SARAH T. COYNE

v. Docket No. 95-BOD-453

BOARD OF DIRECTORS/WEST LIBERTY STATE COLLEGE

D E C I S I O N

Sarah T. Coyne filed this grievance against West Liberty State College (WLSC) when she was not reappointed Chairman (chair) of the school's Humanities Department (HD). She characterizes the loss of the chair as a wrongful discharge because of her efforts to rid HD of, in her estimation, a questionable faculty member who should not have been granted tenure in the first place. WLSC counters that a departmental chair is not a tenured position, and that matters and personalities in the HD had become so publicly divisive that a neutral person had to be named chair for the overall good of the department and the school. The parties requested a decision based upon the record compiled at thelower grievance levels. (See footnote 1) The case became mature for decision on March 18, 1996.

Background

Grievant, presently a tenured Associate Professor of English at WLSC, has been a full-time faculty member in the HD since 1968. She was initially appointed HD chair in 1980 for a four-year term. As a result of subsequent four-year and two-year reappointments, she served as HD chair continuously for approximately fourteen years, until the 1994-95 academic year. Under this arrangement, Grievant was a three-quarter-time faculty member and a quarter-time administrator, as she was granted a three-hour reduction of a normal teaching load (twelve hours) to perform administrative duties. Grievant also received a $2000.00 annual stipend as chair.

During the 1991-92 school year, a tenure committee comprised of nine HD faculty

members, but not Grievant, considered whether to recommend the tenure of a fellow (male) department faculty member, "X." (See footnote 2) In January 1992, the members of the tenure committee reported toClyde Campbell, then president of WLSC, that X had not achieved enough points to support a tenure recommendation (X did have some supporters within HD and essentially lost a positive committee recommendation by a 5 to 4 vote). G EX 40. (See footnote 3) In February 1992, Grievant, as HD chair, recommended that X be denied tenure. (See footnote 4) It appears that X had the support of two WLSC administrators. See G EX 28. For whatever reason, Clyde Campbell, then president of WLSC, ultimately granted tenure to X sometime in early 1992.

When Grievant was questioned during direct and cross- examination regarding her handling of the X situation, her responses were somewhat confusing. For example, she claimed she had obtained some evidence of questionable behavior on X's part, some student papers upon which he had written obscene comments, and had turned these over to the tenure committee upon its request. (See footnote 5) On the otherhand, when asked whether she, as department chair, had ever approached X, or sent him any written missives, about her concerns regarding his personal activities, she claimed she had only learned of those things mid-way in the tenure process, and could not broach the subject with him then. TR2 T2:S2, at 13-14. Then she stated that, before the tenure procedure began, she had spoken to various persons, some higher-ranking administrators, a close friend of X's in the depart ment and others, asking them to approach X and to implore him to "clean up his act" so "we wouldn't have to get into all of this." TR2 T1:S2, at 14-15.

After X's grant of tenure, Grievant's efforts to "keep the peace" in the department were primarily directed toward those in the group who had been opposed to his retention. She counseled them to keep calm and cool regarding what were believed to be the unprofessional actions of X and X's proponents in the department and to let "the process" work. The "process" happened to be a group effort to have X's alleged

wrongdoing verified and to rid WLSC of X. See TR2 T1:S1, at 12, 14; T1:S2, at 12-13, 15.

In any event, in April 1992, Grievant and seven other HD faculty members requested of Dr. Campbell that X be investigated by an entityoutside of the college, relative to the allegations which had surfaced of sexual impropriety and/or sexual harassment on the part of X prior to the tenure deliberations. G EX 22. Dr. Campbell thereafter retained a local attorney to conduct an investigation into those allegations.

This attorney perceived his mission as a "fact-finding inquiry" to produce findings and conclusions relative to charges raised against X and demands that X be dismissed. In pursuit of that mission, he first gathered and reviewed various written statements and other documents. He then interviewed a number of WLSC's staff and students at WLSC's campus for two days in May 1992. The attorney also interviewed X, with X's attorney present, at his own office. See G EXs 23 and 31.

