ARBITRATOR'S OPINION & AWARD

Before Michael W. Stutz, Arbitrator

In the Matter of Arbitration between

FEDERATION OF TECHNICAL COLLEGE TEACHERS, AMERICAN FEDERATION OF TEACHERS, LOCAL 1942, AFL-CIO

-and-

BOARD OF TRUSTEES OF COMMUNITY-TECHNICAL COLLEGES

Tenure Process Grievance

AWARD of the ARBITRATOR

The undersigned arbitrator, having been designated in accordance with the Parties' arbitration agreement, and having duly heard the proofs, allegations and contentions of the Parties, AWARDS as follows:

1. The Board violated Article XII of the collective bargaining agreement in connection with the tenure process at Norwalk Community College in the fall of 2002.

2. As remedy, the Employer shall form a Tenure Committee pursuant to the Contract and shall submit all applications for tenure to it.

April 19, 2004

Michael W. Stutz

BACKGROUND

A hearing in this matter was held in Rocky Hill, Connecticut on January 29, 2004, before the undersigned, appointed arbitrator by the parties pursuant to their collective bargaining agreement. Ferguson & Doyle, P.C., by James C. Ferguson, Esq., represented the Union. McCarter & English, LLP, by Richard Voigt, Esq., appeared on behalf of the Employer. Both parties submitted written closing argument.

AGREED ISSUES

The parties submitted the following questions to arbitration:

1) Did the Board violate Article XII of the collective bargaining agreement in connection with the tenure process at Norwalk Community College in the fall of 2002?

2) If so, what shall be the remedy?

STATEMENT OF THE CASE

The Board of Trustees of Community-Technical Colleges (the "Board," "Employer," or "management") and the Federation of Technical College Teachers, American Federation of Teachers, Local 1942, AFL-CIO (the "Union") are parties to a collective bargaining agreement (the "Agreement" or "Contract") that provides for the arbitration of disputes between the parties. This case concerns the procedure for tenure consideration.

Norwalk Community College (the "college") has teachers represented by the Union and others who are represented by the Congress of Connecticut Community Colleges (the "4 C's"). The separate collective bargaining agreements of the two unions include provisions for applying for tenure that are largely, although not entirely, the same.

The facts in this case are not in dispute. On October 1, 2002, Norwalk Community College President William Schwab notified members of

the Union bargaining unit that none of its members were eligible for tenure:

> In accordance with contract requirements, the following list represents A.F.T. Bargaining Unit members who are eligible for tenure for the 2003/2004 contract year.
>
> **NONE**
>
> If your name does not appear on this tenure eligibility list, but you feel you should be considered for tenure this year, please contact Ginny DellaMura, Director, human Resources, to discuss the circumstances immediately.
>
> All materials must be submitted to the Office of the President no later than Thursday, January 2, 2003.

On October 3, 2002, the Union submitted a list of four proposed members of a Tenure Committee, but no committee was assembled.

On October 18, 2002, the Union filed a step 1 grievance with President William Schwab complaining that the notice quoted above violated the parties Agreement.

> This is to request a "Step 1" grievance hearing regarding the validity of the memo entitled A.F.T. Bargaining unit members eligible for tenure, published by the office of the president on October 1, 2002. I believe this document to be in violation of Article XII of the collective bargaining agreement and would appreciate an opportunity to discuss this matter in more detail at your earliest convenience.

On November 18, 2002, President Schwab denied the grievance because posting of the eligibility list is done in accordance with guidelines provided by the Chancellor's office.

Also on November 18, 2002, President Schwab responded to Professor Marilyn Seman's inquiry regarding her eligibility to be considered for tenure during the 2002-2003 process:

> The language in the AFT contract provides that for faculty hired after July 1, 1992, a tenured appointment "normally" will not be offered until the faculty member has completed six (6) years of full-time, tenure track employment with the Board. While that language provides the Board with a measure of flexibility, it does not entitle an individual to apply for tenure before he/she has the required number of years.
>
> Our records indicate that you were hired as an Instructor, effective January 20, 1998. You will be eligible to apply for tenure during the 2003-04 process, with award of tenure possible effective withy the 2004-05 academic year.

The Contract includes a newly-added six year time requirement for offers of tenure that was awarded in interest arbitration to replace a prior three-year period of service requirement before being eligible to be considered for tenure. The six-year requirement is, however, modified by the word "normally."

