THEODORE PAULS,

Grievant,

v. **Docket Nos. 99-BOD-160/175**

BOARD OF DIRECTORS/WEST LIBERTY STATE COLLEGE,

Respondents.

D E C I S I O N

Grievant, Theodore Pauls, employed by the Board of Directors as a professor at West Liberty State College (WLSC or Respondent) filed two complaints on February 11,1999, following a decision by WLSC to reaffirm its determination to issue him a terminal contract. In the first grievance, he alleged that Respondent had failed to evaluate overstaffed areas consistent with its Policy 243, or to apply the Policy in its entirety. He also alleged that Respondent had engaged in a selective execution of the Policy, which it was attempting to apply retroactively. Finally, Grievant alleged that Respondent had failed to apply all pertinent policies regarding termination in this case. Specifically, in addition to Policy 243, Grievant asserts that Respondent was required to follow Policy 15, “Change in Status”, and all related policies mentioned therein. Grievant requested that Respondent's decision to issue him a terminal contract be found without merit, and that decisions regarding elimination of programs, overstaffing, termination, and change in status be made in accordance with the WLSC Policy and Procedure Manual, the State College System Procedures, and the West Virginia Code.

In the second complaint, Grievant alleged that Respondent had failed to follow its Policy 216, “Tenure and Promotion” by failing to consider his tenure request. Grievant requested that he be granted tenure as relief. Elizabeth A. Robinson, Chairperson of the Department of Administrative Systems, denied both matters at level one. Following an evidentiary hearing, WLSC President Ronald M. Zaccari, denied both grievances at level two. Grievant elected to by-pass consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and the grievances were advanced to level four on April 23, and May 3, 1999. Due to the related nature of the grievances, a level four hearing was conducted for both in the Grievance Board's Wheeling office on September 1, 1999. Grievant was represented by M. Eric Frankovitch, Esq., of Frankovitch, Anetakis, Colantonio & Simon. Respondent was represented by Charles J. Kaiser, Jr., Esq. and Denise Knouse-Snyder, Esq., of

Phillips, Gardill, Kaiser & Altmeyer. The grievances became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by both parties on or before October 1, 1999.

In a grievance challenging non-retention of a probationary faculty member, the grievant has the burden of proving his complaint by a preponderance of the evidence. Turman v. Bd. of Trustees, Marshall University, Docket No. 99-BOT-199 (Nov. 8, 1999); Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995). See W. Va. Code §18-29-6. To determine whether Respondent's decisions to not renew Grievant's contract and consider his application for tenure were made in accordance with WLSC and Board of Directors policies, the following findings of fact are made based upon a preponderance of the credible evidence of record established at the level two and level four hearings.

Findings of Fact

1. Grievant was first employed by Respondent Board of Directors as a tenure track Assistant Professor of Marketing at WLSC in August 1993.

2. Due to a lack of enrollment, WLSC determined in January 1998, that the Fashion Marketing specialization would be discontinued. As a result of this decision, the Marketing department was found to be overstaffed by one faculty member.

3. Grievant was the only non-tenured faculty member in the Marketing department of the School of Business Administration.

4. As early as May 10, 1996, Grievant was notified by letter from his department chair of the distinct possibility that he would be issued a terminal contract of employment within two or three years.

5. In December 1996, Grievant was again informed, this time by Chair Jean A. Bailey, of the potential elimination of the Fashion Marketing specialization, and its possible impact on his position at WLSC.

6. In May 1997, Grievant was notified by Chair Bailey of the distinct possibility that he would receive a terminal contract of employment due to low enrollment.

7. On February 25, 1998, Grievant submitted an application for promotion and tenure.

8. By letter dated April 9, 1998, Grievant was advised by Chair Bailey that no action would be taken on the application for promotion and tenure because Grievant would not be retained, and would receive a terminal Notice of Faculty Appointment for the 1998- 99 academic year. 9. By letter

dated April 27, 1998, WLSC President Zaccari officially notified Grievant that he would receive a terminal Notice of Faculty Appointment for the 1998-99 academic year.

10. Grievant initiated grievance proceedings contesting the decision to issue him a terminal contract. The grievance was denied at levels one and two.

11. Following an evidentiary hearing at level four, the undersigned Administrative Law Judge granted the grievance and ordered Respondent to re-evaluate the decision applying the criteria of WLSC Policy 243.

12. Grievant was notified by letter dated January 28, 1999, that Respondent had re-evaluated the staffing situation, applying Policy 243 not just to the Marketing department, but to the entire School of Business Administration, and concluded that it must reaffirm the prior decision to issue him a terminal contract for the 1998-99 academic year.

Argument

At level four, Grievant argues that Respondent did not re-evaluate its decision in compliance with Policy 243 in that it failed to: (1) communicate its perception that the Marketing department was overstaffed to the entire faculty; (2) notify the entire college faculty of the decision it made relative to, or impinging upon, the problem of overstaffing; (3) afford Grievant the opportunity to present a retrenchment proposal to the Vice President for Academic Service for consideration; (4) eliminate temporary, part-time, or adjunct faculty; or, (5) notify him of postings for vacant accelerated courses which he may teach to retain his full-time status. Respondent asserts that it fully complied with the provisions of Policy 243 during the second evaluation, with the same conclusion, i.e., the Marketing department was overstaffed by one faculty member. As the only member of the Marketing faculty who is not tenured, Grievant was issued a terminal contract. Respondent additionally argues that Grievant's complaint that it violated Policy 216 by not considering his application for tenure was untimely filed.

