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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

UNIVERSITY OF ALASKA)
Plaintiff,)
vs.)
UNITED ACADEMICS, on behalf of CHERIE NORTHON,)
Defendant) Case No. 3AN-05-14495 CI

ORDER

University of Alaska (UA) claims arbitrator M. Zane Lumbley erred (1) in determining that Chancellor Gorsuch's decision to deny Cherie Northon tenure was a disciplinary action, not an academic one, and (2) ordering that Northon be paid for the 2004-2005 year, offered the opportunity to serve another terminal year, and evaluated again for tenure. Because the chancellor properly considered a non-tenured professor's unwillingness to work collaboratively and productively with other faculty in determining whether to award tenure, UA's Motion to Vacate and/or Modify the Arbitrator's Award is **GRANTED**.

I. FACTS

UA hired Cherie Northon in 1999. She was employed as an Associate Professor in the University of Alaska-Anchorage Geomatics Department of the School of Engineering (SOE) for four years. The Geomatics Department, part of the 16 member SOE presided over by Dean Robert Lang, consisted of four full-time faculty members: Northon, Thom Eley (a term faculty member and Northon's husband), Steve Buchanan, and Don Davis, department chair.

During her time at UAA, Northon's relationship with other faculty was, by all accounts, difficult and contentious. Disagreement first arose in October 2002, when Northon submitted a packet of new classes to the SOE Curriculum Committee for approval. During the review process, Northon had a series of disputes with Grant Baker, chair of the Curriculum Committee, and Davis, department chair and Committee member. E-mails between the parties, and Dean Lang's subsequent letter to Provost Chapman, indicate Northon expected 'rubber stamp' approval of her classes.

Then, in Fall 2002, a U.S. Army Corps of Engineers Cold Regions Engineering Lab flume was installed in the SOE building. During the installation, fumes from the diesel forklift entered the SOE's building vent, causing a diesel smoke odor to exist throughout the building. Despite assurances from UAA safety personnel that the odor was harmless, Northon and Eley were furious about the smell in their classrooms. Northon and Eley were angry, in particular, with Professor Orson Smith, a professor who played an important role in getting the $250,000 flume donated to UAA. Northon and Eley held Smith responsible for the inconvenience and, in a series of intemperate e-mails, demanded that Smith apologize to them for the incident.

Smith did apologize to Northon and Eley, but apparently not to their satisfaction. As a result, Northon informed a graduate student she was unwilling to serve on the student's thesis committee any longer because Smith was the student's primary advisor. Dean Lang asked Northon to reconsider her decision about withdrawing from the thesis committee because she was in effect penalizing the student. Northon refused. The Dean offered to apologize personally to Northon's class for any inconvenience, and he pointed out that none of the inconvenience was Smith's responsibility, who was not involved in the installation. Dean

Lang urged Northon to be more collegial with her colleagues. Northon, in response, stated she need not be "polite."

Northon began to assemble her tenure file in September 2003. On September 8, Davis drafted a letter, at Northon's request, to include in Northon's tenure review file. The draft letter noted some of Northon's achievements, and stated that Northon had autonomous work habits that did little to create a collegial working environment. Northon complained about the letter to Dean Lang, who asked Davis to submit a revised letter. In his revised letter, Davis noted that Northon did not regularly provide him with feedback on her grants or research and did not pass her proposed workloads by him.

Shortly thereafter, on October 2, 2003, Northon filed an informal grievance against Davis, alleging that an e-mail from Davis to Northon stating that Davis had developed feelings for a woman while at a bachelor party had created a hostile working environment. As a remedy, Northon requested that Davis not have supervisory authority over her and no longer serve on the SOE Peer Review Committee (PRC), which would be considering her tenure application. Northon's grievance was partially resolved at an informal grievance resolution meeting, by designating Dean Lang as Northon's direct supervisor and by giving Dean Lang oversight of the PRC's actions to make sure Northon's tenure review was fair, while allowing Davis to remain on the PRC. The portion of Northon's grievance dealing with Davis' alleged "inappropriate remarks" was referred to the UAA Diversity Director, who discussed the remarks with Davis. Davis subsequently apologized, and the matter was considered closed.

