IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

YAUNA TAYLOR,	)
	)
Appellant,	)
	)
v.	)
	)
UNIVERSITY OF ALASKA, et al.	)
	)
Appellee.	)
	)

Case No. 4FA-08-2579 CR

DECISION AND ORDER

I. INTRODUCTION

Yauna Taylor challenges the termination of her employment by the University of Alaska. The University terminated Taylor for disciplinary and performance-based reasons. But the University chose to use nonretention procedures when ending Taylor's employment rather than "for cause" termination procedures. Because nonretention may not be used for disciplinary or performance-based reasons, and because the University is required to afford Taylor the procedural protections found in "for cause" terminations when terminating for disciplinary or performance-based reasons, the University's nonretention of Taylor is reversed and Taylor is entitled to an award of back pay. Because the scope of Taylor's continuing employment rights has not been adequately briefed, the scope of

Taylor's back pay remedy and the issue of remand shall be subject to further proceedings.

II. FACTS AND PROCEEDINGS

Yauna Taylor worked as an administrative assistant in the Culinary Arts Department at the Tanana Valley Campus of the University of Alaska Fairbanks. Taylor worked for the University under a series of hiring letters that covered a portion of several school years. The last of Taylor's letters covered the period, August 5, 2007 - June 7, 2008. Each of Taylor's employment letters advised Taylor:

> **Special Conditions of Employment:**
> This appointment is for "regular," "continuing" employment with benefits.
>
> **General Conditions of Employment:**
> This appointment and other terms of employment are governed, in order of priority, by Board of Regents Policy, University Regulations, and applicable campus rules and procedures, as they presently exist and as they may be amended from time to time at the discretion of the University, as well as by the terms of this letter.
>
> New employees of the University are employed in at at-will probationary status for the first six months of employment. Promoted employees also serve a probationary period with limited rights of retreat. During the probationary period your employment may be terminated for no reason or any reason. Pursuant to University Regulation 04.09.040, the University also may elect to discontinue employment through nonretention with notice or pay in lieu of notice.

The University gave Taylor a notice of non-retention on April 3, 2008. The reason for the non-retention was Taylor's

"lack of professionalism," "lack of responsiveness to clear expectations," and "resistance to correction action."[1] But rather than rely on these reasons for termination, and in lieu of "for cause" termination proceedings, the University chose instead to simply give Taylor a notice of nonretention which they contend terminated Taylor's employment, without cause, on four weeks notice. The University paid Taylor for four calendar weeks, through May 1, 2008 in lieu of the applicable notice period.

Taylor timely grieved the nonretention. She argued that she was a "for cause" employee entitled to a hearing, not subject to nonretention in the way it was being used. The University appointed Anchorage attorney William Cotton as hearing officer. The University moved for summary judgment on the scope of its right of nonretention. Taylor opposed. Cotton held that the University's nonretention policy, 04.07.100, applies to regular, non-probationary employees and that the only material issue in a nonretention termination was whether the applicable notice was given. Finding no dispute of fact as to the four-week notice, Cotton canceled the requested hearing and reported the matter to the Chancellor, recommending that the Chancellor uphold the nonretention.

---

[1] Taylor is admonished for the language used in the heading at page 13 in Appellant's Reply Brief to describe the University's performance-based reasons. Taylor is free to choose words seen fit, but vulgar colloquialisms are inconsistent with the decorum of the court, especially when they do not advance the case.

Acting Chancellor Brian Rogers accepted Cotton's recommendation to dismiss Taylor's grievance. Taylor then appealed to University President Mark Hamilton. President Hamilton affirmed the nonretention.

President Hamilton held as follows:

> By their terms, [Policy 04.07.100 and Regulation 04.07.100] contain no description of the circumstances under which the University may invoke the nonretention procedures. As a result, the University has broad discretion to determine whether particular circumstances warrant discontinuation of an employment relationship and broad discretion to determine whether it will discontinue the employment by means of a "for cause" proceeding or by means of a notice of nonretention. Ms. Taylor has presented no claim that the University abused its discretion in choosing to terminate her by means of nonretention.

