IN THE MATTER OF ARBITRATION

BETWEEN

UNITED ACADEMICS, AAUP/AFT,
LOCAL 4966,

Union,

and

UNIVERSITY OF ALASKA, FAIRBANKS,

University.

ARBITRATOR’S OPINION

AND AWARD

DR. WESLEY PULLMAN

NON-RETENTION GRIEVANCE

HEARING SITE: University of Alaska, Fairbanks
Fairbanks, Alaska

HEARING DATE: March 20, 2005

POST-HEARING BRIEFS DUE: Postmarked May 2, 2005

RECORD CLOSED ON RECEIPT OF BRIEFS: May 16, 2005

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I. INTRODUCTION

This case arises out of the non-retention of Dr. Wesley Pullman (Grievant) by the University of Alaska, Fairbanks (University or Employer) following the conclusion of the 2003-2004 academic year. United Academics (Union) filed a grievance alleging the University's non-retention decision violated Article 2, Article 9.12, and Article 9.25 of the Collective Bargaining Agreement. When the dispute was not resolved during the lower levels of the grievance procedure, the Union advanced the case to arbitration.

II. STATEMENT OF THE ISSUE

The parties were unable to agree on a statement of the issue. The University proposed the issue to read:

Did the non-retention of Wesley Pullman violate the parties' Collective Bargaining Agreement? If so, what is the appropriate remedy?

The Union framed the question to be:

Was the University justified in terminating the employment of Dr. Wes Pullman and, if not, what is the appropriate remedy?

Based on the submissions of the parties, the Arbitrator formulates the issue as follows:

Did the Employer violate the Collective Bargaining Agreement when it notified Wesley Pullman that he would be non-retained and his employment with the University would end on May 22, 2004? If so, what is the appropriate remedy?
III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 2
Purpose

... The parties to this Agreement desire to establish and maintain an atmosphere of mutual understanding and cooperation that will promote the basic purposes of the University of Alaska. The parties share in the commitment of the University community to the achievement of optimal conditions for discovering and disseminating knowledge within an atmosphere of academic freedom, fairness, and individual and institutional accountability. The parties commit themselves to administer this Agreement in such a way as to ensure that the above stated principles shall be best served.

ARTICLE 7
Resolution of Disputes

7.25 Step 5: Arbitration

e. Authority of the Arbitrator

The arbitrator shall have no authority to add to, subtract from, modify, or amend the terms of the Agreement. The arbitrator shall confine the decision solely to the application or interpretation of the express terms of the Agreement. Where provisions of the Agreement call for the exercise of academic judgment, the arbitrator shall not have the authority to substitute her/his judgment for that of the official making such judgment, but shall be confined to whether the procedural steps have been followed. If the arbitrator finds that the procedural steps have not been followed, and that the procedural error was substantially prejudicial to the substantive decision with respect to the grievance, the arbitrator shall remand the case to the decision level where...
the error occurred for reevaluation and may extend an appointment not to exceed one year. In no case, shall the arbitrator have the authority to grant a remedy which includes an appointment of greater than one year or has the effect of granting retention, promotion, or tenure. The decision of the arbitrator shall be final and binding on both parties to the extent permitted by provisions of this Agreement and applicable law.

ARTICLE 9
Faculty Status: Appointment, Evaluation, Promotion, Tenure, and Termination

9.12 Tenure Track Appointment

A tenure track appointment is one that leads to eligibility for consideration for appointment with tenure. Time spent in a tenure track appointment in the academic unit within which tenure is sought shall count toward the time for mandatory review for tenure. Notification of the year of mandatory review shall be made in the initial appointment letter. Non-renewal of a tenure track appointment shall be made in accordance with the notification time periods required by this Agreement.

A tenure track appointment may be made at less than 90 percent, but no less than 50 percent, of full-time status.

The titles of assistant professor, associate professor, and professor shall be used to denote rank of tenure track unit member.

9.21 Evaluation of Tenure Track Unit Members for Retention

Evaluation of tenure track unit members shall be conducted on an annual basis by the dean or director or the dean’s designee, and, at the request of the dean, by the unit member’s department head/chair. During the fourth year of a tenure track appointment the unit member shall receive a comprehensive and diagnostic review by peer unit member review committees and administrators in accordance with
the procedures for evaluation provided in Article 9.25, the purpose of which is to assess progress toward tenure or promotion. The review, however, will proceed to the provost. The review may proceed to the chancellor only at the request of the unit member. A unit member who commences a fourth year review may not convert to a tenure or promotion review.

9.25 Evaluation Process for Retention, Promotion, Tenure, and Post Tenure Review

Except as specifically provided otherwise, evaluation of unit members for retention, promotion, tenure, and comprehensive post tenure review shall be conducted according to the process provided below.

9.4 Termination of Appointment

Termination, which severs the employment relationship of a unit member, shall be based on a considered decision to discontinue an existing employment relationship. Unit member appointments may be terminated under any of the following conditions.