Ultimately, the attorney retained by Dr. Campbell generated a multiple-page report of his investigation which contained specific findings and a recommendation, the so-called "Tucker Report." He concluded that X had, on several occasions, used vulgar or derogatory expressions in speaking to students or writing on students' papers and had, in several instances, engaged in inappropriate behavior of a sexual nature with female students. G EX 31. Dr. Campbell testified that the final recommendation in the Tucker Report was "not to dismiss" X. TR1 T2:S1, at 7. However, based on the report, apparently received by Dr.Campbell in August 1992, Dr. Campbell placed a letter of reprimand in X's personnel file. In the letter, dated August 13, 1992, Dr. Campbell instructed X to refrain from any actions, inferences, or uses of language which would offend or embarrass students and others. Dr. Campbell also assured X that he would not release the Tucker Report to anyone unless he was "ordered otherwise by a higher authority." G EX 26, 31.

Also in August 1992, Dr. Campbell wrote to a member of the group who opposed X's

retention and disclosed that, while he had decided not to dismiss X, he had reprimanded X via a letter of repri mand. Dr. Campbell also advised this member of the group that he would keep the Tucker Report in his possession unless directed otherwise by a higher authority. G EX 30.

Following that, in a strongly-worded letter dated August 25, 1992, Grievant and her group in the HD asked Paul B. Marion, then chancellor of WLSC's governing body, the Board of Directors of the State College System (BOD), to discharge X, "because of his unethical, unprofessional and illegal behavior." G EX 28. According to the letter, support documents were enclosed. In a September 25, 1992, reply letter, the chancellor deferred to the administrative decisions of WLSC's president, both in matters of tenure and discipline. See G EX 48. Thereafter, by letter dated September 22, 1992, Grievant and the seven others who opposed X's retention formally requested (all signed the letter) Dr. Campbell to provide them with the Tucker Report or they would initiate a formal Freedom of Information Act (FOIA) proceeding before the Ohio County Circuit Court. By reply letter dated September 25, 1992, Dr. Campbell denied the request and advised that he considered the Tucker Report exempted from FOIA disclosure. (See footnote 6) G EX 29.

It is unclear from the record whether following the events in Fall 1992, Grievant and her group instituted any other formal actions to bring about the discharge of X. However, it appears from the record that the controversy over X within HD did not abate. In addition, the resultant interpersonal problems and disputes between the two factions in the HD, over which Grievant had not maintained neutrality, had became widely known on and off campus. Prior to January 1993, WLSC had no sexual harassment policy and procedure. As of January 20, 1993, such a policy, Policy Bulletin No. 32, §§14-A.1 through 14.A.7, was effected for the WLSC community. Basically, the policy outlines various procedures for the reporting and processing of sexual harassment claims on the campus. In particular, Section 14.A.7(a) provides that, "[a]ny individual who, after a

thorough investigation, is found to have engaged in sexual harassment of a student or employee of the College shall be subject to appropriate disciplinary action, up to and including dismissal."

During Fall 1993, there began a lengthy selection process for department chairs at WLSC. The college's Faculty Operational Policy, in particular, Policy No. 104, outlines the procedure for selection of departmental chairs. Although the policy itself was not made part of the record, several persons at the hearing described the selection process for departmental chairs, a four step process. Prospective department chairs are nominated and then evaluated by fellow faculty members via formal, written letters of recommendation. Following that, the school dean for the unit reviews the materials and makes a recommendation. The vice-president must then review all of the recommendations, and perhaps the nominees' or others' personnel files, and make arecommendation to the president. Finally, the president of the college must review the recommendations and name the chair for each unit. The president is generally expected to choose between nominees subjected to the evaluation process, unless there are exceptional circumstances. However, the president retains the final appointing authority, and nominees have not always been selected. (See footnote 7)

Grievant and another faculty member (See footnote 8) were nominated for HD chair. G EX 1. During the selection process, Grievant was favored for the chair among the majority of the HD faculty. G EXs 2-9. Additionally, the school dean, David Javersak, recommended Grievant for the HD chair to WLSC's vice president. However, the dean noted on his letter of recommendation for Grievant that she, as chair, should be reminded that she had a responsibility "to build bridges to the section of the faculty who feel alienated by her administrative style and demeanor." G EX 10.