President Hamilton went on to hold that University policy 04.01.055(C) guaranteed an employee not designated as "at-will" the protections of the notice and procedures laid out in regulation 04.01.050, noting that that subsection (2) of regulation 04.01.050(B) ("For Cause Employment"), in turn, permits the University to non-retain even a "for cause" employee. President Hamilton concluded that "the University was entitled to apply the nonretention policy and regulation to end Taylor's employment."

Taylor challenged the University's actions by filing a complaint in Superior Court. The complaint alleges various causes of action. The court converted Taylor's challenge to the

University's termination to an administrative appeal. Taylor sought de novo review of her termination and the court deferred ruling on that request. Because the court addresses Taylor's constitutional questions in this decision, de novo review is no longer necessary and will be denied. Taylor's administrative appeal of the termination is resolved by this decision. The Counts in Taylor's complaint not resolved by this decision remain in effect and shall be subject to further proceedings.

III. DISCUSSION

A. Standard of Review

Appellate courts review an agency's interpretation of its own regulations under the reasonable and not arbitrary standard. This deferential standard of review properly recognizes that the agency is best able to discern its intent in promulgating the regulation at issue.[2] Accordingly, review of whether the University of Alaska complied with its own regulations is limited to a determination of whether the decision was arbitrary, unreasonable, or an abuse of discretion.[3]

The interpretation of a contract is a question of law over which the court exercises its independent judgment.[4] The

---

[2] *Regulatory Comm'n of Alaska v. Tesoro Alaska Co.*, 178 P.3d 1159, 1163 (Alaska 2008).
[3] *Hunt v. UAF*, 52 P.3d 739, 742 (Alaska 2002), citing *Nickerson v. Univ. of Alaska Anchorage*, 975 P.2d 46, 50 n.1 (Alaska 1999).
[4] *Cassel v. State, Dep't of Admin.*, 14 P.3d 278, 283 (Alaska 2000).

interpretation and application of the Alaska and United States Constitutions is a matter of the court's independent judgment.[5]

B. Taylor's Employment Was "For Cause" Employment .

University Regulation 04.01.050 and Taylor's employment letters plainly establish that Taylor's employment was "for cause" employment. Taylor's employment letter states, "New employees of the University are employed in an at-will probationary status for the first six months of employment." Pursuant to this provision, at the conclusion of the six-month probationary period, Taylor lost her at-will status. University Regulation 04.01.050, Types of Employment, states plainly, "The University designates employment not established as at-will to be for cause."[6] Accordingly, when Taylor's employment lost its at-will status, it became "for cause" employment.

---

[5] *State v. Smart*, 202 P.3d 1130, 1134 [citing Grinols vs. State, 74 P.3d 899,891 (Alaska 2003)].

[6] R04.01.050. Types of Employment,

B. For Cause Employment

The University designates employment not established as at-will to be for cause. For cause employment entitles the employee to notice and appeal processes as follows:

1. In the event the University decides to pursue a for cause termination of employment, the supervisor will provide the employee with a written statement of the reason(s) for the planned action and a statement of the evidence supporting the reason(s) for the planned action. The procedure set forth in University Regulation 04.08.080 shall be followed, and notice of the employee's right to request a hearing in accordance with that procedure will be given at the time the employee is notified of the University's intention to initiate a termination for cause.
2. In the event of layoff, nonretention, or financial exigency the supervisor shall provide notice of termination as set forth in the applicable Regents' Policy and/or University Regulation. Review shall be set forth in the Regent's Policy or University Regulation applicable to the particular type of termination.

C. Taylor Was Also Subject to Nonretention

The University's policies and regulations and Taylor's employment letter plainly establish that Taylor was also subject to nonretention. Taylor's employment letter states, "Pursuant to University Regulations 04.09.040, the University may also elect to discontinue employment through nonretention with notice or pay in lieu of notice." University policy 04.07.100 states, "The University may discontinue or not renew an existing employment relationship through nonretention."[7] And detailed nonretention procedures are set forth in regulation 04.07.100.[8] Accordingly,

---

Where the applicable Regents' Policy or University Regulation does not specify a review process, e.g., Regulation 04.07.100 - Nonretention, the grievance process set forth in University Regulation 04.08.070 shall apply.