9.41 Non-retention of Tenure Track Unit Members

Non-retention follows a decision not to continue the employment of a tenure track unit member. The Chancellor or the Chancellor's designee shall provide written notification of termination to the unit member. The following schedule of notification shall be based upon consecutive years of uninterrupted service as a tenure track unit member within the University of Alaska.

a. Within the first year, regardless of contract extensions, the unit member shall be notified no later than February 16 for appointments based on the academic year, or three (3) months prior to the end of the base appointment for appointments based on an alternative nine (9) month period.

b. Within the second year, regardless of contract extensions, the unit member shall be notified no later than
November 15, for appointments based on the academic year, or six (6) months prior to the end of the base appointment for appointments based on an alternative nine (9) month period.

c. After two (2) or more years, the unit member shall be notified not less than twelve (12) months prior to the expiration of the final appointment.

Ex. 10.

IV. STATEMENT OF FACTS

Dr. Wesley Pullman was hired by the University as a tenure track faculty member on May 28, 2003. Dr. Pullman’s appointment letter read in relevant part:

Under the appointment authority of President Mark Hamilton, and with the concurrence of Chancellor Marshall L. Lind and Provost Paul B. Reichardt, I am pleased to offer you the following position with the University of Alaska Fairbanks, College of Liberal Arts, Social Work Department:

Faculty rank/title: Assistant Professor of Social Work
Tenure status: Tenure Track
Academic unit: University of Alaska Fairbanks
College of Liberal Arts
Department of Social Work

Continuing appointment: Yes
Term of base appointment: From August 24, 2003 to May 22, 2004

Special Conditions of Employment:

This appointment is for a continuing tenure track position. If the university continues your appointment, you will be reviewed for retention annually, and your 4th year comprehensive review will occur in academic year 2006-07. You will be required to stand for tenure not later than
academic year 2009-10. The deadline for submitting review files is, as stated, in the Agreement. If the university decides to discontinue your appointment, you will receive notice of non-renewal in accordance with the Agreement.

Your employment with the university is primarily governed by the Agreement between the university and United Academics. However, to the extent provided for by the Agreement, your employment is also subject to the terms of this appointment letter, Regents' Policy, University Regulation and rules adopted by the MAUs. The relationship between the Agreement and these other sources of authority is as set forth in the Agreement. Ex. 1, pp. 1, 2.

As a faculty member, Pullman was also covered by the terms of the Collective Bargaining Agreement.

Grievant Pullman moved from Virginia to Fairbanks and commenced work on August 24, 2003 in the University Social Work Department. The Social Work Department is part of the University's College of Liberal Arts headed by Dean Phyllis Morrow. The College of Liberal Arts is one of eleven units at the University, headed by then Chancellor Marshall Lind and Provost Paul Reichardt. The University Social Work Department consisted of Chair Judy Shepherd and several other faculty members. Shepherd was an academic colleague of the other department members, and not considered their supervisor. She is a fellow member of United Academics. Dr. Pullman testified that the move from Virginia to Fairbanks was a major career change. Dr. Pullman explained the major considerations that influenced his decision were the tenure track nature of the position and a chance to integrate collegially with faculty in his field of expertise.
Dr. Pullman taught two classes in the fall of 2003: Introduction to Social Work, and Social Welfare. In addition, Givens finished one research project and started and finished a second research project, joined several associations and professional groups, started a part-time job, and participated in additional community and service activities.

Students in Givens's Social Welfare class complained to Dr. Shepherd about Givens's grading practices. During the fall semester Dr. Shepherd spoke with Givens regarding his performance and attitude. There is an obvious disagreement between Dr. Pullman, and Dr. Shepherd, and Dean Morrow as to the quality of Givens's performance. The record is uncontradicted that no written evaluation was conducted, conveyed to Dr. Pullman, or placed in Dr. Pullman's file prior to his notice of non-retention. The fall student evaluations did not become available until the early spring of 2004.

University witnesses testified that in the fall of 2003 the University was facing a budget crisis created by legislative funding cuts for the 2004-2005 year. Provost Reichardt identified the University deficit at $350,000, and for the College of Liberal Arts, Reichardt directed Dean Morrow to reduce $150,000 from her budget for 2004-2005.

On December 11, 2003, Dean Morrow issued letters of non-retention or non-renewal to two faculty members. Dr. Morrow issued a notice of non-retention to tenure track faculty member Pullman, and a notice of non-renewal to a term faculty member. Dean Morrow also left vacant several other positions in the College of Liberal Arts. The notice of non-retention issued to Pullman read.
Pursuant to Article 13 of the 2001-2003 Collective Bargaining Agreement (Agreement) between the University of Alaska and United Academics-AAUP/AFT. I regret to inform you of the decision not to continue your employment with the University of Alaska Fairbanks, College of Liberal Arts, Department of Social Work beyond your current appointment.

As provided in Article 9.41 of the Agreement, which governs non-retention of tenure track faculty, you are hereby provided notice of non-retention. Your employment with the University of Alaska Fairbanks will end on May 22, 2004.