Discussion

Generally, institutions of higher education in West Virginia have broad discretion to terminate non-tenured probationary faculty members for any reason that is not arbitrary and capricious, or without factual basis. However, these institutions are bound to follow the substantive and procedural requirements set forth in the policies which they promulgate. See Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Hall v. Mingo County Bd. of Educ., Docket No. 95-29-529 (Mar. 28, 1996);

Wright v. McDowell County Bd. of Educ., Docket No. 93-33-115 (Nov. 30, 1993).

WLSC Policy 243 provides in pertinent parts:

I. A. When the administration presumes or decides that an area is overstaffed, this perception must be communicated to the entire faculty of the Department affected by the decision, not just to the Department Chairperson and School Dean.

I.B. When any decision or conclusion is reached relative to or impinging upon the problem of overstaffing, the entire college faculty must be notified. This tenet assumes that the faculty will be apprised periodically of any overstaffing.

III. When it appears that an overstaffing situation may exist, the Vice President for Academic Services shall initiate possible retrenchment action by notifying the appropriateSchool Dean(s), Department Chairperson(s) and the Faculty Senate Personnel Committee that retrenchment appears to be necessary in the area(s) specified. The academic area(s) including all members of the faculty within the area(s), shall then react to the Vice President for Academic Services' notification and may present a retrenchment proposal to the Vice President for Academic Service for consideration. . . .

IV. Staff reductions in overstaffed areas should be achieved in the following manner:

* * *

C. Elimination of temporary faculty.

D. Dropping of part-time (adjunct) faculty, providing they do not have a teaching specialty necessary for a particular curriculum
which cannot be covered by a full-time faculty member.

E. Dropping of non-tenured faculty . . . .

H. Tenured faculty who have their employment terminated when major programs are discontinued in their academic specialty, and when redirection and/or reassignment are impossible. [sic] In such cases, **at least one calendar year's** notice must be given, and any person so terminated retains all rights identified below:

* * *

2. Vacancy Postings: A faculty member shall be notified of those vacancies in the individual's area(s) of competency that occur during the following four academic semesters. . . .

J. In addition to all points covered in the current revised and/or amended Board of Directors Policy Bulletin No. 414 (with respect to proper notification, due process, etc.), a non- tenured faculty member who is released solely for reasons of overstaffing should also retain all rights outlined in these Guidelines Section IV, Paragraph H, items 1-3.

Provost John McCullough and Intermin Dean of the School of Business Administration, Elizabeth Robinson, addressed Grievant's allegations at the level four hearing. Provost McCullough testified that notice of overstaffing in the Marketing department was substantially conveyed to the entire faculty through the minutes of the Curriculum Committee meeting of January 27, 1998, during which it was voted to discontinue the Fashion Marketing program due to low enrollment. Although aware of the impending action, Provost McCullough stated that Grievant made no response, as permitted by Policy 243.

The Provost continued to explain that in applying Policy 243, it was determined that WLSC employed no temporary (non-tenure track) or adjunct (part-time) faculty in Marketing, and none of those employed in other departments of the School of Business Administration were subject to release prior to Grievant, because he was not qualified to teach the courses assigned to any other individual. Addressing a newspaper advertisement for adjunct faculty at WLSC, Dean Robinson testified that the purpose was to develop a pool of adjunct faculty, and not to replace Grievant, or create another full-time faculty position.

Provost McCullough explained that the accelerated programs offered by WLSC are directed to working adults over the age of twenty-five. Classes may be taught on Saturdays, with the goal of graduation within two years. Accelerated classes are usually taught by regular faculty members, but are not considered a part of their regular class load. The Provost concluded that no combinations of these classes were available to create a full-time position for Grievant. Although there is no documentary evidence to show that members of the School of Business Administration were notified that the Marketing department was overstaffed, it does appear that the information was provided, and Grievant does not dispute that he was aware of the situation. In fact, it appears that he had been placed on notice of such a possibility as long as two years prior to the actual event. Therefore, to the

extent there *may* have been any procedural defects relating to Section I, Paragraphs A and B, the error did not affect the outcome of this case, and was harmless.

There is no *evidence* that Respondent in any manner impeded Grievant in presenting a retrenchment proposal, as provided by Policy 243, Paragraph III. Subsequently, there was no violation by WLSC of this provision.

There is some dispute between the parties as to whether the elimination of temporary and adjunct faculty should be limited to the Marketing department, or include the entire School of Business Administration. Dean Robinson stated there were no temporary or adjunct positions in the Marketing department. Seven temporary or adjunct positions are filled in the School of Business Administration; however, Provost McCullough addressed those individually, noting that the individuals who currently hold them have specialized certifications, licenses, or subject matter expertise not held by Grievant.