A decision relating to termination of employment that is designed in writing as the "final decision" of the University may be appealed to the Superior Court for the State of Alaska within 30 calendar days of the final decision pursuant to Alaska Rule of Appellate Procedure 602.

[7] P04.07.100. Nonretention. The university may discontinue or not renew an existing employment relationship through nonretention. Nonretention does not reflect discredit on an employee. If notice of nonretention is required by university regulation, the notice will be in writing and will comply with university regulation adopted under this section. The university may not use nonretention to terminate tenured faculty.

[8] R04.07.100 Nonretention. If the University elects to discontinue employment through nonretention under Regents' Policy 04.07.100, written notice shall be given as required by this section. Provisions of this section do not apply to termination of employment pursuant to other provisions of Regents' Policy or University Regulation, nor do they apply to employees covered by collective bargaining agreements. At the election of the University, the employee may be given pay in lieu of notice.

A. Notice Periods

1.Exempt (administrative/professional/technical or APT) staff will receive at least six (6) calendar months notice of nonretention.

2.Non-exempt (classified) staff will receive at least four (4) calendar weeks notice of nonretention.

3.Faculty members non-covered by collective bargaining agreements will receive notice of nonretention to the extent required by Regents' Policy 04.04.047.B.

nonretention applies to Taylor as well as all University employees. But nonretention must be properly understood and applied.

D. The University Improperly Applied Nonretention to Taylor

The University improperly applied nonretention to Taylor under the circumstances of this case. Termination for disciplinary or performance reasons is "for cause" termination. And the University does not dispute that Taylor was terminated for disciplinary and performance reasons. Taylor was terminated for "lack of professionalism," "lack of responsiveness to clear expectations," and "resistance to correction action." This disciplinary and performance-based termination entitled Taylor to "for cause" proceedings and the protections they provide. Nonretention cannot be substituted for "for cause" termination when terminating for disciplinary or performance reasons.

The University contends that it may use nonretention in lieu of "for cause" termination, in its discretion. They argue

---

B. Term Employees. Term employees are employed for the duration of a project, grant, or contract, or for a specified length of time. The University is not required to give notice of nonretention at the conclusion of the project, grant, or contract, or the specified length of time. Employment ends automatically at the conclusion of the project, grant, or specified length of time unless a new employment agreement is entered into. Term employees may be nonretained during employment, with notice as provided above. Such notice period, however, will not exceed the duration of the project, grant, or contract, or the specified length of time.

C. Written Notice. Written notice of nonretention will be considered given when such notice is sent by certified mail to the last known mailing address of the employee, or when actually received by the employee, whichever is earlier.

that nonretention is not limited to non-disciplinary terminations. President Hamilton relies on the absence of any subject matter limits in the language of the nonretention policy and regulation as authority for this proposition.

According to the University, employees such as Taylor are subject to nonretention at will. These employees have no property interest in their employment beyond the four week notice required by the applicable nonretention regulations. In the University's view, nonretention swallows whole all of the "for cause" rights and procedures, except for four weeks. In short, employees such as Taylor go from at-will, to at-will with four weeks notice.

This is an unreasonable interpretation of the regulations. This interpretation renders "for cause" employment rights meaningless. These critical "for cause" rights and procedures cannot be ignored and must be given greater meaning and effect than the University contends. Any view of nonretention that so expurgates "for cause" rights and procedures is necessarily in error.

This interpretation overlooks the structure and history of the University's policies and regulations. The University's nonretention policy was originally numbered 04.09.040 and located in Part IV, Chapter IX - Nondisciplinary Terminations/Financial Exigency. It was listed alongside

resignation, retirement, emeritus status, layoff, and financial exigency. It was subsequently renumbered and moved to 04.07.100. But its language remained unchanged. Renumbering and moving the regulation does not change its meaning. Nonretention is a nondisciplinary proceeding. It can be used by the University for financial, pedagogical, administrative, or other such reasons.[9] It cannot be used as a substitute for disciplinary or performance-based terminations.

