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IN DEFENSE OF ACADEMIC JUDGMENT: SETTLING FACULTY COLLECTIVE BARGAINING AGREEMENT GRIEVANCES THROUGH ARBITRATION

BERNARD MINTZ* AND ALLAN GOLDEN†

INTRODUCTION

Any student of the growth and development of higher education would have to take serious note of a fairly new trend in faculty relations—the collectively negotiated agreement or contract. A recent article¹ lists 180 college faculties as being represented by collective bargaining agents. The growth of this phenomenon has had a major impact on college administration.

The "heart" of most collective bargaining agreements is acknowledged to be the grievance procedure which in most instances utilizes the arbitration apparatus as its court of last resort in dispute resolution. This article concerns itself with an analysis of this process of arbitration as applicable to the contracts negotiated by the City University of New York with its faculty collective bargaining agents in 1969. At the City University there were two bargaining units, two bargaining agents and two agreements. The United Federation of College Teachers (AFT) represented Lecturers, Teaching Assistants, and part-time faculty. The Legislative Conference (NEA) represented faculty in tenure-bearing titles and career administrative personnel. A review of this negotiation, including the background of its development, has been previously discussed elsewhere.²

The more narrow concern of this article is study of the arbitral process as applied in judgment and interpretation of one clause common to the grievance procedure in both of the contractual agreements. This brief paragraph in the contracts, labelled "Nota Bene," introduces that portion of the grievance procedure directed to arbitrators and clearly sets forth an important contract caveat for them. This caveat seeks by mutual agreement of the contracting parties to prevent the arbitrator from substituting his academic judgment for

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1. 6 CHRONICLE OF HIGHER EDUCATION 2 (1972).
the academic judgment of "academe." The Nota Bene clause thus literally prohibits arbitral interference in the academic process. In light of the CUNY experiences, examination of various arbitrators' interpretations of the Nota Bene clause follows.

I. ANATOMY OF AN ARBITRATION CASE

In the Fall of 1970 the Legislative Conference brought its first case to arbitration—the "Smith" case. The facts were as follows: in October, 1969, the Appointments Committee of the Department voted unanimously not to reappoint the grievant, thus denying tenure. The Advisory Board, utilized by the College Personnel and Budget Committee as an independent check on departmental recommendations, also voted unanimously not to recommend the grievant for reappointment with tenure. In November, 1969, the College Personnel and Budget Committee also voted not to reappoint the grievant with tenure.

After notification of the department action, the grievant met with the Dean of Faculty to discuss the matter of non-reappointment. The grievant also met with the Chairman of the Department who indicated that he would speak to the Dean of Faculty and try to arrange for another year of teaching. In December, 1969, the Chairman wrote the following letter to the grievant:

Dear "Smith":

I discussed the possibility of your appointment for another year with Dean "Jones". He advises me that this is impossible since such reappointment would be equivalent to granting tenure, which the Committee on Appointments did not recommend.

The Legislative Conference met informally with the Dean of Faculty and the Chairman of the Department. As a result of this meeting the Appointments Committee of the Department met in special session and voted to recommend reappointment with tenure. In February, 1970, the College Personnel and Budget Committee affirmed its earlier decision and voted not to recommend reappointment with tenure.

The agreement with the Legislative Conference provides a grievance procedure as follows:

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<td>Step I</td>
<td>The President or his designee</td>
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<td>Step II</td>
<td>The Chancellor or his designee</td>
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<tr>
<td>Step III</td>
<td>Binding arbitration</td>
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3. In the interests of confidentiality, pseudonyms have been substituted for grievants' actual names.
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The grievant proceeded to file a Step I grievance with the President of the college. The President's response was the following:

Upon review of your presentation, both orally and in writing, of a grievance under the terms of the contract with the Legislative Conference, I am obliged to conclude that the recommendation of the College Committee on Faculty Personnel and Budget that you not be granted a reappointment, with tenure, should not be reversed.

The grievant then filed a Step II grievance with the Chancellor of the University. The Legislative Conference alleged that the observation and evaluation procedures of Article XVII (Professional Evaluations) had been violated. The Conference further alleged that the grievant had not been informed of the nature of the observations in violation of the Personnel and Budget Procedures of the Board of Higher Education (BHE, 12/18/67, Cal. No. 3 (b)). Those Procedures, in relevant part, state:

When teaching observation reports are used, their major findings should be communicated (by the department chairman) to the teacher who has been observed mainly to the end that the teacher may know what the criticisms of his teaching are and strive to correct them.

The Step II decision issued by the office of the Vice Chancellor for Administration, the Chancellor's designee, responded to these allegations as follows:

4. Article XVII, in relevant part, states:

17.2 At least once each semester non-tenured employees shall, and tenured employees may, be evaluated on the basis of at least a one-hour observation of the work of the employee. The employee shall be given at least twenty four (24) hours of prior notice of observation.

17.3 The department chairman within a period of three (3) weeks from the date of observation shall discuss the evaluation with the employee who shall have the right to present any material he feels is pertinent to the proper consideration of the nature and scope of the evaluation. Immediately following discussion of the evaluation with the employee, the chairman shall prepare a record of the discussion in memorandum form.

17.5 At least once each year, each employee shall have an evaluation conference with his department chairman. At such conference, the employee's total academic and professional progress for that year and cumulatively to-date shall be reviewed. Immediately following this discussion, the chairman shall prepare a record of the discussion in memorandum form.