Grievant has twice taught one of the classes filled as a temporary position, “Legal Environment-Business Law”. However, Provost McCullough opined that simply because he had taught the class did not mean that Grievant was adequately qualified in that area. WLSC traditionally employs an individual with a Juris Doctorate degree to fill the position. Qualifications aside, Grievant's position that he could assume these classes to maintainhis employment is not persuasive. By their very nature, temporary and adjunct positions are not tenure track positions because they are offered on a limited, or as-needed basis. There is no requirement in Policy 243 that WLSC must assign these types of classes to a tenure-track faculty member who would otherwise not be retained for lack of need. The same holding applies to the accelerated classes. These assignments are supplemental to a regular faculty member's assignment, and there is no obligation on the part of Respondent to offer the classes to an individual whose services would otherwise be terminated for a lack of need. Therefore, it is determined that Respondent acted in substantial compliance with Policy 243.

___Even if it should be determined that Respondent somehow erred in the application of Policy 243, the decision to not grant Grievant tenure would still result in the termination of his employment.

___This issue was not well developed in the present matter; however, Grievant does not argue that the decision was arbitrary and capricious, only that WLSC failed to consider his application for tenure within the time lines and dates provided in its Policy 216. WLSC concedes that it did not review the application for tenure in light of the staff reduction which was to affect Grievant, as the only non-tenured member of the Marketing faculty.

Series 36 of the Procedural Rules for the College System of West Virginia Board of Directors (Series 36), 131 C.S.R. 36 (1997), contains the following provisions relevant to this matter:

9.2 In making tenure decisions, careful consideration shall be given to the tenure profile of the institution, projected enrollment patterns, staffing needs of the institution, currentand projected mission of each department/division, specific academic competence of the faculty member, and preservation of opportunities for infusion of new talent. The institution, while not maintaining "Tenure Quotas," shall be mindful of the dangers of losing internal flexibility and institutional accountability to the citizens of the state as the result of an overly tenured faculty. Tenure may be granted only to faculty in positions funded by monies under the control of the State College System Board.

9.3 Tenure shall not be granted automatically, or for years of service, but shall result from action by the president of the institution following consultation with appropriate academic units.

12.1 Causes for Dismissal: The dismissal of a faculty member shall be effected only pursuant to the procedures provided in
these policies and only for one or more of the following causes:

13.1 A tenured or tenure-track faculty member's appointment may be terminated because of the reduction or discontinuance of an existing program at the institution as a result of program review . . . .

The Grievance Board has previously cited these provisions in upholding dismissals of nontenured faculty members due to programmatic changes, (McMullen v. Bd. of Directors/West Liberty State College, Docket No. 96-BOD-473 (April 14, 1998); and Carpenter v. Bd. of Trustees/W. Va. Univ., Docket No. 93-BOT-220 (Mar. 18, 1994)), and declining enrollment. Kauffman v. Shepherd College, Docket No. BOR-86-216-2 (Nov. 5, 1986). In the present matter, Respondent's determination not to consider Grievant's application for tenure, in consideration of prevailing programmatic needs and circumstances, was appropriate under the foregoing sections of the Board of Directors Procedural Rule. In addition to the foregoing it is appropriate to make the following formal findings of fact and conclusions of law.

Conclusions of Law

1. In a grievance challenging non-retention of a probationary faculty member, the grievant has

the burden of proving his complaint by a preponderance of the evidence. Turman v. Bd. of Trustees, Marshall Univ., Docket No. 99-BOT-199 (Nov. 8, 1999); Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995). See W. Va. Code §18-29- 6.

2. Generally, institutions of higher education in West Virginia have broad discretion to terminate non-tenured probationary faculty members for any reason that is not arbitrary and capricious, or without factual basis. However, these institutions are bound to follow the substantive and procedural requirements set forth in the policies which they promulgate. See Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Hall v. Mingo County Bd. of Educ., Docket No. 95-29-529 (Mar. 28, 1996); Wright v. McDowell County Bd. of Educ., Docket No. 93-33-115 (Nov. 30, 1993).

3. Grievant failed to prove by a preponderance of the evidence that WLSC violated its Policy 243 in determining that it was necessary to implement a reduction of faculty assigned to the Marketing department.

4. Any violation in the implementation of Policy 243 was harmless error.

5. Series 36 of the Procedural Rules for the College System of West Virginia Board of Directors (Series 36), 131 C.S.R. 36 (1997), specifically permits a tenured or tenure-track faculty member's appointment to be terminated because of the reduction ordiscontinuance of an existing program at the institution as a result of program review . (McMullen v. Bd. of Directors/West Liberty State College, Docket No. 96-BOD-473 (April 14, 1998); and Carpenter v. Bd. of Trustees/W. Va. Univ., Docket No. 93-BOT-220 (Mar. 18, 1994)), and declining enrollment. Kauffman v. Shepherd College, Docket No. BOR- 86-216-2 (Nov. 5, 1986).

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio County. Any 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. However, the appealing party is required by W. Va. Code §29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: December 2, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE