GRACE NORTON,

Grievant,

v. **Docket Nos. 98-BOD-022/041**

BOARD OF DIRECTORS/WEST VIRGINIA NORTHERN COMMUNITY COLLEGE,

Respondent.

D E C I S I O N

Grievant, Grace Norton, employed by the Board of Directors as an Associate Professor of Sociology at West Virginia Northern Community College (Respondent), advanced two grievances to level four in February 1998. The first grievance arose from Respondent's placement of a letter memorializing a counseling session regarding acts of insubordination, in Grievant's personnel file. In the second matter, Grievant alleged that her 1996 performance evaluation was arbitrary and capricious. The grievances were processed separately at levels one and two. Grievant elected to bypass consideration at level three as permitted by W. Va. Code §18-29-4(d). The matters were consolidated for hearing at level four on May 28, 1998, and became mature for decision with the submission of Respondent's proposed findings of fact and conclusions on July 13, 1998. (See footnote 1)

The following findings of fact are made based upon a review of the record in its entirety.

Findings of Fact

1. Grievant is employed by the Board of Directors as an Associate Professor of Sociology at West Virginia Northern Community College (WVNCC). Grievant holds a nine-month faculty contract, effective the academic year, August through May. 2. After some preliminary discussion with Grievant, Paige Whorton, a student at WVNCC, filed an application form, dated June 28, 1996, for a Course Learning Contract (CLC). This application provided that Grievant would offer Mr. Whorton individualized instruction in a three-hour course titled “West Virginia and Appalachian Subculture” during the Summer II session in 1996. The application was signed by Grievant.

3. On July 30, 1996, Grievant met with her Department Chair, Dr. Richard C. Pusz, to discuss the CLC. A transcript of that meeting reveals that Dr. Pusz inquired as to the delay in beginning the instruction, and Grievant advised him of her difficulty in obtaining the textbooks. Their discussion

included an acknowledgment that only two weeks remained in the summer session, and Mr. Whorton would necessarily have to complete the course work during the fall semester.

4. Dr. Pusz recommended the CLC be approved on August 19, 1996, and Dr. Philip Mancha, Vice President of Teaching and Learning, approved the CLC on August 30, 1996.

5. Dr. Mancha notified Mr. Whorton by letter dated September 4, 1996, that the CLC had been approved for the “Summer 2 Semester, 1996.”

6. At some point, Mr. Whorton advised Dr. Pusz that he had been unable to locate Grievant after she had agreed to process the CLC.

7. By memorandum dated September 4, 1996, Dr. Mancha advised Grievant that he had approved Mr. Whorton's CLC, by exception, and expressed concern that Grievant had not processed the document in a timely fashion. The CLC form provides, “this contract must be signed and approved by all parties and received back in the Records Office within 15 days after the start of the semester in order to be valid.” Grievant hadwaited one full month to sign the contract. He stated,

I would like you to take the initiative to meet with Dr. Pusz within five working days of the date on this memo to explain to him what specific and concrete steps you are taking to ensure than Mr. Whorton will receive an excellent educational experience with this CLC. I would like you to identify for Dr. Pusz the specific dates you will be meeting with Mr. Whorton and what will be covered at these meetings. Dr. Pusz can be expected to follow-up on this information in conversations with Mr. Whorton. In addition, I wish to inform you that I will not authorize payment for this CLC until Dr. Pusz satisfies me in writing that you did meet with Mr. Whorton on the agreed upon dates and covered the material agreed upon and until I can verify that Mr. Whorton has received a grade - not an incomplete - for this CLC.

8. Grievant did not meet with Dr. Pusz after receiving the September 4, 1996, memorandum.

9. Dr. Pusz advised Dr. Mancha on September 18, 1996, that he continued to be concerned regarding Mr. Whorton's CLC, in that he had not received from Grievant any specific planning for dates, times and materials to be used.

10. Mr. Whorton completed an “Add/Drop” slip, dated September 23, 1996, dropping the class.

11. On or about September 26, 1996, Dr. Mancha advised Grievant of Dr. Pusz's memorandum and advised her that the failure to meet with her Department Chair, as he had directed

in his memorandum of September 4, 1996, only increased his concern for the quality of educational experience being given to Mr. Whorton. Dr. Mancha continued to state, “I expect you to have this meeting with Dr. Pusz no later than October 4, 1996 . . . Your failure to take the initiative as I have directed in this memorandum will be consideredas insubordination.”