5. Professor Mintz was then serving in this post.
1. The failure to observe and evaluate the grievant... is a procedural violation which is relevant but not determinative to this grievance.

2. . . . Existing Board [of Higher Education] policy states and the Agreement [with the Legislative Conference] infers that the negative criticism arising from teacher observation must be communicated to the teacher in order to provide direction for improvement.

The failure to communicate negative criticism to the grievant is a clear violation of the Bylaws of the Board and the written policies of the Board . . .

An individual may fail of reappointment, and may fail of achieving tenure in particular, in the absence of negative criticism or even in light of positive classroom observations. The recognized criterion for tenure in a first-rate University is excellence.

In this case, the violation of failure to communicate the department's evaluation to the grievant is substantive and must be given appropriate weight in the determination [to reappoint or not to reappoint]. However, procedural violation cannot establish academic excellence. In fact there was no allegation that academic excellence could be established in this case.

The Step II decision concluded "that there has been a violation of Board bylaw and policy. It is further concluded that . . . the violations are relevant to the determination." Once the decision acknowledged the merits of the grievance the problem of remedy was upon us. The Chancellor's Office, early in the grievance procedure, had adopted a policy of nonintervention in the academic decisions of the colleges. However, the presence of substantive violations of Board policy presented a dilemma. What was required was a decision which did not grant tenure but did take cognizance of the above-mentioned violations. The decision was one which the University felt was equitable in light of the facts. It read, in part, as follows:

1. Upon resignation from the title of instructor [at the time of the grievance a tenure-bearing title] . . . the grievant shall be appointed as a lecturer (full-time) [a non-tenure-bearing title] for the academic year 1970-1971 . . .

2. Such appointment shall be terminal with the academic year 1970-1971.

Now the decision was the grievant's—to accept the one-year's appointment or to proceed to arbitration and gamble on a more favorable decision. The grievant elected to file for arbitration.

To understand this case and its importance more fully, it is neces-
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sary to understand the grievance procedure and its genesis. As previously stated, the grievance procedure is a three-step process. In the evolution of this procedure there were hours and hours of debate, wrangling and vituperation over the University's hard-nosed position of not accepting the substitution of an arbitrator's academic judgment for the academic judgment of the academy. Excerpts from the management—recorded unofficial minutes of the negotiations with the Legislative Conference reflect this struggle.6

6. In the following dialogue, the Legislative Conference is referred to as "LC," the City University as "CUNY," and the United Federation of College Teachers as "UFCT."

LC: If the University fails to carry out its procedures, we should be able to go to arbitration.

CUNY: If we follow this, we would have to have a referee to rule on procedural matters and limit his authority solely to procedural matters so that he can only remand it back for correction of errors.

LC: What about the President's right to exercise academic judgment?

CUNY: That could not go to arbitration.

CUNY: If we agree to bring only procedural matters to arbitration, would you feel protected?

LC: I think so.

CUNY: . . . Our basic objection is making appointment, reappointment, promotion, and tenure subject only to a third party and we said that grievance procedure would stop at Step II. You objected and now we modified to allow the procedural elements to go to arbitrator and not academic judgment.

LC: . . . We object to the reappointment, appointment, promotion, and tenure procedure . . . . Why should he [the grievant] lose out on what he should have had.

CUNY: The language is no good. The arbitrator is not a mindreader. . . . It would clarify it if you make it a separate clause. Take our wording.

LC: How about a failure to follow procedure?

CUNY: We can add that.

LC: There must be sanctions otherwise there is no finality.

CUNY: Take a procedural arbitration. Even as a result of the proper procedure, the man may never be promoted. Therefore, how can the arbitrator predict the future?

LC: In that case the Board shall make restitution. . . . This way the President will learn to follow procedures.

CUNY: In such case, the arbitrator's power is limited to remanding the matter for review in accordance with the proper procedures.

LC: Fine, substantive issues will not go to arbitration. We accept this . . . .

CUNY: We are in agreement on your objection. The arbitrator rules as to procedure . . . .

The UFCT adopted an even more intransigent position on this question.

CUNY: [There is] one big hangup . . . . We felt strong need to distinguish between procedural elements as opposed to academic judgments in going to arbitration. It appears that you are not willing to accept that at all. We propose

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The result of these negotiations was the now rather well-known Nota Bene clause which the unions finally accepted. This clause in Article VI (Grievance Procedure and Arbitration) is interjected between Step II (the Chancellor) and Step III (Arbitration) and states:

Nota Bene:

Grievances relating to appointment, reappointment, tenure or promotion which are concerned with matters of academic judgment may not be processed by the Conference beyond Step 2 of the grievance procedure. Grievances within the scope of these areas involve the possibility of taking procedural elements to arbitration, but not the things involving academic judgment.

UFCT: It is the hangup. The dichotomy between academic judgment and procedure is difficult to live with. An academic judgment can be prejudicial. A president of a college can argue that a decision of poor faith is made on sound academic judgment.

CUNY: You describe a situation which carries with it bias. If one wanted to, one could make all kinds of assumptions. We cannot have the arbitrator substitute his academic judgment for that of the peers.

UFCT: We are not asking that. If it can be demonstrated that a decision was prejudicial, the arbitrator should strike it down.