WLSC's vice president, Stephen D. Rowe, had served thirteen years as an administrator at a technical college in Indiana, and had only recently been appointed as a WLSC administrator, in September 1993. He was concerned about the escalating

problems within HD, relative to the split in opinion over the retention of X. He arranged to meet with Dr. Javersak to discuss the possibility of appointing a HD chair who possessed some degree of neutrality. The two of them considered the two nominees, and indeed, all of the HD faculty for the chair. Ultimately, they felt William Boyer, a non-contender and non-tenured HD faculty member who had not become embroiled in the HD interdepartmental dispute, was the only HD faculty member who had the requisite interpersonal skills to manage the "fractured" and "polarized" HD. In testimony, Dr. Rowe emphasized that he would not have looked outside of the HD to find a chair, and that, had Professor Boyer not been willing to serve as chair, he would have recommended Grievant again.

By memorandum dated February 28, 1994, Dr. Rowe recommended Professor Boyer's appointment as HD chair to Dr. Camp bell. Interestingly, Dr. Rowe testified that, out of sixteen chair appointments, effective the 1994-95 school year, he made a total of three recommendations which were counter to recommendations made by school deans, and two of his recommendations were not nominees. TR1 T3:S2, at 8. See also, G EX 11. Of record is an April 8, 1994, letter sent to then-interim BOD chancellor, Dr. James W. Rowley, signed by Grievant (actually, signed in her stead by a colleague, since Grievant was on sabbatical the second semester of the 1993-94 school year and abroad since late March 1994) and the seven other members of the HD department opposed to the retention of X. G EX 45. Materials were enclosed, including the Tucker Report. These materials, the letter stated, were to aid the chancellor in "reviewing" Dr. Campbell's decision not to dismiss X. Dr. Rowley responded by letter dated April 15, 1994. He stated that BOD had no plans to review further Dr. Campell's decision regarding X, again defer ring to the involved president the responsibilities and decision-making relative to the granting of tenure and the disciplining of faculty. G EX 48.

Grievant, still out of the country, was notified by Dr. Rowe, in a lengthy letter dated April 18, 1994, that he was recommending Professor Boyer's appointment as HD chair.

The vice president went to great lengths to explain that he was not dissatisfied with Grievant's service as chair, but that, due to the "rift" in the HD, he felt the "most neutral member" of the department should be asked to serve as chair. G EX 13. In the first week of May 1994, Dr. Campbell followed Dr. Rowe'srecommendation and appointed Boyer as HD's chair, effective the 1994- 95 school year. See G EX 16.

Grievant's contract and tenure as a faculty member at WLSC were not disturbed as a result of not being reappointed as the HD chair, although she lost the $2000.00 annual stipend as chair and was obligated to return to full-time teaching. She ultimately filed this grievance in protest.

Discussion

Grievant's position in this matter is best articulated in her level four grievance pleading:

(a) Grievant had a "property interest" in her position as chairperson in that she had a reasonable objective expectation of being reappointed as chairperson.

b) By failure of [then-president] Campbell to reappoint her, [G]rievant was denied that "property interest" and was effectively discharged from her position.

(c) [Then-president] Campbell failed to reappoint [G]rievant to her position as chair due to the fact that she, as a supervisor in her capacity as chairperson of the Department of Humanities, attempted to enforce the law and policy against sexual harassment and attempted to help provide an educational environment free of sexual harassment in her department at the college.

(d) The effective discharge of [G]rievant by [then- president] Campbell was motivated by his desire to stifle [G]rievant and prevent her from her attempt to enforce the laws of the state against sexual harassment.

Further along in her grievance statement, Grievant argues that WLSC's actions as outlined above amounted to a "contravention of the substantial, clear and compelling

public policy" of the state and nation, in that she sought to "bring to light a pattern of sexual harassment" by X. Finally, Grievant claims "damages including, but not limited to indignity, humiliation, loss of reputation, embarrassment, insult and loss of earnings and earnings capacity in an amount to be determined." As relief, should she prevail, Grievant "demands compensatory damages in the sum of One Hundred Thousand Dollars ($100,000.00) together with prejudgment and post-judgment interest, her attorney fees and costs."

The primary issue to consider is whether Grievant does have a property interest with respect to the HD chair. According to Grievant, it is immaterial that she retained her full-time position as a faculty member of the Humanities Department, because the loss of the chair amounted to a "deprivation of time and money . . . exactly . . . [like] the type of 'property interest' the Court has described" in State ex rel. McLendon v. Morton, 249 S.E.2d 919 (W.Va. 1978).

The Grievance Board has held that, even in the context of full-time government employment, "[u]nless the employment is for a fixed term, the well established common law rule is that either party can terminateemployment at will with or without cause." Setzer v. W.Va. Dept. of Public Safety, Docket No. 89-DPS-476 (Nov. 24, 1989). Additionally, "[a]n employee serving at-will has little protection from even arbitrary dismissals and no rights with respect to management changes in the terms and conditions of employment." Carson v. W.Va. Bd. of Directors/Fairmont State Coll., Docket No. 90-BOD-176 (Nov. 30, 1990), at 4.

It has also been held that the only exceptions to the general at-will rule are based in either contractual or statutory provisions which alter the at-will employment relationship, or involve dismissals shown to be motivated by reasons in substantial contravention of public policy. See Wilhelm v. Dept. of Tax & Revenue, Docket No. 94-L-038 (Sept. 30, 1994); Parker v. W.Va. Health Care Cost Review Auth., Docket No. 91- HHR-400 (June 30, 1992).

Aside from her citation to McLendon v. Morton, which stands for the proposition that tenure-track faculty in a public institution of higher education in West Virginia are generally entitled to due process, i.e., a notice and an opportunity for a hearing prior to the denial of tenure as a faculty member, Grievant raised no specific due process issues in thisclaim. Nor did Grievant cite any authority for the proposition that she was entitled to notice and a hearing prior to her non-selection.

However, in a claim somewhat more similar to Grievant's, a college administrator whose contract was not renewed contended he was in a protected class of employees that could be discharged only after a hearing and for cause. State ex rel. Tuck v. Cole, 386 S.E.2d 835 (W.Va. 1989). Following an extensive discussion of property interests, the Court declared that an employee without a property interest in his job may have his contract non-renewed by his employer "without a hearing and without giving any reason." The Court stated that "[t]he statutes and regulations are silent about procedural and substantive rights of college administrators," but that it was clear the plaintiff was an administrator and thus had no "objective expectancy" that his employment would necessarily be continued beyond any current contract. Id. at 838. Thus, the college was permitted to terminate the administrator and was not required to state any reasons for the action.

The Grievance Board has followed the reasoning in Tuck and has determined that a higher education employee with an administrative contract filled such a position at the will and pleasure of the institution's president and had no property interests in that administrative positionbeyond the terms of the administrative contract. Carson v. W.Va. Bd. of Directors, supra. In short, an employee's expectation for continued employment must be grounded in employment rights set forth in rules, statutes, practices, etc. No statute, rule or practice grants any particular property interest to administrators in West Virginia's public institutions of higher education for continued employment beyond the contracted term of employment. Samples v. Glenville State College, Docket No. 94-

BOD-564 (July 28, 1995).

Here, Grievant does not dispute that her prior appointments as the HD chair, a part-time position, were administrative appointments predi cated upon the "will and pleasure" of the president of WLSC. Moreover, there had been no action on WLSC's part to displace Grievant during her contracted term as departmental chair, during or after the tenure debate surrounding X in 1992, or at anytime thereafter. Instead, Grievant's four-year term of employment as the HD chair simply ended with the close of the 1993-94 school year. Therefore, there has been no "discharge" or dismissal of Grievant from her administrative post as departmental chair.

However, a personnel action adverse to Grievant's interests has taken place, that being Grievant's non-selection as HD chair for a newterm. The question then is whether WLSC violated any law, policy or regulation when it offered Professor Boyer the job instead of Grievant. The evidence does not support such a finding.