12. Grievant did not meet with Dr. Pusz as directed in the September 26, 1996, memorandum.

13. Dr. Mancha and Dr. Pusz met with Grievant on October 29, 1996, in a formal counseling session conducted as the result of Grievant's insubordinate behavior.

14. Dr. Mancha placed a memorandum memorializing the counseling session in Grievant's personnel file for a period of one year. In addition to the CLC issue, Dr. Mancha advised Grievant that the incident had raised for him the question of whether she engaged in similar poor teaching practices in her regular classes. Conceding he did not know the answer to that question, Dr. Mancha identified the following eight good teaching practices, which were to be used by Dr. Pusz as part of Grievant's annual evaluation:

First, you should distribute at the very beginning of a course a complete professional syllabus. . . .

Second, you should be available readily to your students. . . .

Third, you should be able to demonstrate that you encourage active learning in your classroom. . . .

Fourth, you should be able to demonstrate that effective learning is going on in your classes . . . You should establish college level performance standards for your stated class objectives and then develop a research design that will identify how successfully your students attained these standards. Your data should suggest objectives where you are particularly effective and objectives where new approaches might be warranted. You should share this research design and data with Dr. Pusz.

Fifth, I expect frequent and prompt feedback on performance as evidenced by quizzing and testing that is returned to the student within several days and as evidenced by notes and comments on the student's materials that convey the thinking behind your evaluation of their work . . . .

Sixth, I understand that you have high expectations for your students. I applaud you on this matter. At a minimum, I expect you to convey these high expectations through your syllabus.

Seventh, you should choose and develop sufficient and effective materials for students to learn the content and skill goals of your courses . . . .

Finally, all future CLC's must be signed in a timely fashion.

15. The October 29, 1996, memorandum had been removed from Grievant's personnel file at the time of the level four hearing.

16. On December 5, 1996, Dr. Pusz provided Grievant her performance evaluation for the 1996 academic year (January - December). Grievant was awarded 58.302 of a possible 100 points.

17. Grievant was evaluated in the areas of Teaching, Professional Development, and Service. In Professional Development she received 8 of a possible 10 points. In Service she was awarded 6 of 10 points. In the area of Teaching, Grievant received 19.133 of 24 points from student evaluations. In the section completed by the Department Chair, Dr. Pusz awarded Grievant 8.400 of 24 points in Teaching Practices, 8.769 of 12 points in Class Visit, and 0 of 12 points in Instructional Materials. Under self evaluation, Grievant gave herself 8 of 8 points, for a total of 44.302 out of a possible 80 points. Compiled, these scores totaled 58.302 out of a possible 100 points.

18. Grievant has participated in the grievance procedure on a number of occasions, both as a grievant and as a representative for co-workers.

Discussion

I. Letter of reprimand

The placement of a memorandum to memorialize a verbal counseling session in an employee's personnel file constitutes a disciplinary action, and Respondent bears the burden of proving the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Respondent argues that the October 29, 1996, letter memorializing a counseling session was properly placed in Grievant's personnel file because her failure to contact Dr. Pusz, as directed on two occasions, constituted insubordination. Grievant asserts that she was not under contract to offer

the CLC, therefore, it was not reasonable to expect her to perform duties related to that assignment.

Addressing the letters of September 4, 1996, and September 26, 1996, specifically, Grievant testified at level four that she did not consider the language of the first letter to be an order, but rather a request. Because she had met with Dr. Pusz on July 30, 1996, and could not provide him additional information until she met with the student, which did not occur until September 15, 1996, she did not schedule a meeting with her Chair upon receipt of the September 4 letter. Grievant stated that the September 26, 1996, letter told her that the previous letter was in fact an order; however, Mr. Whorton had verbally notified her on September 15, 1996, that he was dropping the course. Upon receipt of this information, Grievant asserted that she perceived the meeting to be no longer necessary.

Although Mr. Whorton's decision to drop the course from his studies effectively terminated Grievant's activities providing instruction, the memoranda in question are more pertinently directed to her performance as an instructor at WVNCC. Grievant offers no reason why she could not have contacted Dr. Pusz following the September 4, 1996, memorandum to simply advise him that she had not yet met with the student. Neither does she suggest that she was in any way prohibited from contacting Dr. Pusz, to notify him that the student had withdrawn from the class, after her receipt of the September 26, 1996, memorandum. Certainly, two short courtesy calls could have averted both the counseling session, and memorandum of October 29, 1996. Her failure to contact Dr. Pusz, as directed by the Vice President of WVNCC, was insubordination, and Respondent's action relating to the October 29, 1996, memorandum is upheld.

