

**BEFORE
ANDREW M. STRONGIN
ARBITRATOR**

January 13, 2025

In the Matter of the Arbitration between-

**UNIVERSITY OF SCRANTON
FACULTY AFFAIRS COUNCIL**

-and-

UNIVERSITY OF SCRANTON

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AAA Case No. 01-24-0000-4319

APPEARANCES:

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This proceeding concerns a challenge by the Faculty Affairs Council (“FAC”) to the determinations of the University’s then-Provost, Dr. Michelle Maldonado, to deny the individual requests of six faculty members for a 70% salary supplement for their respective one-year sabbatical leaves to be taken during the 2024-2025 academic year. The stipulated issue is whether the University violated Section 12.4 of the Faculty Handbook dated September 19, 2023, as incorporated into the parties’ collective bargaining agreement, by denying the 70% supplement for one-year sabbaticals, and if so, what the remedy shall be.

BACKGROUND

Briefly by way of background, the parties are governed by a jointly negotiated collective bargaining agreement as augmented by a Faculty Handbook incorporated therein, which also is jointly negotiated. Greatly distilled, the terms of the Handbook are negotiated from time-to-time by a Faculty Handbook Committee (“FHBC”), subject to the approval of the FAC membership, the Faculty Personnel Committee, and ultimately the University’s Board of Trustees.

Pursuant to the Handbook and at times relevant to this proceeding, faculty members enjoy certain defined rights to one-semester or one-year sabbaticals. Applications for sabbaticals, including any request for a salary supplement, are submitted at the beginning of each fall semester for sabbaticals to be taken the next academic year. In 2006 and until amended on September 19, 2023, Sec. 12.4 of the Handbook provided:

A faculty member on sabbatical for one semester will receive full salary. Normally a faculty member on sabbatical for an academic year (two semesters) will receive one-half of his/her

salary. A request for a greater salary supplement (up to 70%) for a one-year sabbatical leave, and a justification for the request, may be made to the Provost/VPAA through the Faculty Research Committee at the time the sabbatical application is filed. The Faculty Research Committee will review and provide advice to the Provost/VPAA on the salary request and its relevance to the nature of the proposed project. The Provost/VPAA will decide to grant, refuse or modify the request.

So far as anyone could testify and to the extent of the available evidence dating back to 2006, a majority of the Faculty Research Committee (“FRC”) – comprised of 10 faculty members from the University’s three colleges, chosen by the Provost’s office without input from the FAC – uniformly recommended, each year, that the Provost grant the 70% salary supplement to all faculty members to request the supplement for their planned one-year sabbaticals. According to Associate Provost David Marx, who served on the FRC, the FRC reviewed all applications, voted whether to grant the 70% supplement, and in all cases a majority of the FRC advised that the Provost grant the 70% supplement. Dr. Marx testifies that the Provost took those recommendations seriously based on his personal discussions with the Provost: “I know Provost took it seriously because there were times when I could have suggested, me personally that something should receive 50% and it received 70%. The committee had said 70%. I felt differently, but the Provost went along and said 70%. So they took it very seriously.”

Thus, there is no evidence of a single instance prior to 2022 in which the Provost refused or modified a timely request for the 70% supplement; it appears, rather, that the Provost accepted the FRC’s recommendation in every case. Indeed, in 2018, the Provost belatedly granted the 70% supplement to Dr. Gretchen VanDyke, despite her failure to request the supplement when applying for a one-year sabbatical in Fall 2017. So far as this record shows, the 70% supplement was only

refused to one faculty member who forgot to request the supplement when filing his application but, unlike VanDyke, did not seek to correct that error until after the University already had begun paying him at the 50% level.

Notwithstanding this history, the FRC, through Associate Provost Marx acting as its Co-Chair, communicated to the FHBC as early as 2020 a burgeoning concern that there were no express criteria to govern the FRC's recommendations on requests for the supplement. Rather than to establish specific criteria, the FHBC ultimately struck the FRC component of the process, amending Sec. 12.4 of the 2022 Handbook, with FAC, FPC, and Board approval:

A faculty member on a one-semester sabbatical ... will receive full salary. Normally a faculty member on sabbatical for an academic year (defined here as the beginning of the fall semester to the end of the spring semester) will receive one-half of their base salary. A separate request for a greater salary supplement (up to 70%) for an academic year sabbatical leave, and a justification for the request, may be made directly to the Provost/SVPAA at the time the sabbatical application is filed. The Provost/SVPAA will decide to grant, refuse or modify the request.