> 12.2.1
>
> ...
>
> A tenured appointment normally will not be offered until the Faculty Member has completed six (6) years of full-time, tenure track employment with the Board. Tenure may be offered by the Board only to Faculty Members on a full-time regular appointment, provided that service on a special appointment may, in the Board's discretion, be counted toward the six (6) year requirement if such service has been continuous with service on a regular appointment. There shall be no express or implied right to the award of tenure.
>
> 12.2.2 The following procedures shall govern the consideration of bargaining unit members for tenured appointments.

a. A college-wide Tenure Committee shall be formed at each college, consisting of four tenured Faculty Members, elected by the Faculty and two members of the Administration selected by the President. ...

b. The President shall make recommendations for award of tenure to the Board. The President shall consider the recommendations of the Tenure Committee. If the President's recommendation for the award of tenure does not agree with the recommendation of the Tenure Committee, the President shall notify the Faculty Member involved and the Union President, in writing, and shall provide said Faculty Member, in writing, with the reason(s) for such action.

...

d. Tenure is granted by the Board after consideration of the recommendation of the President and is continuous, provided that the Board may accept the recommendation of the President or reach such other decision as may be in the best interests of the Community College System. Should tenure be denied by the Board, the Faculty Member affected shall be so advised in writing and shall have the option to appear before the Board or a Committee thereof, with representation, to appeal the Board's decision. The decision of the Board on the appeal shall be final.

[Emphasis supplied]

In awarding the increase in the years of service required from three to six, Arbitrator Tim Bornstein wrote,

> ... but nothing in the Board's proposal requires a faculty member necessarily to wait six years before tenure may be awarded. On the contrary, it provides that "normally" tenure will be offered only after six years' service. He or she may request credit towards tenure based on prior experience and request an early tenure decision. That is standard practice in higher education.

During written argument in the interest arbitration, the Board acknowledged that the word "normally" meant that a shortened period was possible:

> ... the Board's offer states that the decision to offer a tenure appointment will not "normally" be offered until the sixth year of employment. It is the Board's view that this language provides the opportunity for a shortened e valuation period, if circumstances dictate.

POSITIONS OF THE PARTIES

Union:

The Union argues that the grievance in this matter presents three issues: 1) Whether the contract allows the Employer to make a determination of who is eligible to apply for tenure prior to the process through the utilization of an eligibility list; 2) whether the Employer can refuse to form a Tenure Committee; and 3) whether the Employer can refuse members with less than six years service access to the Tenure Committee.

Concerning the eligibility list, the Union contends that there is no basis in the Agreement for such a list, and suggests further, that such a list effectively nullifies the provisions of Article 12.2.2 by unilaterally foreclosing the rights of members of the bargaining unit to apply and be considered for tenure.

The Union asserts that the Agreement requires the formation of a Tenure Committee. Therefore, the Employer's failure to form such a committee violated the Agreement and denied faculty the opportunity to be considered for tenure pursuant to the Agreement.

The Union asks the arbitrator to find that the Employer violated the Agreement by issuing an eligibility list, by failing to form a college-

wide Tenure Committee, and by denying Professor Seman and others the opportunity to be considered for tenure.

Employer:

The Employer argues that it has the right to perform a preliminary screening of members seeking tenure, and to publish a list of those eligible. The Employer notes that the list includes the statement that anyone who feels their name should be on the list should contact management promptly. According to the Employer, the existence of a requirement in its contract with the 4C's union for such an eligibility list does not translate into a prohibition of such a list for AFT members whose Contract does not include the same requirement. The Employer states that the publication of such a list is consistent with the letter and spirit of the Contract and "reflects an orderly administrative process at merged colleges."

With respect to the preliminary screening of tenure applicants, the Employer asserts that it is within management's reserved rights to perform such screening. According to the Employer, the Contract does not require that the Tenure Committee review applications for eligibility for consideration for tenure, and, therefore, in the absence of any explicit provision for such a duty, it is retained by management. The Employer also suggests that Arbitrator Bornstein's discussion of the six year requirement and its modification by the word "normally" was simply dicta and is not a binding interpretation.

For these and other reasons, the Employer asks the arbitrator to deny the Union's grievance.