In the Fall of 2003, Northon submitted her application for tenure. The guidelines required, among other things, a bipartite faculty member serve on her Peer Review Committee

(PRC). Thus Davis, who held a bipartite position, served on the PRC along with four tripartite faculty from the School of Engineering. Although the PRC concluded that Northon met the requirements for teaching, service and professional growth, it determined she did not satisfy the requisite research criteria for tenure. Its members voted unanimously against tenure. Because it was Northon's mandatory tenure review year and failure to receive tenure would result in a one-year term appointment leading to a severance of her career with the University, PRC Chair Question directed a second vote. The PRC ratified its initial determination and filed its recommendation against tenure on October 23, 2003.

Northon appealed the PRC's decision to Dean Lang, who disagreed with the PRC and recommended Northon for tenure on January 23, 2004. Thereafter, on February 9, 2004, the University-wide Faculty Evaluation Committee (UFEC) unanimously agreed with Lang and recommended tenure. On March 30, 2004, Provost Chapman agreed with the UFEC and Dean Lang, and also recommended Northon for tenure.

When the matter came before Chancellor Gorsuch, Gorsuch determined that the University should deny Northon tenure. In his May 14, 2004, letter to Northon, the Chancellor stated:

> As Chancellor, I am tasked with the responsibility of making tenure decisions that reflect the best interests of the School of Engineering and the University of Alaska Anchorage. As an integral part of reaching a tenure decision, I must carefully review and consider the future academic direction and needs of the . . . University of Alaska Anchorage. I have also carefully reviewed your tenure application and evaluation file documents. I have concluded based upon this review that it is not in the best interest of the University to award you tenure for the following reasons.

> In order to succeed and maximize its contribution to the University and the School of Engineering, the Geomatics program requires faculty who can fully integrate and function and become part of a complete community of interest with the other engineering programs and faculty. In my opinion, based upon your demonstrated difficulty in integrating your academic interests and abilities, and your collegial interactions with the engineering school, programs, and faculty, you have not met these requirements. Thus, your limited academic relationship and integration with a wider engineering program seriously limits your potential contribution to the overall program and will not strengthen the cross functionality and program delivery abilities necessary in a small engineering program.

Chancellor Gorsuch also noted that, whereas previous reviews had limited their inquiry to "materials contained in the evaluation file documents you presented for review," his review was not so limited. Thus he advised that he also had examined appropriate School of Engineering Criteria for the Award of Tenure, Board of Regents' Policy on Evaluation of Faculty and Agreement Article 9.2.3(a). Gorsuch also reviewed individual letters recommending against tenure submitted by faculty members Baker, Buchan, Davis, and Smith, and a 627-page file of e-mails and other documents provided by Lang and forwarded to the Chancellor by Provost Chapman.

Northon appealed her tenure denial on May 15, 2004. In its July 28, 2004, report, the Appeals Board recommended that denial of tenure was an inappropriate solution to the inter-personal conflict within the School of Engineering, and suggested solutions outside the narrow decision the Chancellor was called upon to make. Subsequently, on July 30, 2004, Chancellor Gorsuch informed Northon that he disagreed with the Appeals Board's opinion, and that he had determined to reaffirm his denial of tenure because Northon had demonstrated a refusal to

participate in department activities, an unprofessionalism not in the best interests of the University.

Northon appealed Gorsuch's decision to arbitrator M. Zane Lumbley. On September 22, 2005, Lumbley found that UA's denial of tenure did not involve a substantive academic judgment and was tantamount to discipline. Arbitrator Lumbley further found that Northon's tenure denial constituted constructive discharge and ordered UAA to pay Northon for the 2004-2005 academic year, offer her another year of employment, and again evaluate her for tenure based upon a revised tenure file. UA filed an application with this Court to vacate and/or modify Arbitrator's decision. Northon cross-moved to confirm the Arbitrator's award.