Your right to appeal this decision is provided in Article 7.33 of the Agreement.

Thank you for your services to the University of Alaska. We wish you well in all your future endeavors.

Ex. 2, p. 1.

The Union filed a grievance challenging the notice of non-retention given to Dr. Pullman, which alleged in pertinent part:

By this memorandum, United Academics and Dr. Wes Pullman are notifying Dean Morrow of initiation of Step 1, Informal Resolution of the Grievance Resolution Process, which is defined in Article 7, Section 7.2 of the Collective Bargaining Agreement (CBA) between the University of Alaska and United Academics - AAUP/AFT. The bases for the grievance are gross procedural violations by Dean Morrow of Article 9 of the CBA: specifically the retention process for tenure track faculty and evaluation of faculty. Procedural violations by Dean Morrow include, but are not limited to:

1) Dr. Pullman has not been afforded the due process protection of “Evaluation of Tenure Track Unit Members for Retention” guaranteed him by the CBA, Section 9.21. If the university does not wish to retain Dr. Pullman, a tenure track faculty member at UAF, it must afford him the opportunity of a retention evaluation provided in Article 9.25 at this time. This evaluation will proceed to the provost level, but may proceed to the chancellor level, if so requested by Dr. Pullman. The decision to retain or not retain Dr. Pullman will be made by the provost, or the chancellor, based on the
procedural steps of the evaluation process, not by Dean Morrow. Since Dr. Pullman was not notified of the university's intention of non-retention until December 15, 2003, he will not have the opportunity to be evaluated until the next evaluation cycle begins in September, 2004. He is prepared to submit his file for evaluation at that time.

2) There was no documented dissatisfaction with Dr. Pullman's progress towards promotion and tenure, nor with his professional conduct, nor with the performance of his university responsibilities, at the time the (invalid) non-retention letter was delivered to Dr. Pullman.

... 

3) Dr. Pullman has not been given sufficient time to establish himself at the university, in order to be evaluated for retention.

... 

4) United Academics asks the question, "Where is the university's commitment to the achievement of optimal conditions for discovering and disseminating knowledge within an atmosphere of academic freedom, fairness, and individual and institutional accountability, agreed to in Article 2 of the CBA?" Dr. Pullman had been here only 4 months, when he received the (invalid) letter of non-retention.

Ex. 2, pp. 2, 3; emphasis added.

On February 16, 2004, Grievant wrote a letter to Dean Morrow requesting the reasons for non-retention. Ex. 3. Dean Morrow responded by stating:

I am writing in response to your letter dated February 16, 2004, in which you requested the reasons for your non-retention. As I reviewed with you during our meeting on February 12, the College of Liberal Arts (CLA) is facing a continuing deficit and the prospect of an even more severe budget shortfall next year. Given that shortfall, Provost Reichardt directed all departments and colleges to find savings, and to consider personnel cuts including the non-
rareview of term faculty as well as the non-retention of first-year tenure track faculty as necessary.

In reviewing CLA's budget in order to identify sufficient cuts, I determined that the Social Work position you occupy is a logical one to discontinue. The college added this position only last year, funded partially through Social Work grant funds and partially through Fund 1. The loss of this position would present less hardship to CLA than the loss of other positions. The Department Chair has also indicated that as funding has become tighter, she will need to put grant funds that have supported this position to other purposes.

As a second basis for the decision to non-renew, you have not satisfactorily fulfilled departmental expectations. Student and faculty members have identified concerns about your teaching, your overall attitude, and your approach to departmental projects throughout the semester. The Department Chair directly discussed these concerns with you in October and November, and advised me of these problems at the time.

Ex. 3, p. 1; emphases added.

On March 3, 2004, Dean Morrow responded to the grievance stating in pertinent part:

It is the University's position that it is permissible to non-renew tenure-track faculty members after their first year, provided timely notice is given. CLA gave such notice to Dr. Pullman in this case. While evaluations play a role in decisions to retain or non-renew faculty members, Regents' Policy 04.04.01(C)(1)(a) provides for the issuance of a notice of non-renewal in a faculty member's first year and the CBA has no provisions prohibiting this type of non-renewal when such an action is needed, as determined by the University. Additionally, although it is not traditional for faculty members to be evaluated in the first year of a tenure-track appointment, Article 9.21 of the CBA provides that an evaluation of tenure track unit members "shall be conducted on an annual basis by the dean or director . . . .". This language in the CBA permits a first year evaluation to occur. The CBA does not require a formal evaluation to precede the issuance of a notice of non-renewal to a first year tenure track faculty member.

Ex. 4, pp. 1, 2; emphasis added.
The grievance was advanced through the grievance procedure where the University denied it at each step. At Step 4, James Parrish, General Counsel, served as the Step 4 designee for President Mark Hamilton. Parrish concluded in his Step 4 decision:

CONCLUSION: The relief requested in the grievance is denied, except to the extent that Dr. Pullman requests a formal evaluation for purposes other than retention. Ex. 8, p. 21.