Although Grievant seems to be arguing that she has some proprietary right to be re-selected for the position of chair because of her years of capable service as a chair, no such right is conferred by WLSC Policy 104. The Policy does not mandate the re-selection of an incumbent chair, however exemplary the service as chair has been. To find otherwise, one must also accept that departmental chairmanships are, or could be, lifetime appointments, and fully intended by the Policy. If lifetime chair placements were intended, reexamining the placement of current department chairs or evaluating and choosing from among other nominees from time to time would be an exercise in futility, and contrary to the spirit and intention of the Policy. The foregone conclusion would be that an incumbent chair seeking another term would automatically prevail.

Moreover, the record supports that the multiple-step selection process leading to the offer of the HD chair was followed. Nominations were made, peer evaluations were rendered, and the school dean and vice president made recommendations. It is true that, at a certain stepin the process, both nominees, who were in opposing "camps" over

the issue of X, were rejected by Dr. Rowe, the vice president. Thereafter, Dr. Campbell, while expected to select a nominee, was not bound to do so, and he instead relied on the input and recommendation supplied by Dr. Rowe that Professor Boyer would be the better choice, under the circumstances. These administrators were in the best possible position to determine whether the circumstances were exceptional in this case, warranting a selection other than a nominee. While Grievant may have expected that she would be reappointed HD chair, and while she was a bona fide nominee with the support of the majority of her peers, there was absolutely no legal obligation on Dr. Campbell's part to name her again.

Grievant also raised the claim that she was removed as chair to "stifle" her attempts, as the administrator of her department, to cause the termination of, or to expose, a "proven" sexual harasser. First and foremost, it is clear from the record that the controversy surrounding X involves alleged actions, deeds and behaviors prior to the granting of tenure in January 1992. It is also evident that Grievant basically relies on the contents of the "Tucker Report" as support that X is a "proven" sexual harasser, and that she had a duty as a WLSC administrator toenforce laws prohibiting sexual harassment by seeking his termination as a faculty member at WLSC.

Certainly, it is outside the scope of this grievance for the undersigned to determine if X is indeed a proven sexual harasser. However, it must be said that there is no reliable evidence before the undersigned that X is a sexual harasser. Persons interviewed in conjunction with the Tucker Report were not placed under oath, and there is no "testimony" or transcript to review, relative to those interviews. Neither did Grievant herself, nor any of the three HD professors she called as witnesses at the level two hearing, two males and another female, make any claim that they had been sexually harassed by X, nor was there any testimony or documentary evidence that they had ever personally helped any WLSC student or staff member to process a formal sexual harassment complaint against X.

Dr. Campbell, WLSC's president at the time, testified that Grievant, acting solely in her capacity as HD chair, had never contacted him personally to discuss allegations about X's behavior or to institute formally an action to cause X's removal. TR1 T2:S1, at 6. Dr. Javersak, the HD school dean, stated he had never received a formal complaint or grievance accusing X of sexual harassment. TR1 T2:S2, at 7. Moreover, Dr. Rowe, WLSC's vice-president, testified that, at all times pertinent to the grievance, no WLSC faculty, support staff or student had filed any formal sexual harassment complaint with him about X. TR1 T3:S2, at 11. Grievant herself admitted that, in her capacity as HD chair before X came up for tenure consideration, she had never counseled or disciplined X in conjunction with allegations or suspicions that he had sexually harassed someone, that he was acting unprofessionally or that he had engaged in inappropriate behavior with students.

Dr. Rowe did not dispute Grievant's contention that she had a responsibility, when serving as HD chair and the unit's direct supervisor, to act upon complaints of sexual harassment on the part of a faculty member in her unit. In Dr. Rowe's view, the issue over X's alleged past behavior had been tested through administrative channels and resolved, warranting no further action on Grievant's part. However, Dr. Rowe emphasized that the decision to recommend Professor Boyer as HD was based upon his belief that a neutral person as chair could help heal the rift in the HD, and not upon any desire to stifle Grievant. Certainly, whether Grievant is HD chair or not, there is nothing to stop her or the members of her group from further pursuing the issue of X's retention at WLSC. Despite the fact that Grievant had joined a group of her colleagues in the HD who were trying to oust X for alleged actions on his part prior to when his tenure was granted in 1992, the record does not support that the decision in 1994 to appoint Professor Boyer as HD chair was grounded in any professional or personal ill-will toward Grievant, or that any illegal, retaliatory motivation prompted, or played any part in, the decision. Nor was there any evidence that the decision not to name Grievant as the HD

chair was an arbitrary and capricious decision on Dr. Campbell's part.

