[Cite as *Kent State Univ. v. Am. Assn. of Univ. Professors - Kent State Chapter,* 2011-Ohio-5597.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

KENT STATE UNIVERSITY,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2010-P-0064**
- vs -	:	
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS – KENT STATE CHAPTER,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2009 CV 00258.

Judgment: Affirmed in part, reversed in part, and remanded.

Christopher F. Carino, Brouse & McDowell, 500 First National Tower, 388 South Main Street, Akron, OH 44311 (For Plaintiff-Appellant).

Cornelius J. Baasten, Baasten, McKinley & Co., L.P.A., 4150 Belden Village Street, N.W., #604, Canton, OH 44718-3651 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Kent State University ("KSU"), appeals from the judgment of the Portage County Court of Common Pleas, denying appellant's "Motion to Vacate Arbitration Award" and granting the motion to confirm the same award filed by appellee, American Association of University Professors, Kent State Chapter ("AAUP"). For the reasons discussed below, we affirm in part, reverse in part, and remand the matter to the trial court.

{¶2} This appeal arises from the pre-arbitration denial of tenure of two KSU professors. The collective bargaining agreement ("CBA"), to which KSU and AAUP are parties, sets forth the procedures for tenure consideration and appeals processes in the event tenure is not recommended by the academic sector of the university. Generally, faculty members eligible for tenure consideration must develop, organize, and submit evidence supporting their candidacy for tenure. Before a particular tenure committee convenes, all tenured faculty (not members of the tenure committee) in the specific department, college, or school of which the candidate is a member are invited to provide signed written comments pertaining to the candidate. These comments are then forwarded to the tenure committee for consideration.

{¶3} After the faculty-based tenure committee has passed on the candidate's fitness, the matter is reviewed by KSU's Provost, the university's senior academic administrator. If the provost concludes the candidate should be granted tenure, the matter is then forwarded to KSU's President for a final review. If, however, the provost does not recommend tenure, the affected faculty member may appeal the adverse determination under CBA Article VII, Section 2.

{¶4} Article VII, Section 2 sets forth the *exclusive* procedure "under which disputes involving substantive academic judgments affecting a Faculty member's employment status in areas of granting or denial of tenure *** may be appealed." The process provides that, if the provost recommends a faculty member be denied tenure, an adversely affected member of the faculty may initiate an appeal with the Office of the Provost and "shall specifically cite any procedural errors or omissions that were alleged to have occurred in the decisionmaking process." Upon initial review, the Office of the

Provost may, within its discretion, resubmit the appealed decision to the administrative level for reconsideration.

{¶5} If discretionary reconsideration does not occur or reconsideration is denied, the affected faculty member may pursue his or her appeal directly to KSU's President or the university's "Joint Appeals Board" ("JAB"). The JAB consists of a four-member committee comprised of two university faculty members and two KSU administrators. If an affected faculty member selects to have his or her appeal heard by the JAB, the board will review the matter and forward its recommendation to KSU's president. In relation to this procedure, Article VII, Section 2(F)(5) of the CBA provides:

{¶6} "If a majority of the (JAB) concur in a decision, this decision shall be forwarded to the President of the University as the final recommendation of the academic sector on the appealed decision. Upon advance written notice to the convenor of the (JAB), the President may meet with the panel at any time after receiving its report and recommendation for the sole purpose of seeking clarification concerning the bases and implications of its recommendation. Normally, the President will accept the recommendation and proceed accordingly except in compelling circumstances wherein the President believes that the best interest of the University would not be served in accepting the recommendation. In those cases where the President does not accept the panel's recommendation, the President shall set forth in writing the reasons for the rejection."

{¶7} Article VII, Section 2(G) of the CBA sets forth the final avenue of appealing an adverse recommendation: arbitration. That section provides, in relevant part:

{¶8} "If an appellant believes that an adverse decision ultimately rendered on appeal by the President was caused in substantial part by a procedural error or omission, either in the original decisionmaking process or in the appeals process and such alleged procedural error or omission was raised when it occurred, or in the original appeal and in the appeal to the [JAB] or occurred during the [JAB] or Presidential review, such appellant may, with the concurrence of [AAUP], appeal the matter to arbitration."