The nonretention policy specifically states that, "Nonretention does not reflect discredit on an employee." This language suggests that it is inapplicable to disciplinary or performance based terminations where discredit is necessarily at stake. The University relies on this "not reflect discredit" language to support the proposition that so long as the disciplinary or performance reasons for the nonretention are disregarded, suppressed, unstated, or not disclosed, nonretention may be used. But the discredit that attaches to a disciplinary or performance-based termination cannot be ignored.

The University claims that, as applied to Taylor, nonretention causes no discredit. But this is not true. Granted, a notice provided to Taylor does say that the University will not disclose to third parties the performance or conduct related

---

[9] See, *Masden v. Univ. of Alaska*, 633 P.2d 1374 (Alaska 1981)(nonretention used in nondisciplinary circumstances.)

reasons for the nonretention. But the notice also says plainly that, "the university will consider any such reasons with respect to future employment with university."[10] And President Hamilton in his decision goes only so far as to say that nonretained employees will be eligible for reemployment in "most circumstances," thus not all circumstances.

In short, performance or conduct related reasons for nonretention can be a discredit towards future University employment. The University is in fact using nonretention where discredit attaches. This suggests that nonretention is being misapplied. The policy contemplates nonretention being used only when it would not reflect discredit on an employee. Thus it cannot be applied in circumstances where discredit attaches.

The procedural protections found in "for cause" terminations are not found in nonretention terminations. The special nature of disciplinary or performance-based terminations requires these protections. The Alaska Supreme Court has held that when a "for cause" employee's character or capacity for employment is called into question with charges of incompetency or misconduct, heightened procedural protections are required, including the right to a hearing where the employee can present a defense and the administrative authority can examine both sides of the controversy, protecting the interests and rights of

[10] See, Request for Reasons for Termination of Employment, ER 280.

all involved.[11] Because the University's nonretention regulations do not provide these procedural protections, they are inadequate. More is needed in this case where Taylor's character and capacity for employment are called into question.

The University's application of its nonretention policy and regulation is unreasonable. It disregards the fact that employees such as Taylor are "for cause" employees - they are not "at-will with four weeks notice" employees. It disregards nonretention's origins in the nondisciplinary chapters of its policies. And it disregards retentions lack all procedural protections.

Taylor is a "for cause" employee when it comes to termination for disciplinary or performance-based reasons. When Taylor is being terminated for disciplinary or performance-based reasons procedural protections of "for cause" termination apply. Nonretention is not a substitute for "for cause" termination under the circumstances in this case. Accordingly, the University's so-called nonretention of Taylor should be reversed.[12] Because Taylor has provided no authority for a University system-wide injunction, Taylor's request for a

---

[11] *City of North Pole v. Zabek*, 934 P.2d 1292, 1298 (Alaska 1997) (citing *Nichols v. Eckert*, 504 P.2d 1359, 1366 (Alaska 1973)).

[12] It is unnecessary to reach the constitutional question under Alaska Constitution, Article 12, section 6 raised by Taylor concerning the merit system of employment. In any case, the court concludes that merit principles do apply, that the University's policies and regulations are consistent with merit principles, and that Taylor's termination does not implicate merit principles. Indeed, Taylor's termination was a merit-based termination.

system-wide injunction against using nonretention should be denied.