CUNY: The University has offered you a compromise. In areas of appointment and reappointment procedural aspects may go to arbitration. . . . When it comes to academic decisions, we are not prepared to agree that any party outside the University shall make the decision. Bias or procedure may go to arbitration.

UFCT: We [are] agreed that appointment, reappointment, promotion, and tenure remain in the University with the Chancellor.

CUNY: We have restated our position on reappointment and appointment. We have taken out promotion and tenure as being not relevant to [Lecturers].

UFCT: This new arrangement is a retreat. You are dealing only with procedural matters and not with substance.

CUNY: No, originally we stopped all appointment, reappointment, promotion and tenure in Step Two.

UFCT: This is crap.

CUNY: We are giving you a firm offer that matters of procedure will go to arbitration.

UFCT: On matters of procedure, suppose we have an academic judgment warped. What recourse does the individual have?

CUNY: Step Two—this is something that the grievant never had before.

UFCT: That's no good. Step Two is the employer.

CUNY: We will not take academic judgment to outside arbitration.

UFCT: We have offered a 3 man panel [to function at Chancellor's level on matters of academic judgment].

CUNY: We reject that.

UFCT: We reject this. You even have a caveat on the arbitration panel. All anyone has to say is "academic judgment" and the case is closed.

CUNY: We have considered your proposal and reject it.

UFCT: We don't believe any procedure should end with the Chancellor.

CUNY: We will not allow third party adjudication of academic judgment.

UFCT: You want management to rule on academic judgment.
in which there is an allegation of arbitrary or discriminatory use of procedure may be processed by the Conference through Step 3 of the grievance procedure. In such case the power of the arbitrator shall be limited to remanding the matter for compliance with established procedures. It shall be the arbitrator’s first responsibility to rule as to whether or not the grievance relates to procedure rather than academic judgment. In no event, however, shall the arbitrator substitute his judgment for the academic judgment. In the event that the grievant finally prevails, he shall be made whole.7

CUNY: That is correct. Management will not give up its responsibilities there.

UFCT: ... The question of whether or not a grievance is procedural or academic should be decided by an arbitrator.

CUNY: ... If you are willing to state that you will accept that only procedural matters go to arbitration, I am willing to decide the question of what the power of the arbitrator would be.

UFCT: Finality.

CUNY: Try it with power to remand for correction of procedural errors.

UFCT: Our position is that we are willing to have an arbitrator determine whether or not an issue was procedural or judgmental ...

CUNY: In terms of our thinking, let’s break into two elements. We are willing to accept the concept on the matter of determination as to whether it is procedural or judgmental with the arbitrator knowing that he has no power in judgmental issues. In matters of academic judgment, our final view is that it stops at Step Two.

UFCT: What happens if you think the arbitrator made an academic judgment?

CUNY: We would have to move to set it aside in the courts ... Look, even in academic judgment, he couldn't do anything. You are losing the point. We are giving you two major things. We are retaining for ourselves that the arbitrator has no position in academic judgment. We gave you a step you never had. It is my honest opinion that the kind of thing you are talking about would be handled at Step Two. If you don't buy this, it is off the table.

UFCT: Why is a Chancellor different from a President?

CUNY: The Chancellor is looking at an overview; the President at his own institution.

UFCT: Hold this in abeyance until evaluation and job security.

CUNY: ... I don’t think you understand what has happened. CUNY never had to deal with collective bargaining. Now they have to. Now BHE and CUNY appoint a team. This team has to deal with further consultative bodies. You have a team that pushes and probes to get limits. You have got to realize the restraints. You have to take a look at what you are getting.

UFCT: Does procedure relate to Step Two?

CUNY: ... We have agreed ...

Excerpted from informal transcript of University notes during bargaining.

We now turn to an examination of the arbitrator's reasoning in the "Smith" case (decision dated December 1, 1970) in which he stated that

the absence of required observations and evaluations and the use of observations that were not properly processed to the evaluation and corrective stages, but which were considered by the several committees in making the recommendations on [the grievant's] reappointment with tenure, manifested an arbitrary use of the established and required observation and evaluation procedures.

Counsel for the Legislative Conference had used the Nota Bene as the pivotal issue, contending that the arbitrator in finding for the grievant could do nothing other than to reappoint the grievant even though such reappointment would confer tenure. On the other side, the University had contended that the Nota Bene clause prohibited the arbitrator from awarding reappointment with tenure and limits his authority to "remaning the matter for compliance with established procedures." Any reappointment, the University argued, would constitute the arbitrator's academic judgment which was specifically prohibited by the Nota Bene. The arbitrator, in making his award, wrote:

[T]o merely remand for compliance with established procedures without a reappointment would be a meaningless exercise. It would not give any redress to [the grievant] for the arbitrary denial of [his] procedural rights that clearly are substantive. . . .