{¶9} Subsection G further states that an arbitrator's review of the matter is specifically limited to a review of "the procedural requirements" set forth under Article VI (governance procedures for faculty committees on tenure and the like) and Article VII, Section 2. If the arbitrator finds "a prejudicial procedural error or omission" and the error or omission (1) occurred in the original decisionmaking process or appeals process; (2) could have been corrected prior to the president's recommendation; and (3) was of such a nature that the substantive academic judgment could have been adversely affected by the error or omission, he or she may grant relief.[1] Subsection G, however, expressly limits an arbitrator's remedial powers to "*** send[ing] the matter back to the governance procedure under Article VI or under Section 2 of this Article VII, as the case may be, with specific findings regarding the procedural error or omission and with instructions to

1. It is worth pointing out that the arbitration provision in Article VII, Section 2(G) of the CBA appears to be internally inconsistent. That section initially provides that an appellant, with the concurrence of the AAUP, may appeal procedural errors or omissions which occurred at any point in the decisionmaking or recommendation process, including those that occurred during the "Presidential review." A necessary condition precedent for the arbitrator granting relief, however, is that "the error or omission [be] raised by the grievant to the end that the error or omission could have been corrected *prior to* the President's decision." (Emphasis added.) Notwithstanding this potential conflict, neither party raised this issue at any point and, as a result, we need not consider its impact, if any, on the proceedings.

reevaluate the substantive academic judgment in accordance with the contractual procedures."

{¶10} On August 23, 2007, and October 11, 2007, AAUP filed grievances on behalf of two KSU faculty members, Professors Mary LaVine and Daniel Dahlgren, asserting the university had violated certain provisions of the CBA outlined above. The record indicates that Professor LaVine did not receive a recommendation for tenure by her specific college's advisory committee, but did receive a recommendation for tenure from the dean of that college. Professor Dahlgren received mixed recommendations from ad hoc advisory committees and was eventually not recommended for indefinite tenure by the dean of the Stark County KSU campus. After additional consideration, however, the executive dean for KSU's regional campuses endorsed Professor Dahlgren's bid for tenure. Each professor's positive recommendations were then sent to KSU Provost, Dr. Paul Gaston.

{¶11} Upon review of the professors' files, including the recommendations made at the successive levels of the tenure review process, Provost Gaston recommended that tenure be denied to both professors. Following the provost's respective recommendations, Professors LaVine and Dahlgren requested a JAB review of their cases. In each case, the JAB recommended the professors be awarded indefinite tenure and advanced its recommendations to KSU's President. Notwithstanding the JAB's recommendations, KSU President, Lester A. Lefton, did not accept the JAB's assessment. Thus, pursuant to CBA Article VII, Section 2(F)(5), he submitted written explanations of his decision not to recommend tenure for either Professor LaVine or Professor Dahlgren.

{¶12} AAUP subsequently filed separate grievances on behalf of Professor LaVine and Professor Dahlgren challenging the president's negative recommendation. In both instances, AAUP asserted the president failed to identify "compelling circumstances" to justify his decision to decline the JAB's respective recommendations to grant each professor indefinite tenure. In response, KSU pointed out that President Lefton met all formal requirements for declining to accept the JAB's positive recommendation by setting forth his reasons in writing.

{¶13} The matter proceeded to arbitration during which the cases were consolidated due to their similarity. The parties initially agreed to stipulate to the issue; to wit: whether, in each case, the president, in his letters declining to adopt the JAB's recommendation to grant tenure, met the contractual requirements specified in Article VII, Section 2(F)(5) of the CBA. As the hearing wore on, however, KSU filed numerous objections based upon its belief that the arbitrator was not limiting the evidence to challenges to procedural errors or omissions as required by the CBA. According to KSU, the arbitrator was considering evidence relating to the merits of the president's "substantive academic judgment," an issue outside the scope of the arbitrator's authority.

{¶14} After considering the case, the arbitrator issued his decision and award. Although his decision acknowledged that "there was no attempt to allege any procedure errors in the tenure review process," the arbitrator determined that the president, in declining to adopt the JAB's positive recommendation, violated Article VII, Section 2(F)(5). In arriving at his conclusion, the arbitrator determined the language of Section 2(F)(5) requires the president to set forth reasons for rejecting the JAB's recommendation. The arbitrator determined, however, that the president's declination

failed to provide an adequate articulation of his reasons and, in effect, merely "reiterated the Provost's rationale for not granting tenure." Consequently, the arbitrator determined the president's reasons were not an actual "response to the JAB panel's recommendation" as required by the CBA. Thus, the arbitrator sustained the professors' respective grievances.