II. Grievant's 1996 performance evaluation

The issue of evaluation is not a disciplinary matter, and Grievant has the burden of proving each element of the complaint by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

Grievant argues that she does not deserve the rating of 58.302, which she claimsis the lowest evaluation given to anyone in ten years, and twenty points lower than the next lowest-rated employee. Grievant disagrees with those categories in which she was rated at “1" (Needs Improvement), and argues that the evaluation did not consider her entire work for the calendar year,

including two other CLCs and fifteen courses she taught. She argues that the rating was actually reprisal for filing previous grievances and representing other employees in the grievance procedure.

Respondent concurs that Grievant's failure to meet standards, as demonstrated in Mr. Whorton's CLC, and her decision to ignore two direct orders from Dr. Mancha were considered in completing the evaluation, but notes that other factors were also part of the decision. Specifically, Grievant made no effort to demonstrate that effective learning occurred in her classes through the creation of a student data based research design, as directed by Dr. Mancha, and she returned a quiz to a class before grading them. Respondent notes that Grievant was rated as “exceptional”, “expected”, “above average”, and “average” in many categories, and while she was rated as “needs improvement” in several categories, this rating was given to other faculty members as well. Respondent asserts that Dr. Pusz followed all applicable laws and policies in conducting the evaluation, and did not act in an arbitrary and capricious manner.

The faculty evaluation forms at WVNCC are multiple page documents, and in this case, a narrative written by Dr. Pusz. In his narrative, Dr. Pusz noted that Grievant had made significant effort in revising old syllabi or preparing new syllabi for a large number of her courses, had designed alternative forms of instruction, and changed some testing practices. Additionally, he noted that Grievant had incorporated group work into some of her course work and had attempted to use technology to enhance her teaching. Dr. Puszcontinued:

Nevertheless, serious neglect of her duties with a course learning contract necessitated that Ms. Norton receive a needs improvement ratings in the following areas:

A. Teaching Practices

1. Encourages frequent contact with students
3. Encourages active learning
4. Gives frequent and prompt feedback on performance
6. Communicates high expectations to students
10. Provides effective learning activities

C. Instructional Materials

1. Provides students with a syllabus which includes

a. Well defined learning objectives

b. Scheduled topics, activities, assignments and tests

c. An absence policy and a grading system

2. Chooses sufficient and effective materials for students to learn course content and skills

3. Develops sufficient and effective materials for students to learn course content and skills

Because of Ms. Norton's poor teaching practices in meeting a CLC for a Mr. Donald Whorton, on September 4, 1996 Ms. Norton was directed in writing by Philip Mancha, Vice President, Teaching and Learning to 'take the initiative to meet with Dr. Pusz within five working days of the date on this memo to explain to him what specific and concrete steps you are taking to ensure that Mr. Whorton will receive an excellent education experience with this CLC.' Ms. Norton's [sic] failed to initiate a meeting with myself (as division chair) about her teaching practices. Therefore, on October 29, 1996 she was told by Dr. Mancha that, 'I informed Dr. Pusz, in your presence, that I expected your refusal to meet with him, as I directed, to be included in your evaluation.'

In the case of Mr. Whorton, Ms. Norton did not prepare specific course objectives, nor produce a complete course syllabus with explicit expectations, nor arrange meeting times that would have allowed Mr. Whorton to complete the course in a timely manner. Serious concerns about Ms. Norton'steaching practices and her development of instructional materials were exacerbated by Ms. Norton's non-response to the Whorton situation. These concerns and her refusal to comply with legitimate college directives necessitated a needs improvement rating in the areas indicated above. To date, Ms. Norton has made no effort to demonstrate that effective learning is going on in her classes through the creation of a student data based research design as directed by Dr. Mancha, nor has she presented student data (as directed) to support her teaching effectiveness.

Ms. Norton received a needs improvement rating in the area of institutional service for her flagrant inattentiveness to the class absence reporting process and her disregard of legitimate directives issued by the Vice President of Teaching and Learning.