Dr. Pullman refused the University's offer of an evaluation for purposes other than retention.

The Union elevated the case to arbitration. A hearing was held at which time both parties were accorded the full and complete opportunity to present written evidence, oral testimony, to examine and cross-examine sworn witnesses, and to argue the case. Post-hearing briefs were timely filed. The case is now properly before the Arbitrator for a final and binding decision.

V. POSITIONS OF THE PARTIES

A. The Union

The Union starts with the premise that the nature of a tenure track position is critical to the Arbitrator's decision, and understanding the Union's argument. The contract specifies three categories of appointments. The three are appointments with tenure, tenure track, and non-tenure. A tenure track appointment is defined, in part, as "... one that leads to eligibility for consideration for appointment with tenure." Article 9.12. Dr. Pullman testified that one of the major reasons he accepted the position at the University was because it was a tenure track position. Dr. Pullman explained that there
must be enough permanence and fairness attendant to an appointment to give him a
fair opportunity to achieve the stability and permanence of ultimately achieving tenure
status. While there is no guarantee of continuing employment to a faculty member on a
tenure track appointment, there is a reasonable expectation by both parties that the
employment will continue unless certain events occur. Article 5.41 provides that the
University must give notice of non-retention no later than February 15 for appointments
based on the academic year. The Union submits the notice is but one requirement
necessary in order to non-retain a tenure track faculty member.

The concept that the expectation of continuing employment is essential to
the requirement that an evaluation is required before the non-retention of the
employment relationship is important. There is no dispute that Dr. Pullman was never
formally evaluated prior to the notice of non-retention being issued. When Dr. Pullman
came to Fairbanks, he found that some of his expectations as to conditions of his
employment would not be met. First, the office he thought he would occupy in the
department was still occupied. Dr. Pullman was located in an office in another
department two floors below the Social Work Department. This remoteness isolated Dr.
Pullman from interacting with his colleagues and with his students.

Second, Dr. Pullman believed that he was replacing a senior faculty
member who was retiring and there would be adequate monies to fund his position.

Third, based on discussions with Dr. Shepherd, Dr. Pullman had
anticipated teaching research and prepared over the summer to do so. On his arrival in
Fairbanks, he was told he would be teaching another course.
The Union asserts the University violated the procedures required in the contract for the evaluation of Dr. Pullman prior to making the decision to terminate his employment. According to the Union, the intent of Article 9.2 is clear in that an evaluation is required for all unit members. The record is also clear that Dr. Shepherd evaluated the performance of Dr. Pullman and that Shepherd and Dean Morrow made the decision to non-retain Grievant Pullman. This evaluation was not shared with Dr. Pullman. It is impossible to conclude that this is not a procedural defect. The evaluation was not conducted in accordance with the contractual requirements.

It is the position of the Union that the value of a faculty member for the purpose of renewal can only be reached following an evaluation. Even with a budget shortfall, some process must be used to determine who is expendable and who is not. Without some qualitative basis for a decision, the decision by definition must be arbitrary and capricious.

The student evaluations were not available until after the issuance of the notice of non-retention. Dean Morrow's decision was based on Dr. Shepherd's anecdotal comments of which Dr. Pullman was unaware to which he was not given a chance to respond before the non-retention decision was made. The Union submits the arbitrary nature of the decision to non-retain Dr. Pullman based on anecdotal comments of which Dr. Pullman was unaware to which he was not given a chance to respond before the decision was made showed the arbitrary and capricious nature of the University's conduct.

The evidence adduced at the hearing demonstrated Dr. Pullman was non-retained because of allegedly poor performance. Once the University recognized that
Grievant was entitled to an evaluation. The University proposed a non-retention notice evaluation. In the view of the University, the post-termination offer of evaluation cured any contractual defects in the non-retention decision. The University argues that Dr. Pullman's failure to accept the offer of an evaluation after the notice of non-retention was given somehow stops Grievant from asserting his claim. Alaska law is clear that employees do not have to avail themselves of an administrative process if it is meaningless. The decision makers had already come to the conclusion that Grievant would be non-retained. It makes no sense to require Grievant to go through the evaluation process before those same decision makers.

The Union believes that it was the decision to non-retain that required the evaluation. The University equates an annual evaluation as one only occurring at the end of the year's activity. The Union argues annual means once a year, and depending on the intent of the parties, can be placed at the beginning, middle, or end of the year. Dr. Pullman disrupted his life to enter a new environment believing he would have a chance to prove himself. Instead, the University without the benefit of an evaluation perfunctorily dismissed him.

Turning to Article 2, the Union argues this provision requires the University to treat faculty members with fairness and fair dealing. The reference in Article 2 to fairness and institutional accountability must be given a purpose and meaning. The University caused Dr. Pullman to relocate himself on the assumption he would be given adequate opportunity to prove himself. Instead, he was secretly evaluated without a chance to respond. Based on the secret evaluation, he was terminated. The University made no effort to allocate funds, which were available for Dr. Pullman to continue his
employment so he could demonstrate adequate performance. Instead, the University made a judgment based on Grievant's professional abilities in a perfunctory fashion, giving him no opportunity to rebut the decision.

The timing of the notice of non-retention highlights the arbitrary nature of the decision. The notice was issued on December 11, 2004, and by terms of the contract did not have to be issued until February 15, 2005. Ample time existed for Dr. Pullman to be evaluated in writing with a chance to respond to the evaluation before the notice was issued. Alaska law has adopted the doctrine of employment contracts that contain the doctrine of good faith and fair dealing. The purpose of an employment contract is to effectuate the reasonable expectations of the parties. The University deprived Dr. Pullman of a benefit of the contract, a written evaluation, and the Union submits that the University did not treat Grievant in a fair and reasonable manner.

While Article 7.25 greatly limits the Arbitrator in granting remedies to address breaches of contract, it also confines the Arbitrator to render a decision solely to the application or interpretation of the express terms of the agreement. The Union stated the remedy it is seeking at the conclusion of its post-hearing brief as follows:

Pursuant to Article 7.25(e), the Arbitrator is limited in his ability to grant a remedy. The Arbitrator cannot substitute his judgment for a substantive academic judgment, i.e., the retention of Dr. Pullman. The Arbitrator can, however, remand a procedurally defective "evaluation" back to the level at which it was made for reevaluation.

In this case there was an "evaluation" which did not comport with the provisions of the contract. It was not in writing and was not furnished to Dr. Pullman for his rebuttal. This "informal" evaluation was the basis, in part, for the non-retention of Dr. Pullman. As pointed out earlier in this brief, the offer of an evaluation by Provost Reichardt to properly evaluate Dr. Pullman could not cure these procedural
defects because in order to accept Dr. Pullman would have to waive his grievance and the remedy available to him under the contract.

This Article does provide that the Arbitrator may extend the appointment not to exceed one year. The Union urges the Arbitrator to grant the remedy. It does so for several compelling reasons. It is difficult to undo what has been done to Dr. Pullman. The University did not treat him fairly or in accord with his rights under the C.B.A. Dr. Pullman must be granted the opportunity to perform and to be fairly evaluated in a procedurally correct manner.

In order to remedy this breach of contract the Arbitrator must rescind the notice of non-retention and extend the appointment for one year. This would allow Dr. Pullman the right to be evaluated at the beginning of that extended year and have his performance evaluated during that year if there is a decision to non-rentain him based upon his previous performance. The granting of the above requested remedy by the Arbitrator is the only remedy that would return Dr. Pullman to his previous position before the breach occurred.

Brief, pp. 25, 26.

B. The University

Pursuant to Article 7.25(e) of the Collective Bargaining Agreement, only the procedural aspects of non-retention are subject to the grievance process. The provision expressly provides that where the contract calls for the exercise of academic judgment, "the arbitrator shall not have the authority to substitute her/his judgment for that of the official making such judgment, but shall be confined to whether the procedural steps have been followed." The University submits the Union not only asserts that a procedural error occurred, but also seeks to arbitrate the substantive decision to non-rentain Grievant Pullman.

Non-retention may be based on one or more of several factors including budgetary pressures, programmatic needs, or performance issues. In the instant case,
because a rationale unrelated to performance independently supports Morrow’s notice of non-retention, the evaluation is irrelevant to the budget-based notice of non-retention. The Arbitrator need not reach the issue of whether the University must evaluate a first year tenure track faculty member prior to issuing a notice of non-retention, because the Union has shown no procedural violation that could substantially prejudice the decision with regard to the University's budget rationale for non-retaining Pullman. Thus, the University submits the Arbitrator may deny the entire grievance on the budgetary reasons alone.

If the Arbitrator does reach the performance-based rationale for non-retaining Pullman, he should also deny the grievance based on four primary reasons. First, no procedural error occurred because the contract does not require a prior evaluation in order to non-retain a first year tenure track faculty member for performance reasons.

Second, any error that may exist was created by Pullman himself because the contract places the duty to initiate the process on the faculty member. Pullman failed to initiate the evaluation process.

Third, Pullman failed to mitigate his damages when he rejected the University’s post-notice offer of evaluation.

Fourth, the Employer submits any University error was not substantially prejudicial to Dr. Pullman’s situation. Pullman was advised of the performance issues, and his performance was evaluated to the same extent that would have been in any routine non-retention evaluation.
The University gave Pullman timely notice under Article 9.41(a) of the Collective Bargaining Agreement. Dean Morrow's December 11, 2003 notice of non-retention recites the decision not to continue Dr. Pullman's employment past May 22, 2004. Dr. Pullman's Tenure Track Appointment Letter shows that he was in his first year of an academic year appointment. Thus, the University submits all that was required was to give Pullman notice by February 15, 2004. Dean Morrow met that deadline.