According to Associate Provost Marx, the change removed the FRC from the process, but did not otherwise give the Provost any additional authority. Dr. Marx testifies that Provost Maldonado commented at the time that removal of the FRC would require the Provost to have knowledge of a college's budget and resources, but he adds that there never was any suggestion that a college could not afford a requested sabbatical and there is no evidence to suggest that a lack of other "resources" ever provided any impetus to deny an application. Thus, except for the negotiated removal of the FRC from the process, the basic construct for requests for sabbatical salary supplements remains the same under Sec. 12.4 of the amended Handbook as under the 2006 version: Sabbatical applicants may, but need not,

request the supplement, in which case the Provost, as before, “will decide to grant, refuse or modify the request.” The only material difference is the removal of the FRC from the process.

During the 2022 academic year, Dr. Maldonado, newly installed in the role of Provost, received four requests for a 70% supplement and initially granted only one, denying the other three (“Class of 2022”). The FAC objected and met informally with Dr. Maldonado. According to Dr. Stacey Muir, then-FAC Chair, the FAC explained its view that, as a matter of past practice, all timely requests for the supplement must be granted. The Provost disagreed, but nevertheless decided to grant all four of the requests at 70%, explaining:

I want to be clear that I do not agree that past practice disempowers the Provost from making a decision on the 70% salary, something that is clearly stated in the Handbook. However, given that faculty have overwhelmingly received the 70% in the past I acknowledge that there should have been more explicit communication regarding Handbook language. The next call for sabbatical applications will clearly state that the 50% for a year sabbatical is normative and the 70% is an exception that requires an additional step in the process. I hope that FAC will collaborate with the Provost’s Office so that faculty are reminded of our Handbook.

In the runup to the fall 2023 sabbatical application process, the Provost’s office advised faculty members on August 28: “There has been a change in language to Handbook section 12.4,” and set forth the new language of Sec. 12.4 without further explication. Then, on September 1, in a memo generally welcoming faculty back to campus, Dr. Maldonado wrote:

This week you received an email regarding Sabbatical Applications. Please remember that as indicated in section 12.4 of the Faculty Handbook, “Normally a faculty member on sabbatical for an academic year (two semesters) will receive one-

half of one's salary." Faculty can apply for a greater salary supplement, which is up to 70%, however these requests will only be granted in exceptional circumstances.

Provost Maldonado did not explain or identify, however, what criteria she would use to determine whether an application would be considered to be exceptional or, conversely, unexceptional. Thereafter, seven faculty members applying for one-year sabbaticals requested the 70% supplement ("Class of 2023"). Dr. Maldonado granted only one of those requests, that of Dr. Kenneth Monks, explaining, "based on the substantial amount of travel you have outlined in your application, I approve the greater salary supplement (70%) during your sabbatical." Provost Maldonado indirectly denied the other six applications by way of what appears to be a form letter granting only 50% funding, without mention of any request for the supplement: "Your request for sabbatical leave for the Academic Year 2024-2025 has been reviewed and endorsed by your Department Chair, the Faculty Research Committee and your Dean. I have approved your sabbatical at the 50% funding level."¹

One of the six applicants denied a 70% supplement, Dr. Jerry Muir, filed a complaint, and the Council then filed a class complaint on behalf of all six of the denied applicants, including Dr. Jerry Muir. The two matters proceeded through the complaint and grievance stages of the parties' dispute resolution machinery and ultimately reached arbitration. It is undisputed that to the date of hearing, Provost Maldonado did not provide any specific details in support of her refusal to grant the six applications, telling the FAC only that the Provost has the authority under Sec. 12.4 to grant, refuse or modify such requests. In this last regard, Dr. Maldonado

¹ An additional proviso was appended to the grant of one of those six applications, but that proviso has no relevance to this proceeding.

testifies that neither the FAC nor any of the six individuals asked for specific reasons for her individual decisions.

Although the Council may not have sought information on the specific grounds for refusing the individual applications, the Council did seek information regarding the standards used by the Provost. Thus, as evidenced by an email exchange on December 12, 2023, Dr. Michael Jenkins asked Provost Maldonado: “Please can you explain your rationale for decision-making (e.g., what standards you applied for compensating at 70% or not) and speak to the claim that 70% compensation for a full-year sabbatical is a well-established past practice?”

Provost Maldonado replied the next day:

My decisions were based on the unique and current sabbatical applications exclusively and not any personal circumstances or past proposals. This process is consistent with section 12.4 of the Handbook which, as you know, was just amended for the 2022 year to leave this decision up to the exclusive judgment of the Provost. Given that language, and it’s [sic] change to put this decision in the hands of the Provost alone, historical sabbatical data is not pertinent.