OPINION

Although the grievance was limited to the allegation that the Employer's eligibility list violated the Agreement, the parties agreed to a broader statement of issue that includes the Employer's failure to assemble a Tenure Committee and the question of which entity under the Agreement, the college President or the Tenure Committee, properly determines whether an applicant's years of experience and service

should make them eligible for consideration for tenure. The agreed issue is,

> Did the Employer violate Article XII of the collective bargaining agreement in connection with the tenure process at Norwalk Community College in the fall of 2002? If so, what shall be the remedy?

Thus, the matter in dispute concerns the propriety under Article XII of the Agreement of the tenure process at Norwalk Community College (the "College") in the fall of 2002. There is no dispute about this process during the fall of 2002.

On October 1, 2002, the Employer issued a memorandum notifying members of the bargaining unit that no one was eligible for tenure for the 2003-2004 contract year and inviting inquiry from faculty who felt they should be eligible for consideration for tenure. Shortly thereafter, on October 3, 2002, the Union submitted a memo with the names of four teachers recommended for an AFT Tenure Committee. No Tenure Committee was ever assembled to consider granting tenure for the 2003-2004 contract year. On October 18, 2002, the Union filed a grievance alleging that the October 1st memo regarding eligibility for tenure violated Article XII of the Agreement. On November 18, 2002, President Schwab notified Assistant Professor Marilyn Seman, in response to her inquiry, that she was not eligible for tenure because she had not completed six years of full-time, tenure track employment with the Board. President Schwab also observed,

> While that language [that six years of service is <u>normally</u> required] provides the Board with a measure of flexibility, <u>it does not entitle an individual to apply for tenure before he/she has the required number of years</u>.
> [Emphasis supplied]

Resolution of the issue in this case involves interpreting the parties' Contract and applying that interpretation to the tenure process during the fall of 2002.

The procedure in the Contract for the award of tenure is set forth in Article 12.2. Written applications are submitted to the President of the College. In this case, the President received inquiry about eligibility from at least one faculty member, Professor Seman, and responded to her that she was not eligible to apply for tenure before serving the required six years in a full-time, tenure track position with the Board. The procedure calls for applications to be referred to a Tenure Committee comprised of four tenured faculty members "elected" by the faculty and two members of the administration selected by the President. The Tenure Committee is empowered under the Agreement to recommend to the President that a tenured appointment be granted, or not granted and a regular appointment issued or not granted and a terminal appointment issued. The President, in turn, is required by the Agreement to consider the recommendation of the Tenure Committee. The President is not required to follow the recommendation of the Tenure Committee, but if s/he does not do so then s/he must give reasons in writing to the faculty member. After the Tenure Committee has recommended to the President that tenure be awarded to a member of the faculty, the President is authorized under the Contract to make recommendations for award of tenure to the Board of Trustees of Community-Technical Colleges. The Board has the final power to grant tenure, which it does after considering the recommendation of the President.

It is undisputed that the six-year service requirement to be eligible for tenure has been modified by the word "normally." The Agreement provides, "A tenured appointment normally will not be offered until the Faculty Member has completed six (6) years of full-time, tenure track employment with the Board." This language, read in conjunction with the Bornstein interest arbitration decision and the parties' briefs in that case, certainly provides some flexibility in the six-year service and/or experience requirement.

There are two central questions to be resolved in the instant arbitration: 1) Did the Employer violate the Agreement when it issued the memo notifying the bargaining unit that no one was eligible for tenure; and 2) Did the Employer violate the Agreement when it failed to establish a Tenure Committee to determine whether faculty applicants for tenure

with fewer than six years continuous service should be considered eligible for consideration for tenure.

The Memo

The memo was inoffensive and did not violate the Agreement as its only purpose was to notify the bargaining unit of the teachers who, in the view of management, have met the six-year service requirement, and to invite faculty whose names were not listed but who believed that they were eligible to be considered for tenure to communicate promptly to management the reasons they should be considered. Nothing in the Agreement prohibits management from issuing such a notice to the bargaining unit. Furthermore, since the 4C's collective bargaining agreement requires such notice, at a merged institution such as the College, there is something to be said for consistent, equal notice to members of both bargaining units.

Additionally, the October 1st memo invites faculty whose names are not listed, but who believe they are eligible, to notify management of the reason they believe they should be eligible. Considering that the Agreement includes some flexibility in the six-year service requirement, the memo provides an opportunity for faculty who seek a flexible application of the requirement to state their case.

For these reasons, I do not find that the memo violated the Agreement.