The University properly exercised its right of non-retention on budget grounds independent of performance evaluations. According to the Employer, the budget-related reasons for the non-renewal do not require performance evaluations prior to the notice of non-retention.

The University next argues a budget-based decision to non-retain is not grievable. How the Employer allocates its limited resources is a policy matter reserved to the University under the broad Management Rights provisions of Article 18. Such resource allocation decisions are not subject to the grievance process under Alaska law. The Dean's decision to non-retain Grievant based on budgetary matters does not constitute a grievance as defined in Article 7. The parties have not and may not bargain with respect to budgetary allocations. The parties have bargained impacts such as timely notice of non-retention.

To the extent that Morrow took into account programmatic considerations when she addressed possible ways to achieve budget cuts, her decision necessarily included substantive academic judgments which are not grievable under the grievance
process. The Union's argument based on alternatives available to Dean Morrow in order to retain Pullman is a classic academic issue that is not subject to external review.

The Union did not seriously dispute the existence of the $150,000 deficit, but did argue that Morrow should have cut term faculty before tenure track faculty. According to the University, no policy, regulation, or contract provision grants greater security to tenured tenure track faculty than to non-tenure track faculty. Faculty members of either status may have their employment discontinued after one appointment, through non-retention or non-renewal, with required notice. The Employer's selection to non-renew a tenure track faculty member rather than a non-tenure track faculty member would not be subject to challenge through the grievance procedure as it is a matter of academic judgment.

The Union's reliance on Regents' Policy 04.03.010 has no application to Pullman's grievance. Dr. Pullman's 2003-2004 position was authorized by the department's annual budget. The policy cannot reasonably be read as requiring there is a budgetary authorization or funding for a position for all future years.

In Article 7.25(e), the parties have agreed to limit remedies in matters such as non-retention, which the contract defines as involving academic judgment. Only procedural errors in the retention review process may be addressed in arbitration, and then only if prejudicial to the substantive decision. Budget allocation decisions are not procedural errors contemplated by the Collective Bargaining Agreement.

Turning to the Union's performance-based argument, the University avers this claim is without merit. The University's right to issue a performance-based notice of non-retention to first year faculty by February 15 is not subject to a prior evaluation.
The terms of Article 9.21 require that annual retention reviews be conducted by the dean or director, without peer review processes, and optionally by the department head or chair. The exception to this abbreviated process occurs in the fourth year when a comprehensive review is performed following the review process set forth in Article 9.25. By common usage, an annual review cannot be performed before the first year ends. The proper interpretation of an annual review is a yearly review conducted after the conclusion of each year. The evaluation of Dr. Pullman’s performance as early as September or early October would have allowed for the review, at most, of five weeks of teaching, research, and service activities. Thus, the Employer submits the most reasonable interpretation of Article 9.21 is that the annual review is not required for non-retention in the first year, because the annual review cannot be initiated until the beginning of the second year.

This reading of Article 9.21 is consistent with the February 18 notice deadlines in Article 9.41 and with the language in the appointment letter: "If the university continues your appointment, you will be reviewed for retention annually, and your 4th year comprehensive review will occur in academic year 2006-07." The Union argued that no documented dissatisfaction with Dr. Pullman’s performance or professional conduct existed at the time the non-retention letter was delivered to Grievant. According to the University, the contract does not require documentation of performance reasons for non-retention. However, the University did document the existence of such reasons after Grievant made a request for those reasons. Such a documentation requirement makes no sense when non-retention may be based on non-performance grounds. The sufficiency of the University’s dissatisfaction with Dr.
Pullman's performance is a substantive academic judgment not subject to the grievance process.

An employee must mitigate the damage from any loss suffered through employer error. If the University is somehow obligated to perform its evaluation in September of the first year, Pullman forfeited any claim regarding the University’s subsequent issuance of a notice of non-retention by failing to accept the University's curative offers of evaluations in February and April 2004. Pullman had no reasonable basis for assuming that the reviewer would be biased. In fact, he did not even respond to Dean Morrow's offer.

Regarding the Union's argument based on academic freedom and fairness, the University submits Article 2 does not override the Employer's specific right to non-retain first year faculty members. The evidence showed the decision to non-renew Dr. Pullman was made on the basis of money and quality, not the exercise of academic freedom or department politics.

Based on all of the above-stated arguments, the Arbitrator should deny the grievance.

VI. DISCUSSION

The Arbitrator finds the Union failed to prove by a preponderance of the evidence the University violated the Collective Bargaining Agreement when it issued Grievant Wes Pullman a non-retention letter terminating his employment effective May 22, 2004. This conclusion is supported by an examination of the contract language and
evidence offered at the arbitration hearing. Accordingly, the grievance will be denied. The reasoning of the Arbitrator is set forth as follows.

The fundamental goal of contract interpretation is to determine and give effect to the intent of the parties as expressed in the written contract. In issues of contract interpretation, arbitrators are controlled in the first instance by the contract language. Past practice and bargaining history may be important in ascertaining the meaning of a contract in dispute where the language is ambiguous or unclear.

