d 316,322; Berkeley-Caines v St. John Fisher College, 11 AD3d 895).

However, "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 the respondent[s'] actions ... violated the [university] rules and w[ere] arbitrary and capricious" (Perinpanayagam 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). As a matter of public policy, courts are particularly sensitive about entertaining such claims because "to do so would require the courts not merely to make judgments as to the validity of board educational policies - a course we have unalteringly eschewed in the past - but, more importantly, to sit in review of the day-to-day implementation of those policies'" (Gertler supra at 486 quoting Torres v Little Flower Serviices, 64 NY2d 119,125).

Here, contrary to the petitioner's contention, the record does not support the conclusion that President Guiliano and the Board of Trustees abdicated the decision making process to a prejudiced and biased School Personnel Committee. Rather, in accordance with the terms of the parties' collective bargaining agreement, as modified on July 28, 2006, President Guiliano consulted with the SPC and, together with Vice President for Academic Affairs and Provost Pizer, subsequently concurred with its recommendation. Moreover, unlike in Bennett v Wells College, 219 AD2d 352, upon which the petitioner relies, the respondents did not depart from their own procedures in conducting the review (see also Skorin-Kapou v State University of New York, 281 AD2d 632), but instead proceeded pursuant to the collective bargaining agreement as explicitly modified on July 28, 2006.

Accordingly, the petitioner's application, pursuant to CPLR article 78, to reverse and annul the respondents' May 18, 2007 determination which denied him tenure as arbitrary and capricious is denied.

The foregoing constitutes the order and judgment of the court.

Dated: 9-25-08

  
A. J. S. C.

**ENTERED**

SEP 29 2008

NASSAU COUNTY  
COUNTY CLERK'S OFFICE