II. STANDARD OF REVIEW

The Alaska Uniform Arbitration Act expressly excludes labor management contracts "unless they are incorporated into the contract by reference or their application is provided by statute."[1] Because the CBA is a labor management contract that does not specifically incorporate the Act, two possible standards of review exist under Alaska law. The standard of review depends upon whether the arbitration agreement was voluntary or compulsory.[2] Voluntary arbitration agreements are those agreed to by contract and are subject to a "gross error" standard of review.[3] "Gross error" consists of "only those mistakes which are both obvious and significant."[4] Compulsory arbitration agreements, on the other hand, are those

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[1] *See* AS 09.43.010.
[2] *See Pub. Safety Employees Ass'n, Local 92, Int'l Union of Police Ass'n, AFL-CIO v. State*, 895 P.2d 980, 984-985 (Alaska 1995).
[3] *Id.*
[4] *Id.* (quoting *Nizinski v. Golden Valley Electric Ass'n, Inc.*, 509 P.2d 280, 283 (Alaska 1973).

required by statute and are subject to a less deferential "arbitrary and capricious" standard of review.[5] While the Alaska Supreme Court has not yet ruled on the standard of review for compulsory grievance arbitrations,[6] it has ruled that compulsory interest arbitrations arising out of labor management contracts are subject to the 'arbitrary and capricious' standard.[7] The Supreme Court's reasoning indicates that the important consideration is whether an arbitration process is required by law.

In this case, UA was compelled to arbitrate by state law under the Public Employees Relation Act,[8] which requires agreements between labor organizations and the state, or political subdivisions of the state such as UA, to "include a grievance procedure which shall have binding arbitration as its final step."[9] Based upon the Alaska Supreme Court's prior decisions, it appears the arbitrator's decision is subject to a less deferential 'arbitrary and capricious' standard of review because it is compelled. This Court need not make that decision, however, because under either standard this Court finds that the arbitrator's decision must be reversed.

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[5] *Id.*
[6] *See Vroman v. City of Soldotna*, 111 P.3d 343, 346 n.2 (Alaska 2005).
[7] *Id.*
[8] AS 23.40.070-.260.
[9] *See* AS 23.40.210(a).

III. DISCUSSION

UA claims Arbitrator Lumbley erred when he ruled that Chancellor Gorsuch's decision to deny Northon tenure was a disciplinary decision, not an academic one. The Court agrees.

The CBA provides that "[w]here provisions of the Agreement call for the exercise of academic judgment, the arbitrator shall not have the authority to substitute his/her judgment for that of the official making such judgment, but shall be confined to whether the procedural steps have been followed."[10] Decisions to award tenure are decisions of academic judgment. CBA 9.2.3(a) states that, in deciding whether to award tenure, "[t]he chancellor may award tenure to such unit members as are, in the chancellor's opinion, qualified and for whom tenure would be consistent with the need, mission, and resources of the MAU and the unit in which the unit member would be tenured." UAA's mission statement states that "[t]he University of Alaska Anchorage inspires learning and enriches Alaska, the nation, and the world through UAA teaching, research, creativity, and service."

In this case, Chancellor Gorsuch denied Northon tenure after determining that her work history demonstrated, among other things, an inability to "fully integrate and function and become part of a complete community of interest with the other engineering programs and faculty." In the Chancellor's judgment, this severely limited Northon's "potential contribution to the overall [Geomatics] program and [would] not strengthen the cross functionality and program delivery abilities necessary in a small engineering program." As opposed to the PRC, Dean Lang, and the UFEC, Chancellor Gorsuch was not limited to reviewing materials in

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[10] CBA 7.2.5(e).

Northon's tenure file. The CBA specifically authorizes Chancellor Gorsuch to rely upon "other relevant sources" outside Northon's tenure file. The "relevant sources" relied upon by Gorsuch included letters recommending against tenure submitted by faculty members and a 627-page file of e-mails. These materials indicated Northon's continual lack of appropriate restraint, a lack of respect for her colleagues and their opinions, her frequent refusal to attend committee meetings[11], and her withdrawal from a student's thesis committee because of her feelings toward the student's primary advisor. Despite these seemingly legitimate concerns in deciding whether to award tenure, Arbitrator Lumbley overturned Chancellor Gorsuch's decision, ruling that the "decision to deny tenure did not involve substantive academic judgment but was tantamount to discipline since it concerned a condition of employment, namely participating in committees and working collaboratively and productively with colleagues[,] . . . which should have been dealt with in line with the University's right to discipline . . . rather than by the denial of tenure. . . ."