In the case at bar, no evidence of past practice or bargaining history was introduced by either party. Both sides did submit several prior arbitration awards between the parties involving the disputed language. Included in the post-hearing briefs were numerous citations to Alaska court decisions providing judicial insight regarding the issues of interpreting employment contracts. I reviewed all of the cases and to the extent necessary will discuss them in this Award.

The starting point for review of this case is to recognize this is not a situation involving Article 9.45, Just Cause. The just cause provision applies to discharge cases involving such issues as neglect of duty or unprofessional conduct. Dr. Pullman was employed in a tenure track position for the 2003-2004 academic year. The University made the decision to non-renew Grievant as a faculty member during the first year of his appointment. The termination was effective May 22, 2004, the end of the term of his "base appointment."

Grievant Pullman came to the University under the terms of a "Tenure Track Appointment Letter." Ex. 1. The latter specified Pullman was hired in a tenure track position under "Continuing Appointment." The term of the initial base appointment
was from August 24, 2003 to May 22, 2004. The appointment letter included the following provision:

This appointment is for a continuing tenure track position. If the university continues your appointment, you will be reviewed for retention annually, and your 4th year comprehensive review will occur in academic year 2005-06. You will be required to stand for tenure not later than academic year 2006-07. The deadline for submitting review files is, as stated, in the Agreement. If the university decides to discontinue your appointment, you will receive notice of non-retention in accordance with the Agreement.

Emphases added.

The appointment letter also contained an acknowledgment that the Collective Bargaining Agreement governed Dr. Pullman's employment with the University as follows:

Your employment with the university is primarily governed by the Agreement between the university and United Academics. However, to the extent provided for by the Agreement, your employment is also subject to the terms of this appointment letter, Regents' Policy, University Regulation and rules adopted by the MAUs. The relationship between the Agreement and these other sources of authority is as set forth in the Agreement.

Dr. Pullman signed the Tenure Track Appointment Letter on June 3, 2003.

While the Tenure Track Appointment Letter refers to the appointment as a "continuing tenure track position," the second and last sentences of the paragraph modify the continuing employment language. By the use of the phrase, "[I]f the university continues your appointment, . . . " in the appointment letter, the Arbitrator interprets the quoted language to reserve discretion in the University to decide whether to continue the appointment. I interpret this to mean "[I]f the University decides to continue the employment, an annual evaluation of the faculty member will follow the
decision to continue the appointment. In the fourth year of the appointment, the faculty member will be subject to "a comprehensive review." The final sentence of the Special Conditions of Employment paragraph once again uses the phrase, "[If the university decides to discontinue your appointment, you will receive notice of non-retention in accordance with the Agreement."

Dr. Pullman signed the appointment letter accepting the terms and conditions of employment presented to him by the University. I conclude that the terms of Tenure Track Appointment Letter vest in the University the sole prerogative to continue or discontinue the appointment of Dr. Pullman as a tenure track faculty member.

The inquiry into the resolution of this dispute does not end with this conclusion concerning the terms of the appointment letter. The next step is to examine the Collective Bargaining Agreement in order to determine whether the appointment letter is in conflict with the Collective Bargaining Agreement. The notice provision of the Collective Bargaining Agreement is found in Article 9.4.

The Union argues that prior to making a decision to non-retain, the University must conduct an evaluation. According to the Union, the failure to evaluate Grievant before making the decision to non-retain amounted to arbitrary and unfair treatment of Grievant Pullman. The Union also submits Article 9.21 requires an annual evaluation of tenure track faculty members.

The Union's interpretation of Article 9.21, Evaluation, stops short of a review of the entire provision on the subject of evaluations. Article 9.25 specifically addresses, among other items, the process for the evaluation of faculty members for retention. The first paragraph of Article 9.25 reads:

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Except as specifically provided otherwise, evaluation of unit members for retention, promotion, tenure, and comprehensive post tenure review shall be conducted according to the process provided below.

Emphasis added.

The University argues the "[e]xcept as specifically provided otherwise" language refers to Article 9.4, Termination of Appointment. I agree with the University's interpretation.

Article 9.4, Termination of Appointment reads in part:

Termination, which severs the employment relationship of a unit member, shall be based on a considered decision to discontinue an existing employment relationship. Unit member appointments may be terminated under any of the following conditions.

Emphasis added.

I concur with the Employer, the above-quoted language vests broad discretion in the University to sever "the employment relationship of a unit member, . . . ."

The sole limitation of that managerial prerogative is that the determination to sever the employment relationship "shall be based on a considered decision to discontinue an existing employment relationship."

Dean Morrow wrote to Grievant stating:

In reviewing CLA's budget in order to identify sufficient cuts, I determined that the Social Work position you occupy is a logical one to discontinue. The college added this position only last year, funded partially through Social Work grant funds and partially through Fund 1. The loss of this position would present less hardship to CLA than the loss of other positions. The Department Chair has also indicated that as funding has become tighter, she will need to put grant funds that have supported this position to other purposes.