FAC Chair Dr. Stacey Muir later reiterated Dr. Jenkins’ request for historical data, specifically asking the Provost whether the University ever had denied a request for the 70% supplement. The Provost conceded that it had no evidence of any such denial and did not believe there ever had been a denial.

The parties do not appear to have engaged in any further substantive discussion of the issue prior to the instant hearing. At hearing, however, Provost Maldonado testifies generally that she considered budgetary and programmatic considerations, as well as travel and residency requirements. She explains that she granted Dr. Monks’ request for the 70% supplement because he cited substantial domestic and international travel.

Meanwhile, as the matter worked its way through the grievance procedure to arbitration, the six affected members of the Class of 2023 were confronted with a time-sensitive choice as to how to proceed with their sabbaticals. Ultimately, three of the affected faculty members converted their full-year sabbaticals to one semester (Drs. Christie Karpiak, Jerry Muir, and Stacey Muir); the other three proceeded with their one-year sabbaticals at the 50% salary rate (Drs. Susan Poulson, Billie Tadros, and Declan Mulhall).

THE PARTIES' POSITIONS

The parties filed post-hearing briefs setting forth their respective positions, the principal points of which may be summarized as follows:

The Council contends that, binding or not, the Provost's practice since the inception of the operative language of Sec. 12.4 of the Handbook in 2006, updated without material change in 2022, has been to grant every timely request for the 70% supplement, without exception. The Council argues that this practice created an expectation that such would continue to be the case, without any countervailing agreement or establishment of new or different criteria to suggest otherwise. The Council acknowledges Provost Maldonado's statement in 2023 that such requests would only be granted in "exceptional circumstances," but argues that Provost Maldonado provided no clarifying details or reason for any applicant to believe their own circumstances were other than "extraordinary." While the Council does not dispute the reasonableness of the criteria identified by Provost Maldonado in her testimony at hearing, it emphasizes that Provost Maldonado has not demonstrated that she applied that criteria to the denied applicants or explained specifically why she denied their applications. Ultimately, the Council contends that

without regard to whether Provost Maldonado's determinations were arbitrary and capricious, it was neither reasonable nor fair, nor in keeping with the promise of Sec. 12.4 of the Handbook, to leave the denials unexplained, providing no information or guidance to the applicants or basis for their challenge.

The University contends that Sec. 12.4 of the Handbook, by agreement of the parties, clearly and expressly provides the Provost with the sole discretion to grant or deny requests for the 70% supplement. Further, the University argues that no past practice has been established (or even could be given the clarity of the discretionary grant) to undermine the Provost's discretion, as non-exercise of an express contractual right does not forfeit that right. The University argues, too, that even if there was a past practice, it ended when the Council agreed to change the terms of Sec. 12.4 in or about 2022 and the Provost announced that, notwithstanding any previous practice, she intended to grant requests for the supplement only in exceptional circumstances. The University further contends that Sec. 12.4, unlike certain other provisions of the Handbook including Secs. 5.6 (Reduction in Normal Teaching Load), Sec. 5.10 (Outside Employment), Sec. 24.0 (Decisions Concerning Rank or Tenure), and App. VII(C) (Annual Reappointment and Non-Reappointment of Non-Tenured Tenure-Track Faculty), does not require the Provost to provide any explanation for an otherwise reasonable consideration of supplement requests. Finally, the University relies on Provost Maldonado's testimony at hearing that she thoroughly reviewed the applications for the Class of 2023 and made thoughtful decisions whether to grant or deny them, arguing that the Provost therefore met her obligations under Sec. 12.4.

DISCUSSION

From the inception of Sec. 12.4 in 2006, the plain terms of the provision imbued the Provost with the sole discretion to determine whether to grant, refuse, or modify an application for the 70% supplement. When the parties amended the provision in 2022, they agreed to excise the FRC's review and advice role in the process, but critically made no change to the Provost's discretionary authority. Thus, after 2022, as had been the case since 2006, the Provost remained imbued with the same sole authority to "decide to grant, refuse or modify the request," still without reference to any established criteria.

The history of the parties' application of Sec. 12.4 prior to Dr. Maldonado's appointment as Provost is clear and undisputed: Notwithstanding that "normally" one-year sabbaticals were to be compensated at 50%, applicants could request a 70% supplement, and in each and every instance the Provost accepted the justifications for those requests and therefore granted each and every one of them, never modifying or refusing any of them. There is no direct evidence as to the parties' understandings – shared or otherwise – as to the intended meaning of "normally" and by what considerations an application for the 70% supplement could or would be granted rather than refused or modified, but history shows that the applicants' justifications, whatever form they took, always were accepted as a basis for granting the requests. Critically, the evidence is that the Provost's earlier decisions were no rubber stamp, they were the product of a deliberative process that the FRC and the Provost took seriously.