It is true that . . . the procedural decision requiring reappointment automatically means tenure for [the grievant] . . . . But short of awarding a nominal remand that would confine the denial of rights to [the grievant] and relieve the University from its restorative obligation, there is no other recourse under the Nota Bene. To follow the resolution urged by the University would result in providing no antidote to the wronged and to liberate the wrongdoer. It would be contrary to the intent expressed in the Nota Bene and eminently inequitable. 8

The Conference's enthusiasm for the "Smith" result is incongruous

8. The Legislative Conference hailed this decision with a special one page bulletin headlined "LC Wins Landmark Arbitration" from which the following is quoted:
The substance of this decision will have far-reaching effect on many tenure and non-reapppointment grievances currently being processed by the Conference which involve violations of Article XVII [Professional Evaluations]. Our contract has been upheld in no uncertain terms. The Conference expects that at long last, the University Administration will realize what a collective bargaining agreement means and that they'll start honoring it.
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with its previous agreement to the clear language of the contract. The Conference had won its victory in the Nota Bene provision by having inserted into it the right of the arbitrator to remand if procedures used in the decision-making process were found to be arbitrary or discriminatory. In the discussion of this provision examples of such procedural deficiencies were noted such as the failure to present the candidate’s full record, lack of a committee quorum, evidence of ethnic or sex bias, etc. Unfortunately, these examples had not been included in the written statement of the provision.

As a profound understatement, the University Administration was disturbed by this decision by an experienced and learned arbitrator. His dilemma was understandable, his solution not acceptable.

It should be reiterated that at Step II of this grievance the Chancellor’s designee had recognized the college’s utter failure to follow required procedures and had ordered the grievant appointed for an additional year as a terminal appointment. This decision had, of course, not been accepted by the grievant or the Legislative Conference.

The University’s recourse was as follows. It requested and was granted the opportunity to present its case for reconsideration by the arbitrator. He remained firm in his decision stating that “[t]he remedy as awarded is in conformity with the conclusion on remedy and the remand compliance found necessary under the terms of the Agreement in the circumstances of the case.” The University then offered the grievant a position for one year with notice to the effect that it would be attempting through legal avenues to set aside the direction in the award to reappoint with tenure. This, too, was rejected. When the University took no further action in the matter and continued not to accept the award, the Conference went to the Supreme Court of the State of New York to seek redress via a judgment confirming the award. At that hearing the University again sought a modification of the arbitrator’s award on the grounds that the arbitrator had exceeded his authority by ordering the reappointment of the grievant. The court ordered the University to follow the direction of the arbitrator. The University then decided to appeal this decision.

On April 11, 1972, the Appellate Division of the Supreme Court, in a 3 to 2 decision, reversed the lower court in favor of the University’s

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10. Id.
position concerning the Nota Bene.\textsuperscript{11} The University announced the decision to the faculty via a flyer headlined “Academic Judgment Upheld in Landmark Decision—Appeal by University Sustained by Appellate Division of the State Supreme Court.” The flyer quoted the majority opinion which stated:

The arbitrator . . . endeavored to transmute procedural irregularities into a power gratuitously assumed to himself to confer tenure, although the exercise of “academic judgment” alone governs the conferring of tenure.

. . . . It is difficult to believe that the agreement before us was intended to strip the Board of [Higher] Education of its basic power to determine the condition of excellence, required for the achievement of tenure, or that the Taylor Law, with its obligation to bargain as to all terms and conditions of employment . . ., was intended to allow such an abrogation.\textsuperscript{12}

The “Smith” case began in March, 1970. The latest judicial opinion is dated April, 1972. In that two year period several other arbitrators have expressed their views of the Nota Bene and have based decisions on such views.

II. CHANGING THE ARBITRAL CLIMATE

It should be noted that while the “Smith” case was in progress, other cases involving the Nota Bene clause proceeded to arbitration. Some of these were heard before the same arbitrator, some before other arbitrators. Let us examine the treatment afforded the clause.

The fourth grievance brought to arbitration by the Legislative Conference revolved around the Nota Bene and was heard by the same arbitrator as had decided the “Smith” case. The “Johnson” case\textsuperscript{13} involved non-reappointment with tenure, where the grievant in the third year of a three-year probationary period had not been evaluated in accordance with the observation and evaluation procedures of the Agreement.

The arbitrator in finding an arbitrary use of procedure stated:

\[\text{[H]ad the procedural denials to [the grievant] been . . . not of an arbitrary character, the Agreement itself would preclude remedial}\]

\textsuperscript{12} Id. at 480-81, 330 N.Y.S.2d at 690, 691.
\textsuperscript{13} Unreported decision dated June 24, 1971. Due to the fact that the arbitration cases referred to in this article are unreported, reference to them is by date of arbitration decision only.
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action by the Arbitrator. But in a case where the denial has been arbitrary, it would be inequitable to deny the remand by award as permitted by the Agreement . . . . [T]he Arbitrator in these cases should not be asked, as the University in effect has, to make a judgment as to whether the grievant suffered any appreciable harm or injury as a result of some "technical omission." Since he cannot inquire into the value judgments made by the members of the Department P & B in considering the applicant for reappointment, he could not be in any position to evaluate the impact of the procedural violation. His conclusions must presume an effect that can be expunged only by requiring that the procedural rights arbitrarily denied be remedied before there is an academic judgment rendered by the Department P & B that is non-assailable collaterally through contractual procedural deficiencies.

This case is readily distinguishable from the more unusual conditions in the ["Smith"] case. Here the contractual procedural defects are confined to the third year of [the grievant's] employment.

. . . . The October 9, 1969 Department P & B determination on [the grievant's] reappointment . . . [has] to be expunged and his record re-examined inclusive of . . . [a] new evaluation. This [is] the only reasonable means of providing [the grievant] his procedural rights prerequisite to giving him the full consideration in its review of him for reappointment for the 1970-1971 academic year, even though retroactively.