Ex. 3, p. 1.
When Dean Morrow’s stated reasons for the non-retention are combined with the testimony presented at the arbitration hearing regarding the budgetary situation of the University, I find the University’s determination to sever the employment relationship with Dr. Pullman was based on sound budgetary reasons. Therefore, I must conclude the decision to non-retain was "based on a considered decision to discontinue an existing employment relationship."

The last sentence of Article 9.4 is clear and unambiguous. Plausible claims for conflicting interpretation cannot be made for the sentence, which reads: "Unit member appointments may be terminated under any of the following conditions." Emphasis added. The conditions for termination are set forth in the sections which follow.

Article 9.41 provides that non-retention follows a decision not to continue the employment of a tenure track unit member. The determination to non-retain is expressly reserved in the University. The evidence shows the University made a decision not to retain Grievant Pullman based on budgetary constraints. I hold on the facts of the instant case the determination to non-renew Dr. Pullman conformed to the contract standard of a considered decision.

Dr. Pullman was in the first year of his base appointment that encompassed the period August 24, 2003 to May 22, 2004. Following the decision not to continue Dr. Pullman’s employment, the Chancellor or the Chancellor’s designee is required by the contract to “provide written notification of termination to the unit member.” The only condition to the termination of a first year faculty member is found in Article 9.41(a) that provides:
Within the first year, regardless of contract extensions, the unit member shall be notified no later than February 15 for appointments based on the academic year, or three (3) months prior to the end of the base appointment for appointments based on an alternative nine (9) month period. Emphasis added.

I find the Union's attempt to incorporate an evaluation requirement on the decision to non-rent a first year faculty member to be without merit. Nothing in the language of Article 9.4, Termination of Appointment, even hints at such an evaluation requirement being a condition for non-retention of a first year faculty member. The language is clear and unambiguous that tenure track unit member appointments "may be terminated under any of the following conditions." Tho only condition set forth in Article 9.41(a) is that "the unit member shall be notified no later than February 15 for appointments based on the academic year, . . . ."

In order for this Arbitrator to accept the Union's position, I would have to amend the express language of Article 9.4 and Article 9.41 to add a new condition demanding an evaluation prior to the severance of the employment relationship of a unit member. Under the terms of this Collective Bargaining Agreement an arbitrator has no authority to add to, subtract from, modify, or amend the terms of the Collective Bargaining Agreement. Therefore, I must dismiss the Union's attempt to graft an evaluation condition onto Article 9.4, Termination of Appointment.

After Dr. Pullman received the timely notice of non-retention, he requested the reasons for his non-retention. Dean Morrow responded in writing stating two reasons. The first reason Dean Morrow cited was the budget restrictions for which this Arbitrator has previously discussed.
The second reason referred to performance-related issues. Dean Morrow responded to Grievant's request for the reasons for his non-retention with a rationale, "you have not satisfactorily fulfilled departmental expectations." I conclude this reference to the performance-related issues does not trigger the evaluation process set forth in the Collective Bargaining Agreement. As the Union concedes, a tenure track appointment is no guarantee of continued employment.

The University argued its post non-retention offer of evaluation cured any procedural violations that might have occurred. I find this position to be without merit. The decision to non-retain had already been made. The offer of an evaluation contained in the Step 4 grievance response provided "except to the extent that Dr. Pullman requests a formal evaluation for purposes other than retention" is no offer at all. Ex. 5. Alaska law does not require an employee to avail himself of administrative process if it is meaningless. I hold the purported post non-retention offer of evaluation to be an empty promise.

The Union made a strong argument based on fairness and fair dealing. Article 2. While your Arbitrator is troubled by the University's appointment of Dr. Pullman to a tenure track position, and thereafter making a determination to non-retain three months after he started employment, the Tenure Track Appointment Letter and the Collective Bargaining Agreement expressly grant the University the right to make such a decision.

The Arbitrator must reject the proposition the fairness provision of Article 2 can trump the clear and unambiguous language of Article 9.4. The express language that grants the University the prerogative to sever the employment of a first year tenure
track faculty member by providing notice by February 15 is clear. Therefore, I must conclude where the University exercises its specific contractual powers to non-renew a tenure track faculty member, there is no basis to conclude the University acted in an arbitrary and capricious manner in determining to sever the employment relationship with Dr. Pullman.
AWARD

Having reviewed all of the evidence and argument, the Arbitrator concludes the University acted in conformance with the Collective Bargaining Agreement when it notified Grievant Wesley Pullman that he would be non-retained and his employment with the University would end on May 22, 2004. The grievance is denied and dismissed in its entirety.

Pursuant to Article 7.25, the fees and expenses of the Arbitrator are payable equally by the parties to this dispute.

Respectfully submitted,

[Signature]

Gary L. Axon
Arbitrator
Dated: August 1, 2005