The remainder of the narrative reviewed a class visit in which Dr. Pusz observed that a quiz was returned and found to have been ungraded, requiring Grievant to retrieve the papers. He also noted that Grievant had administered a quiz and attempted to use an opaque projector during her lecture;

however, the projector did not work, and she used the blackboard to demonstrate her point. He suggested that she be more careful in grading papers and ensure that the equipment was functional prior to class. He further observed that during the remainder of the class Grievant had broken the students into two groups for discussion, reminding them that the work was a group responsibility. She suggested some text books in response to a request for source material, and offered to meet with students during her office hours to provide additional assistance. At the end of the class, Grievant was observed proceeding to her office to confer with a student.

At the level four hearing, Dr. Pusz testified that he perceived Grievant to have acted unprofessionally regarding the CLC, and that he considered the academic progress of every single student to be important. He confirmed that all the categories rated “needsimprovement” on Grievant's evaluation were affected by the CLC episode, which he described as a “highly contributing factor”. Dr. Pusz acknowledged Grievant's grievance activities on behalf of herself and others, but denied that was the basis for the evaluation.

An action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be considered; explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp., 769 F.2d 238 (4th Cir. 1984). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id.; Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

In the present matter, Dr. Pusz allocated a tremendous amount of weight to the CLC incident when evaluating Grievant for the entire calender year. As discussed previously, Grievant failed to follow a directive of the Vice President, and was properly reprimanded. However, it is also noted that Grievant had never been given a contract of employment for that work, raising the question of how much weight is should be given in an annual evaluation. Because Dr. Mancha was not aware that Grievant had engaged in poor teaching practices in any classes for which she was contracted, the eight elements listed in the memorandum were improperly imposed. Absent any evidence that all faculty are required to develop a research design to identify how successfully their students attained performance standards, it is improper to hold Grievant accountable in this manner. In conclusion, to

place such emphasis on a single matter, and to observe her classroomperformance only once, while giving very limited consideration to the bulk of Grievant's work, renders the evaluation arbitrary and capricious.

Grievant claims that the evaluation was taken in reprisal or retaliation for past grievances she has filed or in which she represented other individuals. Reprisal is defined by W.Va. Code §18-29-2(p) as "retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

(1)that he/she engaged in protected activity, e.g., filing a grievance;

(2)that he/she was subsequently treated in an adverse manner by the employer or an agent;

(3)that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,

(4)that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995); Fareydoon- Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994). Of course, if a grievant makes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Connor, supra. See Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461 (1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 172 W. Va. 627,309 S.E.2d 342 (1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

Consistent with the foregoing requirements, Grievant established a prima facie case of retaliation. Although Dr. Pusz indicated that reprisal was not his motive in this matter, Respondent failed to provide convincing evidence that a faculty member would ordinarily be treated so harshly. Therefore, it must be determined that Grievant has proven the content of the evaluation was motivated by retaliation for her previous grievance activities.

In addition to the foregoing findings of fact and discussion it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. The placement of a memorandum to memorialize a verbal counseling session in an employee's personnel file constitutes a disciplinary action, and Respondent bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §18-29- 6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. Respondent has proven by a preponderance of the evidence that Grievant engaged in insubordination when she intentionally failed to follow two directives from Dr. Mancha that she report to her Department Chair regarding a CLC she was offering to a student.

3. The issue of evaluation is not a disciplinary matter, and Grievant has the burden of proving each element of the complaint by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1§4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

4. An action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be considered; explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp., 769 F.2d 238 (4th Cir. 1984). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id.; Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

5. Reprisal is defined by W.Va. Code §18-29-2(p) as “retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.”

6. A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

(1)that he/she engaged in protected activity, e.g., filing a grievance;

(2)that he/she was subsequently treated in an adverse manner by the employer or an agent;

(3)that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,

(4)that there was a causal connection (consisting of aninference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995); Fareydoon- Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994). Of course, if a grievant makes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Connor, supra. See Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461 (1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

7. Grievant has proven by a preponderance of the evidence that her evaluation was arbitrary and capricious, and/or the result of reprisal.

Accordingly, the grievance is **GRANTED**, regarding the evaluation, and Respondent is Ordered to remove the document from Grievant's records. The grievance addressing the memorandum is **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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

Date: August 31, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant was represented by Dallas Elswick of the United Steelworkers of America, and Respondent was represented by Assistant Attorney General Gregory G. Skinner.

Grievant elected not to file proposed findings and conclusions.