This award appeared to be a vindication of the University's position regarding the Nota Bene. The arbitrator, unlike his decision in the "Smith" case, did not order the grievant to be reappointed but called for the evaluation of the grievant and the requisite memoranda (as provided for in Article XVII of the Agreement) followed by review of the question of reappointment for 1970-1971 by the Department Personnel and Budget Committee. In making this award, the arbitrator adhered to the language of the Nota Bene to the effect that "the power of the arbitrator shall be limited to remanding the matter for compliance with established procedures."

The next arbitration decision of a Legislative Conference case again concerned reappointment with tenure and alleged violations of Article XVII. The "White" case14 was heard by another arbitrator. The arbitrator's award stated:

There was an arbitrary use of procedure, as provided in Article XVII of the agreement between the parties and in the written policies of

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the Board, in the denial of reappointment . . . for the 1970-1971 academic year. Pursuant to the provisions of Section 6.4 of the Nota Bene, this matter is remanded to the parties for compliance with established procedures.

As in the "Johnson" case the arbitrator upheld the Nota Bene and its limited conferral of arbitral power. The arbitrator considered himself bound by the language of the agreement:

The intent of the parties was that the arbitrator was not to enter the area of judgment reserved to the Divisional P & B; he was merely to concern himself with whether the steps required by the collective bargaining agreement and the Bylaws and policies of the Board prior to consideration by the Divisional P & B had been followed.

... Although compliance by the arbitrator with the literal language of the Nota Bene in this case may not grant [the grievant] complete relief, because of the passage of time, the parties, in agreeing to such language, must have taken that possibility into consideration . . . . If they intended to cover violations of Board policies prior to the agreement they must have known that observations cannot be made and discussions thereof take place retroactively. Nevertheless, they did not give the arbitrator the authority to provide relief which would compensate for the passage of time, including also the fact that the academic year in question may have ended before the decision on procedure is made.

Once again the arbitrator who had decided the "Smith" and "Johnson" cases was called on to hear a Nota Bene case. The University was confident of a finding in its favor. The award15 in the "Jones" case read as follows:

There was an arbitrary use of procedure in the denial of reappointment to [the grievant] for the 1970-1971 academic year. . . . The matter is remanded for compliance by the President. . . . [The] President . . . shall review [the] case and "consult" with the Faculty P & B before rendering his final decision on whether to recommend [the grievant] for reappointment with tenure for the academic year 1970-1971 to the Board of Higher Education.16

The arbitrator also stated the following:

Whether the "academic judgment" or the decisional process itself was exercised incorrectly or inadequately was a sphere expressly excluded

15. Unreported decision dated July 2, 1971. 16. Id.
from arbitral adjudication by the Section 6.4 Nota Bene. Grievances
arbitrable in accordance with the terms of the Section 6.4 Nota Bene
are bounded by the Section 6.2 (1) and (2) definitions . . . .17

That the University’s position in regard to the Nota Bene had
been sound was further reinforced by the decision18 of a third member
of the Legislative Conference arbitration panel. As with previous
cases, the issue concerned reappointment with tenure where there had
been violations of the observation and evaluation procedures. The
arbitrator’s award read:

Within the meaning of the Nota Bene there was an arbitrary use of
procedure in connection with the denial of the reappointment of [the
grievant]. A hearing on the matter of remedy shall be scheduled.19

The salient parts of the arbitrator’s opinion read as follows:

[I]t is my conclusion that if I find any one or some of the charges as
an arbitrary or discriminatory use of procedure within the meaning of
the Nota Bene, this case, at that point, is transformed fully to its
remedial stage. As I see it, it makes no difference whether there was
a single or multiple arbitrary or discriminatory use of procedure with
regard to the denial of the grievant’s reappointment, for in either
event the scope of my authority to fashion a remedy if any, is equally
as complete and is neither enlarged nor narrowed by how many times
the Nota Bene was violated.

. . . . [T]he foregoing findings are enough to transform this case
fully into its remedial stage. Whether or not there were additional
breaches of the Nota Bene by the Board is immaterial because my
power to fashion a remedy and the scope of that remedy would be no
different. Accordingly a hearing on the question of remedy for the
grievant will be scheduled promptly.20

The final indication that the University’s defense of the Nota
Bene had been successful was a decision concerning two grievants
handed down by a fourth member of the Legislative Conference arbit-
tration panel. As with previous cases the issue again was reappoint-
ment with tenure. The award21 read as follows:

17. Id.
19. Id.
20. Id.
The grievances . . . relate to academic judgment and not to procedures. Both grievances are therefore denied.

The arbitrator, in very unmistakable language, concluded as to his power under the Agreement:

Initially the issue which must be resolved under Section 6.4 is whether the President's action was a matter of academic judgment. The Agreement requires the Arbitrator to determine that, and also states that the Arbitrator may not overrule the academic judgment where it, rather than contractually improper procedures, has caused denial of tenure.

. . . Once it is decided that the grievance relates to academic judgment rather than to procedure, the arbitrator has no jurisdiction over the matter. Section 6.4 declares flatly that he may not "substitute his judgment for the academic judgment."

