

## Annual Appointees' Rights to Notice of Non-Reappointment Attacked

### President McCormick Rejects Opinion and Award of Arbitrator -- Reaffirming Need for Binding Arbitration

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In a troubling decision impinging on the rights of faculty in non tenure-track positions to clear and unequivocal notice of non-reappointment, President McCormick rejected the decision of an arbitrator jointly selected by the AAUP and Rutgers University. Arbitrator Richard Adelman, a member of the National Academy of Arbitrators and long-term member of the joint panel, was appointed to hear and decide a dispute regarding the non-reappointment of a faculty member in the School of Engineering. The aggrieved faculty member held a half-time appointment at Rutgers continuously for 23 years. The dispute pertained to University Regulation 3.3.16 (now 60.5.12) and the right to appropriate notice of non-renewal of renewable annual contracts.

Following failed attempts to resolve the matter internally and through the steps of the internal grievance process, the union filed for arbitration. At a hearing held on February 3, the attorneys for each side presented documents and witnesses in support of their respective positions. The positions were as follows:

#### AAUP:

For 23 years, the grievant received letters of appointment which set forth the beginning and end date of his appointments, i.e., July 1 to June 30. Beginning in 1991, the letters included the statement: "There will be no further notice of expiration of this appointment." (emphasis added).

As in the previous 22 years of his appointment, the grievant understood that his appointment was for one year and expired on June 30. He also understood that he held a "renewable" appointment and was entitled to reappointment unless specifically told otherwise in writing. On June 18, just 12 days before the expiration of his then current one-year appointment, the grievant was verbally told by the Vice Chair of the Department that he was not being rehired due to budget cuts. The grievant testified that he was "flabbergasted" by the news and, moreover, the way in which he was informed -- in an open office, in front of staff, in an insulting manner. He received a letter approximately one week later confirming in writing that he would not be reappointed. The letter thanked him for his distinguished teaching and service to the University and for his significant financial contributions (he made donations to the University on a regular basis).

University Regulation 60.5.12 requires that the University give all faculty members, holding appointment for one year or more with limitation of term, written notice of non-reappointment 12 months in advance of the expiration of their appointment if they have been employed for two or more years. (A different schedule exists for faculty in their first or second year of employment.) The union argued that "notice of expiration of appointment" and "notice of non-reappointment" are distinct and require two different actions. The University's policy on Annual Appointees states that the intent of the notice provisions in the regulations is to provide faculty members "clear and unequivocal notice of non-reappointment."

The inclusion of "no further notice of expiration" in the boilerplate appointment letters fails to provide "clear and unequivocal notice of non-reappointment" and fails to meet the requirements for notice of non-reappointment as required in 60.5.12. In addition, the union presented evidence that the University's claimed reasons for non reappointment were pretextual.

Rutgers:

The position advanced by Rutgers at the hearing was that the language in appointment letters which provides, "There will be no further notice of expiration of this appointment," satisfies the notice requirements of 60.5.12 to provide "written notice of non-reappointment." Dr. Stubaus (Assoc. VP for Faculty Affairs) testified that, "That sentence, every time he [the faculty member] gets it, should put him on notice that unless he gets a different letter saying we are able to give [him] another appointment that he has no expectation of another appointment." The sentence also, she maintained, meets the requirements for "clear and unequivocal notice" of non-reappointment found in University policy on Annual Appointments. The attorney representing the University (Lisa Wahler) stated in her brief: "Simultaneous notice of appointment and non-renewal is a standard practice at the University and to require the University to do other than simultaneously provide notice of appointment and non-renewal would provide annual appointees with a benefit not negotiated with the Union. . . and not mandated by University Regulation."

Arbitrator's Findings:

The Arbitrator found that Rutgers violated 3.3.16 and failed to provide the grievant with sufficient notice of non-reappointment. He also ruled that the memorandum from Dr. Stubaus (policy on Annual Appointments) which requires that faculty "receive a clear and unequivocal notice of non-reappointment" was not met by the language included in the annual letters of appointment, i.e., "There shall be no further notice of expiration of this appointment."

The Arbitrator awarded the grievant compensation equal to one year of salary less any income earned during the (notice) year he was entitled to.

President McCormick:

President McCormick disagreed with the Arbitrator's finding and rejected the award. McCormick informed the grievant that the University meets its obligations under 3.3.16 for notice of non-reappointments by including (in letters of appointment) the sentence that the appointment will expire and that no further notice of the expiration will be provided. He reduced the compensation awarded by the arbitrator (one year less any income earned) to 29 days of compensation for the period July 1 to July 29. (The grievant received his appointment letter on July 29 and, because this is the letter that Rutgers' asserts provides both notice of appointment and non-reappointment, it was due no later than June 30 -- thus the 29 days of pay.)

Conclusion:

The provision of 60.5.12 is meaningless if the "no further notice of expiration" language contained in the annual appointment letters is considered to provide clear and unequivocal notice of non-reappointment to an individual who is, in fact, renewed year after year.

Most Article IX grievances advance allegations defined as "Category Two" violations and are, by restrictions in the Agreement, subject only to advisory arbitration. This means that, although there is a full hearing with witnesses testifying under oath before a professional arbitrator, the decision flowing from the hearing comes back in house and the President of the University may accept, reject or modify what the arbitrator has ruled. During the last round of negotiations,

when the AAUP pressed for expansion of issues subject to binding (not advisory) arbitration, the administration's team asserted that there wasn't reason to believe that McCormick would, in fact, reject the considered decisions of an outside neutral. There was no "track record." Two points are now perfectly clear:

1. Protections for annual appointees must be secured through negotiations and through provisions guaranteed in the collective agreement. One cannot rely on a plain reading of University Regulations and policy with regard to an individual's right to know in advance that he/she will not be reappointed.
2. In order to ensure that remedies are available to individuals who have been wronged through a violation or misapplication of University Regulations and policy, violations alleged under the Article IX grievance procedure must be subject to binding arbitration.