E. Taylor Was Wrongfully Denied a Pre-termination Hearing.

The Alaska Supreme Court has consistently held that due process requires pre-termination hearings for public employees:

> The United States and Alaska Constitutions prohibit state actions that deprive individuals of property without due process of law. Public employees who may be terminated only for just cause have a property interest in continued employment. *Storrs v. Municipality of Anchorage*, 721 P.2d 1146, 1148 (Alaska 1986), cert. denied, 479 U.S. 1032, 107 S.Ct. 878, 93 L.Ed.2d 832 (1987).
>
> …
>
> "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.' " *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950)). "Like the federal constitution, the Alaska constitution affords pretermination due process protection to public employees who may only be terminated for just cause." *Storrs*, 721 P.2d at 1150. "At a minimum, the employee must receive oral or written notice of the proposed discharge, an explanation of the employer's evidence, and an opportunity to present his position." *Id.* at 1149.
>
> …
>
> The Supreme Court has "described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.' " *Loudermill*, 470 U.S. at 542, 105 S.Ct. at 1493, (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971)) (emphasis in original). "This principle requires 'some

> kind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." *Loudermill*, 470 U.S. at 542, 105 S.Ct. at 1493 (quoting *Board of Regents v. Roth*, 408 U.S. 564, 569-70, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972)). We have "consistently held that due process of law guaranteed by the United States and Alaska Constitutions requires a pre-termination hearing." *Odum v. University of Alaska, Anchorage*, 845 P.2d 432, 434 (Alaska 1993) (citing Storrs, 721 P.2d at 1149-50; *Kenai Peninsula Borough Bd. of Educ. v. Brown*, 691 P.2d 1034, 1037 (Alaska 1984); *McMillan v. Anchorage Community Hosp.*, 646 P.2d 857, 864 (Alaska 1982); *University of Alaska v. Chauvin*, 521 P.2d 1234, 1238 (Alaska 1974); *Nichols v. Eckert*, 504 P.2d 1359, 1366 (Alaska 1973) (Erwin, J., concurring)).[13]

As a "for cause" employee Taylor had an interest in continued employment and was therefore protected by the Due Process Clauses of the United States and Alaska Constitutions.[14] Those due process rights included the right to a hearing before being terminated.

Taylor was denied such a hearing. If she had such a hearing she may have been able to present facts in her defense which may have weighed against her termination. The University deprived Taylor of this opportunity, prejudging the merits of the termination decision. Taylor's summary termination violated the right to a pretermination hearing.

Taylor is entitled to an award of back pay. But the scope of her back pay remedy has not been adequately briefed and shall

---

[13] *Zabek*, at 1297 (Alaska 1997).

[14] The University's heavy reliance on *Chijide v. Maniilaq Assn. of Kotzebue, Alaska*, 972 P.2d 167 (Alaska 1999) is misplaced. *Chijide* is distinguished as an at-will employment case.

be subject to further proceedings. There is some question whether Taylor's employment contract ended on June 7, 2008 or whether the "continuing" nature of the contract required more. If Taylor's employment rights ended on June 7, 2008, a duty to mitigate shall not be imposed. If Taylor's employment rights continued past that date, a duty to mitigate may be imposed.

And because of the questions concerning the continuing nature of Taylor's contract, the issue of whether this case must be remanded back to the University must also be addressed. If Taylor has employment rights that continue to this day, a remand for a "for cause" termination proceedings may be appropriate.

IV. CONCLUSION

Because nonretention may not be used for disciplinary or performance-based reasons, and because the University is required to afford Taylor the procedural protections found in "for cause" terminations when terminating for disciplinary or performance-based reasons, the University's nonretention of Taylor is reversed and Taylor is entitled to an award of back pay. Because the scope of Taylor's continuing employment rights has not been adequately briefed, the scope of Taylor's back pay remedy in the issue of remand shall be subject to further proceedings.

V. ORDER

Accordingly,

IT IS HEREBY ORDERED that University of Alaska's nonretention of Yauna Taylor is reversed.

IT IS FURTHER ORDERED that Taylor is entitled to a judgment for back pay.

IT IS FURTHER ORDERED that the scope of Taylor's back pay remedy shall be subject to further proceedings.

IT IS FURTHER ORDERED that all causes of actions and motions not resolved by this decision shall be subject to further proceedings.

DATED this 6th day of July, 2010 at Fairbanks, Alaska.

Michael A. MacDonald
Superior Court Judge