Tenure Committee

The more difficult question raised in this arbitration concerns whether the initial determination of eligibility for consideration for tenure should be conducted by the President of the college or by the Tenure Committee. For the reasons that follow, I conclude that the Tenure Committee should have the opportunity to consider the question, and to advocate on behalf of the applying member with the President, although the President, and, ultimately, the Board have the final say in awarding tenure.

Given the mandatory terms of the Agreement's provision that, "A college-wide Tenure Committee shall be formed at each college..." it really is beyond dispute that the college's failure to form a Tenure Committee in this case violated the mandatory requirement that such a committee be formed. Of course, if none of the faculty were eligible for tenure consideration, then the failure to form such a committee was, at most, a harmless, technical violation of the Agreement.

However, it is also beyond dispute that the parties' intended some flexibility in calculating compliance with the six-year requirement. In this case, there was at least one faculty member who apparently felt she should be considered for tenure even though she had not yet completed six (6) years of full-time, tenure track employment with the Board. Thus, the question is raised whether the Contract requires that applying faculty have the right to consideration of their eligibility by a Tenure Committee or whether the President can determine that an applicant is not eligible without referring the question to a Tenure Committee.

The tenure process set out in the parties' Agreement consists of three steps to achieve tenure: 1) Recommendation for tenure to the President by a Tenure Committee consisting of four tenured faculty members and two members of the administration; 2) Recommendation by the President to the Board that tenure be granted; and 3) The grant of tenure by the Board. Under this procedure, all three entities have the power to reject an application for tenure, but ultimate authority lies with the Board. Both the Tenure Committee and the President may only recommend an applying member of the faculty for tenure.

Reading the procedure in its entirety, it is clear that the Tenure Committee is an important step of the process. This committee may act as an advocate for faculty interests as it is dominated by four tenured faculty members versus only two members of the administration.

Management argues that only eligible candidates for tenure, as determined by the President of the college, may be considered by the Tenure Committee. Although the Employer argues strenuously in support of this position, I cannot agree.

Several significant employee benefits are at stake here: 1) the right to some flexibility in the six-year requirement; 2) the right to be considered by the faculty-leaning Tenure Committee; and 3) the right to the Tenure Committee's advocacy with the President should the Tenure Committee conclude that an applicant should be deemed eligible.

1. The flexibility in the six-year requirement, as explained by Arbitrator Bornstein in awarding it, and as acknowledged in the Board's briefs in that interest arbitration, is a benefit to members of the bargaining unit with service or experience that may not technically meet the six-year requirement. This benefit was proffered by management as a reason for the Interest Arbitrator to accept the Board's proposal in the interest arbitration that increased the required years service for tenure from three to six. By giving the President of the college authority to forgo referring a potentially eligible applicant to the Tenure Committee based on what appears to be a rather inflexible interpretation of the six-year requirement threatens to deny the bargaining unit the benefit of the promised flexibility.

2. The Tenure Committee's composition, with four tenured faculty and two administration representatives, gives it the potential to serve as an advocate for faculty interests. It is also the first entity in the procedure to consider an application for tenure. The Tenure Committee should be able to consider the question of whether or not a particular applicant's service and experience should make them eligible for consideration.

3. When the Tenure Committee finds that an applicant's service and experience is sufficient, it can advocate for this position with the President, either in a recommendation for tenure, or in a more informal or preliminary way. This possibility of advocacy by the Tenure Committee with the President is an important benefit under the procedure.

I appreciate that this interpretation requires forming a Tenure Committee even in circumstances where the President believes that no one is eligible for consideration for tenure, and that meetings of the Tenure Committee consume valuable time of both faculty and the administration. However, in order to protect valuable rights and benefits of the

bargaining unit, I find that the Contract requires formation of a Tenure Committee and submission to it of all faculty applications for tenure.

Conclusion

The October 1st memo did not violate the Agreement. The Agreement does not prohibit such a memo, it is required by the 4C's collective bargaining agreement and the memo invites faculty who are not listed, but feel they should be, to immediately contact the administration.

The failure to assemble a Tenure Committee and submit requests for consideration for tenure to it violated Article XII of the Agreement. The right of members of the bargaining unit to be considered for tenure by a Tenure Committee includes the right to have that committee consider eligibility under the somewhat flexible six-year requirement.

As remedy, the Employer shall form a Tenure Committee and shall submit all applications for tenure to it.

April 19, 2004

Michael W. Stutz