The Council now argues that, apart from the question whether the parties' history supports a finding of an enforceable past practice, the record at least

supports a finding that it was an abuse of discretion for Provost Maldonado, against this background, unilaterally to upset the clear expectation that requests for the 70% supplement would be accepted upon application, the parties never having agreed to change the provision to signal such a mutual intention. The Arbitrator agrees.

Reasonable minds could differ, as these parties do, as to which of the parties bore the impetus to establish clarity regarding standards for considering requests for the 70% supplement both before and after the amendment of Sec. 12.4. The Council argues that the past is prologue, whereas the University argues that Provost Maldonado properly exercised her discretionary authority in refusing applications she found to be unexceptional. What is clear, though, is that the parties' history under the 2006 Handbook irrefutably demonstrated that whatever the justifications proffered by the applicants to that date, they all were deemed to meet or exceed standard. Presumably, that history is a reflection of the quality of the applications in light of the evidence of the care with which the FRC and Provost reviewed applications, and it demonstrates that the applications uniformly were regarded as exceptional in the sense that they were awarded the supplement rather than the "normal" 50%.

That is the state of the parties' history when they amended the Handbook in or about 2022, and there is no evidence to suggest that, in determining to change the language of Sec. 12.4 by removing the FRC from the process, the parties ever discussed the rate at which applications for the supplement had been granted; a need – perceived or actual – to reduce that rate for financial or other reasons; an intention to raise the bar for determining what is deemed "exceptional"; or an intention of the University, through the Provost, unilaterally to institute what can only be understood to be a new, rigorous review process that, without precedent,

led to the refusal of the bulk of the applications to follow. There is nothing on this record to suggest that the ultimate decision to excise the FRC from the process – which met with the Council’s approval – signaled or should have signaled to the Council the University’s intention to effect a dramatic change in the rate at which applications were to be granted going forward.

It is against that backdrop that Provost Maldonado initially refused three of the four applications she received for the Class of 2022, ultimately reversing course but signaling to the Council that, for the Class of 2023, “50% for a year sabbatical is normative and the 70% is an exception that requires an additional step in the process.” Once again, reasonable minds could differ as to which party bore the impetus to clarify Provost Maldonado’s meaning from her handling of the applications in 2022 and her communications in fall 2023. Two things, however, stand out. First, Provost Maldonado’s signal did not identify much less announce any new criteria for determining what she would deem to be “exceptional” or, conversely, unexceptional. Under the process from 2006 through 2022, every time an applicant sought the supplement, it was granted. In common parlance, all of the applications were deemed to exceed the norm, and if the faculty members knew the process for applying would change, the faculty members had no basis for knowing that the standard for granting the supplement would change. Second, although Provost Maldonado acknowledged after the challenge to the Class of 2022 refusals that “there should have been more explicit communication,” she did not specify in advance, as she later did at hearing, the specific criteria she would be considering, including budgetary and programmatic considerations, as well as travel and residency requirements, when determining whether an application was exceptional. These observations perhaps are best reflected in Dr. Jerry Muir’s application for the 70% supplement in 2023, which he prefaced by noting, “My two previous

sabbaticals have been approved for such a salary supplement, and I suggest that my current proposal is of a quality equal to or exceeding its predecessors.”

The Provost’s discretionary authority exists within the special confines of a collective bargaining relationship, is the product of joint negotiation, and must not be exercised unreasonably or unfairly. Provost Maldonado seems to have believed that the amendment to the provision was a harbinger of major change, as if to suggest that but for the FRC’s previous liberal application of standards the Provost would have granted the supplement at a lower rate, but as discussed above, the evidence does not support a finding of any negotiated intention to wreak such a wholesale change in the manner in which the longstanding provision would be administered. As a basic proposition of negotiation, the Arbitrator cannot accept the idea that in agreeing to excise the FRC from the process without any other change to the Provost’s ultimate discretion, or any discussion of a problem with the historical approval rate of requests for the supplement, the parties shared any intention to turn the approval process on its head, to move from a 100% approval rate to what proved to be greater than an 80% refusal rate (initially, three refusals out of four applicants for the Class of 2022, and then six refusals out of seven applications for the Class of 2023).