. . . . [The President's] judgment is unchallengeable under the Agreement, in the absence of evidence that arbitrary or discriminatory use of procedure was involved.22

III. THE UFCT ARBITRATION PANEL VS. THE NOTA BENE

That the application of the arbitral process to higher education collective bargaining agreements is fraught with difficulty should now be apparent. Perhaps the greatest single difficulty is that the arbitration process not only permits but is itself conducive of the result of arbitrators differing in their interpretations of contract provisions. An award23 by one of our arbitrators stated the problem as follows as he rejected another arbitrator's opinion of a contract clause: "I make the foregoing finding with considerable reluctance. Conflicting interpretations by arbitrators as to the identical provisions of a collective bargaining agreement make arbitration a kind of judicial roulette . . . ."24

From the University's viewpoint the decisions rendered by the Legislative Conference panel on the issue of the Nota Bene had been consistent with the intent of the agreement once interpretation in the "Smith" case had been reversed. However, these successes were offset by some of the decisions rendered by the UFCT arbitration panel.

22. Id.
24. Id.
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The concept of "judicial roulette" is particularly noticeable when comparing the opinions of the UFCT panel regarding the Nota Bene and the opinions of the Legislative Conference panel previously discussed. Let us examine some of these UFCT arbitral opinions.

The first UFCT arbitration in which interpretation of the Nota Bene was at issue concerned the non-appointment of a grievant. In this case the arbitrator ruled that there had been a violation of Article VII (Nondiscrimination). In his opinion the arbitrator discussed his interpretation of the Nota Bene.

The Nota Bene . . . excludes from arbitration only those grievances as to non-appointment which are matters of "academic judgment" and I have found that this was not a refusal to recommend appointment based upon academic judgment. At least two possible interpretations of the Nota Bene then become available. First, that I am now restricted to a direction that [the] appointment be remanded for processing in "compliance with established procedures." Second, that if there is no finding of an exercise of "academic judgment" or an "allegation of arbitrary or discriminatory use of procedure" (emphasis supplied) the Nota Bene has no effect whatsoever and the grievance may be upheld or rejected solely on the basis of other provisions of the Agreement. Or, to restate the second approach, the arbitrator's authority is unaffected by the Nota Bene if the contention of the Grievant is that there was neither exercise of academic judgment nor misuse of procedures but a violation of some other mandate of the collective bargaining contract.

. . . Accordingly, I can only consider that a remanding of the dispute "for compliance with established procedures," would only be an idle gesture predating protracted and unprofitable further action and that this case is not subject to the limitations of the Nota Bene. The essence of the matter is whether the prima facie allegation of discrimination in violation of Article VII can survive the test of a statement of the reasons dictating [the] non-appointment. Accordingly, I do not find the restrictions of the Nota Bene applicable in this instance and I will remand the matter to the parties, subject to my continuing jurisdiction, for discussion as to the basis upon which the Grievant was denied appointment. If there is failure to resolve the dispute as a result of such discussions, I shall reserve jurisdiction to hear and determine the matter of the alleged discrimination and, if proven, its remedy.26

26. Id.
This same arbitrator in his next arbitration case stated:

I find and conclude that the refusal of reappointment to the Grievant was a matter of academic judgment not subject to arbitral reversal.

... I concur with the argument of the Union that situations may well exist in which that authority is limited. Thus, constitutional considerations beyond my authority to interpret or apply may be applicable. Moreover, where such a denial of appointment or reappointment clashes with a provision of the Agreement it cannot be termed protected as an exercise of "academic judgment"; that judgment has, in such instances, been made subordinate to a contractual limitation fully within an arbitrator's power to interpret and apply.

These two decisions were greeted by the University with subdued approval. Although the arbitrator had not ordered a reappointment in the first case and had denied the grievance in the second case, there were indications that in future cases the University's position might not be sustained by this arbitrator.

The next UFCT award concerning a Nota Bene issue was handed down by a second member of the arbitration panel. The issue was identical to that of the specific case noted above: can a college deny reappointment to a Lecturer (full-time) who has not pursued and achieved the Ph.D.?

It is the opinion of the arbitrator that the grievance is arbitrable. The grievance involves an alleged violation of the contract and is not a question of academic judgment within the meaning of the Nota Bene. What the grievance seeks is a construction and interpretation of Article 13.1, an issue that is clearly arbitrable.

... The University's construction of the extent of the Nota Bene would prevent the Union from arbitrating any question concerning appointments and reappointments of teachers within the bargaining unit by waving a magic wand called Nota Bene. The contract specifically grants the Union a grievance and arbitration clause which permits it to process through arbitration all claims of contract violation. The first sentence of Nota Bene reads, 'Grievances relating to appointment or reappointment which are concerned with matters of academic judgment may not be processed by the Union beyond Step 2 of the grievance procedure.' What happens if the academic judgment violates a specific provision of the contract, or adds a condition to the contract which is not written into the contract?

28. Id.
... The arbitrable issue posed is whether Article 13.1 of the contract contains a set restriction against utilizing the lack of a Ph.D. degree as valid criteria for denying reappointment of a Lecturer (full-time). This issue is not barred by the Nota Bene.

... The arbitrator finds in favor of the Union on the grievance. The proper remedy is to reinstate the grievant to his position and to make him whole for any loss of earnings suffered by him as a result of the University's action. In addition, the grievant must be retained in his position for the forthcoming academic year since the deadline for giving notice of reappointment had passed prior to the arbitration hearing held in the case sub judice.30

Inconsistent interpretation thus became all too obvious to the University. Whereas one arbitrator had ruled that a Nota Bene case "was a matter of academic judgment not subject to arbitral reversal," another had said in a Nota Bene case that the "issue . . . is clearly arbitrable." A strange twist!