{¶15} By way of remedy, the arbitrator directed KSU "*** to compensate each faculty member *** compensation (salary only) no greater than would have resulted had there been no violation as provided for in Article VII, Section 1.J." The arbitrator further directed KSU "*** to reevaluate the substantive academic judgment of each grievant *** in accordance with the contractual procedure as provided for in Article VII, Section 2.G."

{¶16} AAUP subsequently moved the trial court to confirm the award and, in turn, KSU moved the court to vacate the award. In a judgment entered on July 26, 2010, the trial court granted AAUP's motion and denied KSU's motion. This appeal follows.

{¶17} For its sole assignment of error, KSU combines two, essentially synonymous, issues as follows:

{¶18} "The Trial Court erred in confirming the Arbitration Award (T.D. 18, p. 4: July 26, 2010 Order and Journal Entry).

{¶19} "The Trial Court erred in denying the motion to vacate the Arbitration Award (T.d. 18, p. 4: July 26, 2010 Order and Journal Entry)."

{¶20} Before considering KSU's arguments, we point out that a court's role in reviewing a binding arbitration award is very limited. *Madison Local School Dist. Bd. of Edn. v. OAPSE/AFSCME Local 4, AFL-CIO and its Local #238*, 11th Dist. No. 2008-L-086, 2009-Ohio-1315, at ¶9. An arbitrator is the final judge of law and facts and, as a

result, a court may not substitute its judgment for the arbitrator. Id. Although an arbitrator may not ignore the plain language of a collective bargaining agreement, judicial intervention should be resisted even where the arbitrator has made "'"serious," "improvident" or "silly" errors in resolving the merits of the dispute.'" Id. at ¶12, quoting *Michigan Family Resources, Inc. v. Serv. Employees Internatl. Union Local 517M* (C.A. 6, 2007), 475 F.3d 746, 753.

{¶21} With the foregoing limitations in mind, R.C. 2711.10(D) permits a trial court to vacate an arbitration award when "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." The Ohio Supreme Court has construed this provision to mean "that a reviewing court is limited to determining whether the award draws its essence from the [CBA] and whether the award is unlawful, arbitrary, or capricious." *Assn. of Cleveland Fire Fighters, Local 93 of the Internatl. Assn. of Fire Fighters v. Cleveland*, 99 Ohio St.3d 476, 2003-Ohio-4278, at ¶13. "An arbitrator's award draws its essence from a collective bargaining agreement when there is a rational nexus between the agreement and the award, and where the award is not arbitrary, capricious or unlawful." *Mahoning Cty. Bd. of Mental Retardation & Developmental Disabilities v. Mahoning Cty. TMR Edn. Assn.* (1986), 22 Ohio St.3d 80, paragraph one of the syllabus.

{¶22} "The standard of review to be employed on appeal is whether the trial court erred as a matter of law in confirming the arbitration award." (Citations omitted.) *Dayton v. Internatl. Assn. of Firefighters*, 2d Dist. No. 21681, 2007-Ohio-1337, at ¶11. Our review of the underlying judgment is therefore narrowly confined to an evaluation of the trial court's confirmation order and we shall not consider the substantive merits of

the award save evidence of material mistakes or extensive impropriety. *Portage Cty. Bd. of Mental Retardation & Developmental Disabilities v. Portage Cty. Educators Assn. for the Mentally Retarded*, 11th Dist. No. 2006-P-0111, 2007-Ohio-2569, at ¶13, citing *Internatl. Assn. of Firefighters*, supra.

{¶23} Article VII, Section 2(G) provides, in relevant part:

{¶24} "In [an] arbitration the Arbitrator will be limited to a review of the procedural requirements set forth in Article VI and this Section 2 of Article VII and *in no event may he/she consider or review the substantive academic judgment*." (Emphasis added.)

{¶25} KSU first asserts the arbitrator exceeded his authority in improperly substituting his own academic judgment contrary to the CBA. For the reasons that follow, we do not agree with the university.