The Arbitrator's sole duty under the CBA was to determine whether proper procedure was followed, in this case, tenure procedure. The Arbitrator's decision does not state that UAA did not follow proper tenure procedure. Rather, the Arbitrator concluded that collegiality is not a proper criterion for tenure decisions and may be considered only as a disciplinary matter. Arbitrator Lumbley's ruling is defective for at least two reasons. First, his reasoning commits the fallacy of nonexclusive disjuncts. The Arbitrator's decision proposes the following disjunctive syllogism: 1) a non-tenured professor's unwillingness to work

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[11] These are contractual academic responsibilities of Northon. *See* CBA 6.2.

collaboratively and productively with other colleagues is either a disciplinary matter or it is a tenure matter; 2) it is a disciplinary matter because it is a condition of employment; 3) therefore, it cannot be a tenure matter. What the arbitrator's decision fails to recognize is that a non-tenured professor's unwillingness to attend committee meetings and work collaboratively and productively with her colleagues can be both a disciplinary matter and an academic one.[12] Courts in numerous jurisdictions uphold this proposition.[13]

In addition to failing to recognize collegiality as a proper criterion for tenure decisions, the Arbitrator also erroneously limited Chancellor Gorsuch's authority to decisions of "**substantive** academic judgment." This phrase is not found in the CBA. CBA 7.25(e) specifically states that an arbitrator may not substitute his judgment for that of an official exercising **academic judgment**. The CBA does not distinguish between substantive and non-substantive academic decisions—whatever the attempted distinction. The Chancellor, in addition, is authorized to "give consideration to the recommendations of the peer unit member review committees, appropriate, administrators, and other relevant sources."[14] The materials not within Northon's file relied upon by Chancellor Gorsuch comprise "other relevant

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[12] This Court has reviewed Judge Greene's pre-CBA decision, *Boyce v. Univ. of Alaska*, 4FA-96-0266 CI, and finds its conclusions well reasoned and its ruling that collegiality is a proper criterion for tenure decisions persuasive.

[13] *See, e.g.*, *Bresnick v. Manhattanville College*, 864 F.Supp. 327 (S.D.N.Y. 1994) (holding that factors set forth for awarding tenure, namely teaching excellence, scholarship, and service to college, encompass collegiality or working collaboratively with colleagues); *McGill v. The Regents of the University of California*, 44 Cal.App.4th 1776, 1787 (App. 4th 1996) (holding that although not expressly listed as one of tenure criteria, it is inescapable that collegiality is an appropriate consideration); *Mabey v. Reagan* 537 F.2d 1036, 1044 (9th Cir. 1976) (stating that "[a]n essential element of the probationary process is periodic assessment of the teacher's performance, including the person's ability and willingness to work effectively with his [or her] colleagues"); *Mayberry v. Dees*, 663 F.2d 502, 514 (4th Cir. 1981) (holding that the primary factors to be considered in granting tenure include scholarship, pedagogy, service to the university, and collegiality).

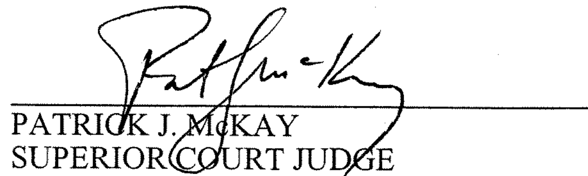
[14] CBA 9.2.3(a) (emphasis added).

sources." The Court notes that many of the documents are actually authored by Northon and do not appear to be taken out of context. The Arbitrator's overly narrow construction of the term "academic judgment" constitutes another basis for vacating his decision.

IV. CONCLUSION

Just as this Court will not substitute its judgment in place of an arbitrator's absent "gross error" or an "arbitrary and capricious" decision, here the Arbitrator failed to give any deference (let alone the significant deference due under the CBA) to the Chancellor's decision. Because the CBA authorizes the Chancellor to consider a non-tenured professor's unwillingness to work collaboratively and productively with other faculty in determining whether to award tenure, UA's Motion to Vacate the Arbitrator's Award is **GRANTED**. Northon's Motion To Confirm Arbitrator's Award is **DENIED.** Chancellor Gorsuch's decision is affirmed.

DATED at Anchorage, Alaska this 19th day of May, 2006.



PATRICK J. McKAY
SUPERIOR COURT JUDGE

I certify that on 05/19/06 a copy of the above was mailed to each of the following at their addresses of record: M. Ashburn / W. Jermain
Administrative Assistant