

NJ Superior Court Hears Rutgers' Appeal of AAUP's Right to Negotiate Changes to Patent Policy

Summary

On September 14, 2005, the New Jersey Superior Court Appellate Division heard arguments from the AAUP and the university administration over whether Rutgers has to negotiate over changes it made in the 1996 patent policy. Rutgers appealed a ruling by the Public Employment Relations Commission (PERC) that the administration was obligated to negotiate over many terms of the patent policy including the amount royalty compensation due to researchers, ownership of laboratory notebooks and other research material that are not involved in patent applications, the reversion of the right to patent to the researcher when Rutgers decides not to patent or exploit the discovery or invention, the timelines and notice requirements in the policy, and the effective date of the patent policy changes. Rutgers argued to the court that it had a right to refuse to negotiate over every aspect of the patent policy, including traditionally negotiable terms such as compensation, and to make unilateral changes to the policy at any time. A decision is expected within a few months.

Expanded

In 1996 Rutgers revised the university-wide patent policy, changing several important provisions. The modifications included:

- reducing the amount of royalty compensation,
- claiming ownership of laboratory notebooks and other research material that are not involved in patent applications,
- denying the reversion of the right to patent to the employee when Rutgers decides not to patent or exploit the discovery or invention,
- diminishing the share of the university's royalties for support of the inventor's department,
- changing the timelines for the university to proceed on a patent and the requirements of providing notice to the inventor about the university's actions, and,
- retroactively applying the new policy to change the rights and compensation of inventions and discoveries patented under the former policy.

The AAUP found that the new policy was not only less faculty and researcher friendly but also that certain crucial protections were eliminated. The AAUP asked to negotiate over those provisions of the patent policy that appeared to be problematic.

Unfortunately, the administration rebuffed all attempts to negotiate, leaving the AAUP with no alternative but to file an unfair practice charge with the Public Employment Relations Commission (PERC). After the charge was filed in 1996, the AAUP continued to try to push the administration to negotiate over the modifications to the prior patent policy. When Rutgers

continued to deny that it had an obligation to negotiate with the faculty and TAs/GAs on this issue, the AAUP invoked the PERC Scope of Negotiations procedure to get a ruling on which aspects of the employment policy were negotiable under NJ law and which were not. After carefully considering the presentations of the AAUP and the administration, PERC issued its ruling finding negotiable most, but not all, of the provisions that Rutgers had changed. PERC ruled that issues of royalty compensation, reversion of rights, ownership of research material not pertaining to a patent application, the effective date of the changes and the procedural requirements of notice and timing were all negotiable. The most significant item that PERC found non-negotiable was the share of patent royalties used to support the inventor's department. The AAUP accepted the PERC ruling. The administration did not and appealed to the Superior Court Appellate Division.

On appeal Rutgers raised the claim that the patent policy was so integral to the core mission of the university that negotiating over any subject would unduly interfere with its managerial prerogatives. The administration did not otherwise challenge that NJ law required negotiations with the union over the specific provision that PERC found to be negotiable subjects, except for two issues: (1) the ownership of those original laboratory notebooks and research material not involved in a patent application and (2) the amount of time that an AAUP member has to disclose an invention or discovery it has made.

The appeal was heard by three judges of the Appellate Division on September 14, 2005. Paul Schachter, Senior Counsel of the firm Levy Ratner, P C., the AAUP's General Counsel, argued on behalf of the union in support of PERC's negotiability decision. Robert E. Anderson, PERC General Counsel, also argued that Rutgers' appeal should be denied. John Peirano, a labor lawyer who represents the administration, and David Sales, a patent lawyer, argued on behalf of Rutgers.

The AAUP and PERC asked the Appellate Division judges to reject the claim that all aspects of the patent policy were non-negotiable based upon alleged potential interference with the university's research mission. They reasoned that every public employer has its particular mission, yet this does not preclude constructive bargaining over compensation and employment procedures. If Rutgers' argument were accepted in this case, then any public employer could shield truly negotiable terms and conditions from good faith negotiations by putting those terms in a "policy," contrary to longstanding NJ law. As an example, a school board could argue that it does not have to negotiate over teacher compensation, by putting the salary tables in a policy on maintaining high teaching standards. The end result of adopting this argument would be to wipe out over 30 years of public employee bargaining in New Jersey.

On the question of when AAUP unit members must make disclosures of their invention to the university, the AAUP conceded that it had no substantial problem with the current policy requiring "prompt" disclosure. The AAUP told the court that it recognized the right of the university to receive disclosures with sufficient time to allow it to evaluate the discovery and to file patent applications pursuant to the patent laws. The AAUP argued that, once the requirements of the patent laws were met, the exact timing of when a report to the administration must be made is flexible. It should be up to the researcher to decide when his or her results are ready to be disclosed, since this may implicate such matters as the integrity of the research. Additionally, even though the current policy is acceptable, if the administration did not have to be responsive to the AAUP on this issue, then there would be nothing to stop it from unilaterally changing the disclosure requirement. It could be made unreasonable by, for example, requiring disclosure within an hour. This would subject faculty members to penalties

for not making hourly disclosures and might affect the integrity of the research. That is why the AAUP argued that preserving the right to negotiate over this term was necessary.

Both the AAUP and PERC acknowledged the right of the university to have control over those laboratory notebooks that are involved in patent applications. This is what the previous policy required. However, the 1996 policy expanded the scope of the administration's ownership and possession of material to include "all other research documents." Since the new wording could include the original research of most faculty, even if the likelihood of getting a patent were minimal, this was a major concern to the AAUP. Adding to the apprehension is the fact that the 1996 patent policy eliminated the written requirement that Rutgers' retain the research material of which it takes possession. Especially in those cases in which the research does not lead to a patent, Rutgers may not have the proper incentive to safeguard the documents. The researcher has a far greater interest in preserving the material. And, if the policy concerning ownership of research material were not negotiable, Rutgers could change it at will to preclude faculty access to their own material or to destroy notebooks, data and source material if it takes up too much space. The AAUP argued that negotiations over research material not involved in patent applications to protect the faculty's interests would not interfere with a significant managerial interest of the university.

The Appellate Division judges did not indicate when they expected to make their ruling, but normal procedure is for a decision to be made within a few months after the oral argument. And, the Appellate Division opinion might not mean the end of the case, since the New Jersey Supreme Court may review the decision of the Appellate Division.