Certainly, the personnel decision not to reappoint Grievant as HD chair was not comparable to the personnel decision at issue in W.Va. Univ. v. Sauvageot, 408 S.E.2d 286 (W.Va. 1991), cited by Grievant as support in this matter. In that case, college officials decided not to retain a non-tenured employee, a worker who had enjoyed a full-time position based upon contract renewals for thirteen years, when funding ceased for her position, despite the fact that the college's stated policy was to retain such long-time employees over less senior workers. The Court therefore concluded that college officials had engaged in arbitrary and capricious decision-making when it failed to find a position for the employee. Here, Grievant's primary employment is intact. In addition to the foregoing, the following conclusions of law are appropriate.

Conclusions of Law

1. Grievant has the burden proving all of the allegations constituting her grievance by a preponderance of the evidence. Canfield v. W.Va. Univ., Docket No. 90-BOT-127 (Sept. 28, 1990); Durrett v. Fairmont State College, Docket No. 98-BOR-122 (Feb. 20, 1990).

2. Grievant's appointments as chair of her department were discretionary on the part of the college's president, and she had no valid property interest in a further appointment as chair when her most-recent appointment and term as HD ended at the close of the 1993-94 school year. See State ex rel. Tuck v. Cole, 386 S.E.2d 835 (W.Va. 1989); Samples v. Glenville State College, Docket No. 94-BOD-564 (July 28, 1995); Thomas v. W.Va. Bd. of Trustees/Marshall Univ., Docket No. 92- BOT-443 (Feb. 14, 1995).

3. Grievant has not demonstrated a violation of law, regulation or policy, nor has she proven by a preponderance of the evidence any arbitrary and capricious decision-making on the part of college officials in the matter of her non-selection as department

chair. 4. Grievant has not established an entitlement to hold the chairmanship of her department as a matter of law.

The grievance is accordingly **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio County, and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

Administrative Law Judge

Date: April 4, 1996

Footnote: 1

The material record consists of the transcript and exhibits of the level two hearing, conducted August 30 and 31, 1995.

Footnote: 2

It is noted that, there is no good reason, and it would serve no useful purpose, to identify X herein.

Footnote: 3

Grievant's nearly fifty level two exhibits, most of which contained exhibit numbers ranging from 2 to 83, affixed during an earlier court action, were sequentially renumbered at level four for clarity and reference purposes.

Footnote: 4

Grievant specifically cited examples where X had written "Dr. Dickhead" and "Asshole" on a student author's papers and had addressed a student in the hall with "Hi Ugly." She claimed these were supporting reasons for the majority of the

tenure committee to withhold points in three categories relative to its assessment of X.

Footnote: 5

See the level two Transcript of the August 31, 1995, hearing session, "Tape 1, Side 2," at 7 (hereinafter TR2 T_:S_, at _.). It is noted that the party who prepared the level two transcript segmented and numbered the pages in the transcript according to the tape number and side of the particular tape being transcribed for the August 30, 1995 session (TR1 T_:S_, at _.), and began anew for the August 31, 1995 session.

Footnote: 6

G EX 31, the Tucker Report, was finally obtained by Grievant and the others as a result of a FOIA action filed in circuit court by the group's attorney. It is not known exactly when the FOIA action was filed, but Grievant's attorney remarked at hearing that the judge ordered the release of the Report on January 1, 1994. From the record it appears that the judge deemed a portion of the Report, the actual written recommendation as to whether X's dismissal was warranted, as privileged, and that portion was not released.

Footnote: 7

See TR1 T1:S1, at 10-11, and TR1 T1:S1, at 10.

Footnote: 8

This particular professor, a male, was a supporter of X.