The decisions rendered by the UFCT panel continued to tear at the fabric of the Nota Bene with statements such as the following:31

The Nota Bene clearly removes from the arbitrator the authority to review, let alone supplant, the judgment of the Board on the competence of a lecturer as a teacher. But the claiming of the exercise of this judgment, if it be such, does not remove the action from challenge and examination under other provisions, when properly invoked, in the grievance procedure and arbitration.32

... The integrity of the academic judgment, which is properly removed from arbitral review, is nurtured and protected by the conscientious application of the prescribed procedure. I should think that those members of the faculty and administration responsible for the application of such judgment would embrace the prescribed observations and evaluations as an additional support of their academic role.

... The only remedy which can repair the impropriety is the reappointment of [the grievants] to the 1971-1972 academic year so that they can be observed and evaluated properly for their teaching assignments as required by the Agreement. The remand procedure has been exhausted.33

30. Id.
31. It should be noted that all of these statements predate the Appellate Division decision.
However, on occasion, there was a UFCT decision which upheld the Nota Bene and the arbitral restrictions. In such a decision, the arbitrator wrote:

The summary of the observations . . . of the Grievant . . . does not sustain a more than meagre suspicion that anything other than academic judgment was involved in the assessment of his talents. In such instances, the Nota Bene restricts the authority of the undersigned to a determination of whether or not there has been arbitrary or discriminatory use of procedure. I find this record devoid of evidence of either.

. . . . In sum, as I have found in other cases, the Nota Bene does not immunize Board action where a provision of the Agreement mandates contrary restrictions. One of these restrictions is that an individual not be the subject of "discrimination" . . . . The fact that the Grievant was engaged in a bitter dispute with one portion of the College administration, however, does not make a prima facie case that a decision not to reappoint him by another branch of that administration is automatically invalid. . . . [T]he grievance was properly denied.

The arbitrator who had rendered the above decision sustaining the Nota Bene now issued a decision in a highly complicated case in which he ordered the grievant to be reappointed. The salient parts of his opinion are the following:

That the grievance involves non-reappointment I do not contest. That the grievance, because it involves non-reappointment, is a matter solely to be judged on the basis of the limited role of arbitration posited in the Nota Bene, I do not now accept as, indeed, I have previously indicated I would not acknowledge. There are many other provisions of the Agreement. Their force cannot be negated by the simple waving of a verbal wand entitled "Nota Bene."

. . . . I feel it necessary to state that, once a violation of Article VII as to hire or tenure of employment is established, the matter is not one to be dealt with exclusively in terms of the Nota Bene. The Nota Bene deals with questions "relating to appointment or non-reappointment" as, admittedly, this grievance does. But the Nota Bene deals with those questions "which are matters of academic judgment" or where "there is an allegation of arbitrary or discriminatory use of procedure." I have already found that the nonreappointment of the
Grievant was not a matter of academic judgment. While the words discriminatory use of procedure could be argued to apply to every situation . . . which resulted in termination of employment, repeated study of the language of the Nota Bene leads one to a different conclusion. As I construe that limitation, it applies to situations where the process and procedures leading up to a determination not to appoint or reappoint are misused in an arbitrary or discriminatory fashion. It was not the *procedures* here which were arbitrary or discriminatory. It was the end result of those procedures rather than their arbitrary or discriminatory use, itself, which is at the heart of these proceedings. That end result . . . was in my judgment a punishment of the Grievant for activities protected under the terms of Article VII.

... Accordingly, I find it unnecessary to determine the question, in controversy under this Agreement . . . as to whether or not issues controlled by the Nota Bene which are resolved in favor of the grievant may or may not be the subject of an award granting reappointment and back pay. I have concluded that the grievance here is properly before me, that it states and sustains a finding that the Board has violated Article VII of the Agreement. I found nothing in the Agreement, the Nota Bene not being applicable, which restricts my remedial authority in such a situation. Accordingly, I find and conclude that the only manner in which this violation can be remedied is by directing that the Grievant be offered, as the Union requests, reinstatement as a Lecturer (full-time) . . . .37

It should be noted that the above constitutes a well reasoned position; albeit an artful dodging of the Nota Bene.

In subsequent cases the University's Nota Bene position had been both denied and sustained. The arbitral process had become a kind of merry-go-round with its Nota Bene decisional ups and downs. For example, one arbitrator made the following comments:38

Even assuming *arguendo* that this was a "Nota Bene" case, it would be rather absurd to remand the matter back for compliance with established procedures. How can a Lecturer be evaluated or observed in absentia? Even in this type of situation (Nota Bene) it would be necessary to reinstate [the grievant] so that the evaluation procedure could be complied with, otherwise the remand would be a fiction . . . . The remedy in this case requires that [the grievant] be reappointed to his position in order for his employer to comply with contract procedures.39

A recent UFCT arbitration decision40 to which we now turn is one

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37. *Id.*
39. *Id.*
which denied the Union's grievance. It seems to sum up fairly succinctly the arbitrator's view of arbitral difficulty generated by the Nota Bene.

The Grievant may well have been right as to the proper usage of his services; the determination as to how to utilize them can only be considered as an academic choice. That choice may have been incorrect in my view. If the Nota Bene means anything, however, it is to be read as insulating such "second guessing" by an arbitrator on a matter relating directly to academic needs...[H]aving found this action to be a matter of academic judgment, I need say no more but dismiss the grievance as having been properly denied. The tangled web of contractual prose which the Nota Bene weaves contains enough conflicting instructions to make that result, in my judgment, untenable. The strands of that web criss-cross in a manner sufficient to make even the arbitral spider seated at its center somewhat dubious as to direction and approach.

...[T]he Nota Bene specifically states that the union may process a complaint to arbitration "where there is an allegation of arbitrary or discriminatory use of procedure." This is followed by the instruction that "In such case the power of the arbitrator shall be limited to remanding the matter for compliance with established procedure." That instruction is further followed by the command that "In no event, however, shall the arbitrator substitute his judgment for the academic judgment."

... It is difficult—perhaps impossible—to make these mandates of the contract "parse" in a situation such as presented herein. After full and repeated reflection, I believe they are best accommodated by the following determination. Where an "academic judgment" is flawed by improper procedure, the arbitrator has authority to remand—whether or not with past or present reinstatement. Where such a remand would accomplish nothing but a punitive result levying a penalty on the Board but, because of the nature of the original decision, positing no legal obligation except a proper procedural implementation of a determination beyond the power of arbitral review, I do not believe that it should be sustained. I cannot state that I am happy or satisfied with such a result. It is the parties—not the arbitrators serving under the Agreement to contrive and authorize a more satisfactory system.41

**CONCLUSION**

What has the University learned from its experience in the arbitration process? It has learned that each arbitrator on a panel is of his own mind and reaches an individual conclusion regardless of how

41. *Id.* (Emphasis added).
any of his colleagues may have reasoned in other related cases. It is also clear that arbitrators do not like to be faced with caveats which restrict their powers. In essence, the hard won bargaining language with its specific intent of eliminating the possibility of a third party (an arbitrator) from substituting his academic judgment for that of the "academe" did not find uniform acceptance with the professionals. It is also appropriate to note that the same lack of uniform acceptance was apparent in the opinions of the Appellate Division of the State Supreme Court in which the majority opinion stated:

    However, in our view, the determination of the Arbitrator exceeded the purview of his power, as the power to grant tenure is vested exclusively within the province of the Board of Higher Education; and, thus, when the Arbitrator abrogated this power unto himself, he violated the Nota Bene of section 6.4 of article VI of the collective bargaining agreement, which specifically excluded such power . . . .

The judicial majority accepted the limit on arbitral power. However, the dissenting judge in the same case did not. His dissent, in part, stated:

    It seems incongruous that an arbitration should be had . . . simply to come to the conceded conclusion that the Board of Higher Education did not enforce its rules in the first place, and that it could only be told now that there must be "compliance with established procedures."43

"Incongruous" to the judge—yes, but that was precisely what the parties had negotiated.

The University has also learned that binding arbitration has made it possible for the unions to win in arbitration either (1) that which was negotiated out of the contract (i.e., the demand taken off the table), (2) that which never came up as a subject of negotiations, or (3) that which was crystal clear in its contract wording but used by the union to probe for further gains through the arbitral process.

One outstanding example of the last point is the matter of "no reasons." It has been the traditional policy of CUNY (and many other universities in the United States) that in matters of non-reappointment, failure to promote or failure to grant tenure, no reason for such action need be given the candidate. The University position had been spelled out in regulations and in the Bylaws of the Board of

43. Id. at 483, 330 N.Y.S.2d at 694.
Higher Education. Neither union ever pressed for a change in this policy as a demand, yet in the second year of contract application it became a major issue in grievance and arbitration cases. The Legislative Conference, in fact, received support from a special National Education Association fund to bring the issue into the federal courts. This despite the fact that the United States Supreme Court was deliberating on two cases, not CUNY cases, in which “no reasons” was the issue. The further pursuit of this case may be aborted by the recent Supreme Court decision. On June 29, 1972, the United States Supreme Court, in Roth v. Board of Regents of State Colleges,\(^4\) ruled that teachers in state-run schools who work on year-to-year contracts do not in general have the right to a hearing before their contracts are not renewed. Justice Potter Stewart, writing for the majority in a 5 to 3 decision, said that non-tenured teachers in state schools had a right to a hearing only if they could show that nonrenewal deprived them of an interest in “liberty” or that they had a “property” interest in continued employment.

We firmly believe that the “academe” can utilize the arbitral process effectively but that the academic world, different from the industrial world, must be served by a special breed of arbitrator. This is not in any sense a plea for the creation of a “super-arbitrator” title or function but rather a plea for recognition of the peculiarities of the academic world. Where else does a candidate for a position (sometimes one which carries a guarantee of life long tenure) fail of re-appointment rather than be “fired”? Where else does the candidate’s supervisor (Department Chairman) or his colleagues who have participated in this academic judgment proceed to write on behalf of such candidate recommendations for employment elsewhere? Where else do one’s peers make decisions which vitally influence a person’s career? Is this not a different world?

This different world now appears to have opted for a set of working conditions based on the industrial model. A set of conditions of employment which takes the form of a negotiated labor agreement and oftentimes gives rise to a need for impartial dispute resolution. It is strongly recommended that such impartial dispute resolution be placed in the hands of arbitrators who are themselves employed in the academic world and who concomittantly have hired out their arbitral skills and knowledge to industry. For that is the only combination which is equitable to the “academe.”

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\(^4\) Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).