Further, there not only is no evidence as to the nature and quality or relative “exceptionalism” of the earlier applications that were granted, there also is no evidence to suggest that the six applications denied for the Class of 2023 were any less “exceptional” than all those that went before, or even than that of Dr. Monks. Nothing in the record suggests that the Council or individual faculty members knew or should have known from the changed language that Professor Maldonado intended to severely curtail the 70% supplement. While the Provost retained the

same considerable discretionary authority to grant, refuse, or modify applications as initially established in 2006, it was neither reasonable nor fair for Provost Maldonado to effect what amounted to a dramatic tightening of the standard without providing applicants any meaningful target at which to aim. If there was to be such a dramatic departure from the results that reasonably could have been expected from the parties' history, it was incumbent on the Provost at least to explain the change in advance, so that the parties could meaningfully address the issue in a timely fashion that would not prove so disruptive to the faculty members' plans as proved to be the case here.

In so concluding, the fact that applications universally were granted in the past does not mean that the Provost ceded express rights to exercise judgment in future cases, and this Award must not be construed as obligating the Provost to grant all requests merely upon application. That never was the established standard, and the Council does not claim at this juncture that past practice requires otherwise. Likewise, the Arbitrator does not find from the evidence of past determinations that the Provost forfeited the right to deny or modify, rather than to grant, future requests that prove unexceptional. The Arbitrator holds only that the Provost's proper exercise of discretion, if the results of that discretion are to depart so significantly from the parties' shared history, demands advance provision to applicants of notice of the criteria on which decisions will be made, as the Provost acknowledged in the fall of 2022. The Provost proved able to articulate standards in her testimony at hearing, and the Council "do[es] not deny that these are reasonable criteria," but those criteria were not timely made known to the applicants, depriving them of any meaningful opportunity to meet them. Here, the Provost provided no such advance guidance, and under all the circumstances the Arbitrator finds that to have been unreasonable and unfair, hence an abuse of discretion.

In this last regard, the University shows that the parties know how to require the provision of explanations for certain managerial actions similar to Sec. 12.4 determinations, but chose not to require such in the case of Sec. 12.4. While provision of an explanation in particular cases might well prove to obviate or narrow any disputes that might arise over the denial of an application and thereby reduce pressure on the parties' dispute resolution machinery, it appears from this record that the reasons for an application's denial can be obtained by request, including through the complaint process if necessary. Given the express requirements for providing reasons for managerial actions in other contexts, however, the Arbitrator cannot find that Sec. 12.4 affirmatively requires that explanations accompany refusals in the first instance.

By way of remedy for the University's improper denial of the grievants' applications for the 70% sabbaticals, the Council requests the following relief, which the Arbitrator finds warranted:

1) The University shall provide backpay and fringe benefits (retirement contributions) to the three grievants who took full-year sabbaticals at 50% compensation. This backpay shall be 20% of compensation at the 2024-2025 salary rate, and the retirement contributions shall be based on the amount of backpay;

2(a) For the three faculty who converted their full-year applications to single-semester applications, the University shall award additional single-semester sabbaticals in the 2025-2026 academic year. Their compensation for the additional semester, should they choose to take it, shall be calculated so that the compensation for the two semesters is 70% of their 2024-2025 base salary. For future sabbatical eligibility, these three faculty members shall be considered part of

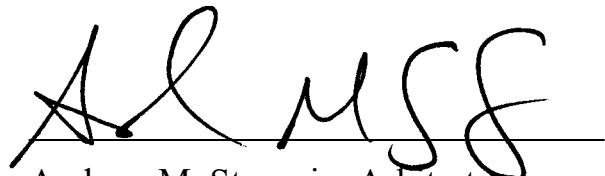
the Class of 2023 notwithstanding that they may take a single-semester sabbatical pursuant to this Award after the 2024-2025 academic year;

2(b) The question of any additional remedy for the three faculty who converted their full-year sabbaticals to a single semester in light of the lost academic continuity shall be returned to the parties for further discussion in the first instance. The Council requests an additional 5% compensation over and above the 70% to be awarded under ¶ 2(a), above, but the University has not been heard on that matter. In the event the parties prove unable to agree on an appropriate remedy for the lost continuity within 60 days of the date of this Award, either party may return the matter to the Arbitrator for final decision; and

3) The Arbitrator retains jurisdiction to resolve any questions that may arise over application or interpretation of the remedial provisions of this Award.

DECISION

Consistent with the foregoing, the grievances are sustained.



Andrew M. Strongin, Arbitrator

Bethesda, Maryland