{¶26} KSU is correct that the decision affecting a faculty member's employment as it pertains to granting or denying tenure is a "substantive academic judgment." See Article VII, Section 2(A). A careful reading of the arbitrator's decision and, in part, his award, however, reveals he did not "reverse" the president's recommendation. Rather, the arbitrator specifically found that the president violated Article VII, Section 2(F)(5) "*** by not providing reasons, based on compelling circumstances, for rejecting the [JAB] panel's recommendation." In drawing this conclusion, the arbitrator construed the relevant provision of the CBA and, in comparing its requirements with the president's written decision declining to accept the JAB's recommendation, found the president failed to adhere to the necessary procedures set forth in the agreement.

{¶27} This analysis is further buttressed by the portion of the arbitrator's remedy which directs KSU to actually "reevaluate" the substantive academic judgment at issue.

The CBA provides, inter alia, that, if an arbitrator determines a prejudicial procedural error or omission occurred that may have "adversely affected" the substantive academic judgment, the arbitrator's "*** sole authority shall be to send the matter back to the governance procedure under Article VI or under Section 2 of this Article VII, as the case may be, with specific findings regarding the procedural error or omission and with instructions to reevaluate the substantive academic judgment in accordance with the contractual procedures."

{¶28} Pursuant to the issue submitted to arbitration, the arbitrator concluded the president, in declining to accept the JAB's positive recommendation, failed to strictly meet the contractual requirements of Article VII, Section 2(F)(5). The arbitrator's remedy directing KSU to "reevaluate" the substantive academic judgment of each professor requires the university to remand each case to the president for a reevaluation of his negative recommendation in light of the procedural error identified in the decision. The arbitrator's decision does not, therefore, make a binding substantive academic judgment or even direct the president to change his mind. It simply requires the president to reevaluate the recommendation pursuant to the arbitrator's specific interpretation of the language of Article VII, Section 2(F)(5).

{¶29} We recognize that KSU disagrees with the content of the arbitrator's analysis. Throughout the underlying proceedings, KSU has argued the president is merely required to set forth his reasons for declining to accept the JAB's recommendation in writing; a minimal criterion with which, KSU has argued, the president complied. This conclusion, however, rests upon a specific construction of the CBA which the arbitrator rejected. KSU's argument, therefore, essentially asks this

court to reconsider the arbitrator's construction of the CBA in favor of its interpretation. We cannot accept this invitation.

{¶30} In *OAPSE/AFSCME Local 4*, supra, this court emphasized that, on an appeal from an arbitration award, a judicial tribunal is essentially prohibited from reweighing or reconsidering an arbitrator's construction of a contract. Quoting *United Paperworkers Internatl. Union v. Misco, Inc.* (1987), 484 U.S. 29, 38, this court observed:

{¶31} "'[C]ourts *** do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those facts simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract.'" *OAPSE/AFSCME Local 4*, at ¶11, accord *Southwest Ohio Regional Transit Auth. v. Amalgamated Transit Union, Local 627*, 91 Ohio St.3d 108, 109, 2001-Ohio-294.

{¶32} Because KSU's argument would require this court to weigh the persuasiveness of the arbitrator's analysis, its argument is overruled. The arbitrator's conclusion that the president's negative recommendation failed to comply with the procedures set forth in Article VII, Section 2(F)(5) is derived from his interpretation of that specific clause in the CBA. We therefore hold the trial court did not err in confirming the arbitrator's decision as it pertains to the arbitrator's interpretation of the procedures required by the CBA when the president does not accept the JAB's recommendation.

{¶33} KSU next asserts the trial court erred in confirming the arbitration award to the extent the arbitrator awarded a monetary remedy to the subject professors. This argument has merit.

{¶34} The arbitrator's decision provides, in relevant part:

{¶35} "Article VII, Section 2.G reads in pertinent part as follows:

{¶36} "'G. Appeal to Arbitration. If an appellant believes that an adverse decision ultimately rendered on appeal by the President … or occurred during the Joint Appeals Board or Presidential review, such appellant may … appeal the matter to arbitration. This shall be done by filing a grievance, which shall be initiated at the Step 2 level and thereafter proceed to arbitration procedures established in 1.G.'

{¶37} "Pursuant to the procedures of Section 1.G, Section 1.M reads as follows:

{¶38} "'M. Exclusivity of Process. Except as otherwise provided by law, this Section 1 and, where applicable the following Section 2 shall be the exclusive remedy for an alleged violation of this Agreement by the University.'

{¶39} "The university is directed to compensate each faculty member *** compensation (salary only) no greater than would have resulted had there been no violation as provided for in Article VII, Section 1.J."

{¶40} Initially, AAUP asserts the underlying proceedings arose from an Article VII, Section 1 grievance arising from the interpretation, meaning or application of the provisions of Article VII, Section 2(F)(5) of the CBA. Pursuant to the CBA, however, an Article VII, Section 1 grievance governs the procedures for those grievances not related to substantive academic judgments affecting a faculty member's employment. As discussed passim, Article VII, Section 2 of the CBA addresses *the exclusive* procedures

for questioning decisions involving academic judgments. One such enumerated judgment is the granting or denial of tenure.

{¶41} The underlying arbitration proceedings eventuated from an alleged violation of Article VII, Section 2(F)(5) due to the president's decision not to accept the JAB's recommendation of granting indefinite tenure to two professors. The original grievances filed on behalf of the professors, the transcript of the arbitration proceedings, and the arbitrator's decision demonstrate the sole issue in arbitration was whether the president's negative recommendation violated Article VII, Section 2(F)(5). As this case is premised solely upon a substantive academic judgment adversely affecting two professors' employment, it is governed by the exclusive procedures set forth under Section 2. Contrary to AAUP's argument, the CBA does not sanction Article VII, Section 1 to be used as a mechanism to disentangle an Article VII, Section 2 dispute. Aside from general "pre-arbitration" procedures (which both Section 1 and Section 2 follow), both sections set forth their own separate and exclusive appeal and arbitration procedures that materially differ from one other.

{¶42} With this in mind, the CBA *does* direct Article VII, Section 2(G) arbitration to follow the procedures set forth in Article VII, Section 1. The arbitration procedures in Section 1, as just mentioned, however, are generic and preliminary.[2] Because Article VII, Section 2 sets forth the exclusive procedures for disputes involving substantive academic judgments, and the supplemental procedures to be utilized under Section 1

2. Again, the CBA is ostensibly misleading when it directs Section 2 arbitration to follow the procedures set forth under Article VII, Section 1(G). That section discusses the procedures that a grievant shall follow during the "Step Two" phase of the grievance process for those grievances that do not implicate substantive academic judgments. Section 1(H) actually sets forth the general procedures for arbitration, e.g., time for filing an appeal to arbitration, notice requirements, conference requirements for both AAUP and KSU to select an arbitrator and a procedural format, etc. This ostensible confusion or misdirection does not impact this court's resolution of the instant appeal.

are prefatory, the issue becomes whether any limitations are placed upon an arbitrator's remedial powers by Section 2 itself. A review of Article VII, Section 2 demonstrates that an arbitrator's remedial authority is so limited.

{¶43} As indicated above, Article VII, Section 2(G) provides that an arbitrator's "sole authority" in awarding a remedy for a violation of Article VII, Section 2 is to send the matter back to the level of review in which the procedural error or omission occurred with instructions to reevaluate the substantive academic judgment pursuant to the relevant contractual procedures. Because the CBA specifically restricts an arbitrator's remedial authority to returning the case to the proper tier of review where the procedural problem originated, a Section 2 arbitrator is precluded from awarding a remedy which extends beyond that authority.

{¶44} In this case, the arbitrator's remedy included an award of compensation. Monetary compensation is not a remedy contemplated in an Article VII, Section 2(G) arbitration and, as a result, the arbitrator exceeded his authority in granting such a remedy. The trial court failed to acknowledge this material mistake in the arbitrator's decision. Because the arbitrator exceeded his powers under the CBA, we hold the trial court erred in failing to vacate this portion of the arbitrator's award. See R.C. 2711.10(D), supra.

{¶45} KSU's sole assignment of error is overruled in part and sustained in part.

{¶46} For the reasons discussed in this opinion, the judgment of the Portage County Court of Common Pleas is affirmed in part, reversed in part, and remanded.

DIANE V. GRENDELL, J.,
MARY JANE TRAPP, J.,
concur.