DR. RONALD INGLE,

Grievant,

v. DOCKET NO. 05-HE-228D

WEST VIRGINIA STATE UNIVERSITY,

Respondent.

DECISION

Grievant Ronald Ingle filed a grievance with his employer, West Virginia State University (WVSU) on June 8, 2005, claiming he had been improperly issued a terminal contract. He claimed WVSU defaulted at level one when his immediate supervisor failed to reply within the allotted time. In a decision issued September 30, 2005, the undersigned found that Respondent had defaulted, and rejected Respondent's argument that its failure to meet the required time limit was excusable neglect.

The grievance upon which this is based states, “Contract termination decision based on false information and misleading statements; no due process in the proper format; more information is forthcoming.” The relief Grievant seeks is “Non termination of contract.” Respondent requested a hearing to determine whether awarding the relief sought by Grievant would be contrary to law or clearly wrong. A level four hearing to determine that issue was held in the Grievance Board's Charleston office on December 1, 2005. Grievant was represented by Chris Barr, Staff Representative for AFT-West Virginia/AFL- CIO, and Respondent was represented by counsel, Elaine L. Skorich, Assistant Attorney General. The matter became mature for decision on January 6, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Given the statutory presumption that Grievant prevailed on the merits of his grievance, the issue now is whether it would be contrary to law or clearly wrong, as proven by clear and convincing evidence, to order Respondent not to issue Grievant a terminal contract for the 2005-2006 school year. Grievant is employed in as a tenure-trackAssistant Professor, and was considered for tenure review. Instead of granting Grievant tenure, he was issued a terminal contract, ending his prospects

for tenured employment with Respondent. Respondent argues that it would be wrong to overturn the decision to issue a terminal contract, because this grievance was untimely filed, and also because institutions such as Respondent have broad discretion to terminate non-tenured faculty such as Grievant, and its decision to do so in Grievant's case was not arbitrary and capricious.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant prevailed in a claim that Respondent defaulted on this grievance at level one, and is therefore presumed to have prevailed on his claim that his “contract termination decision was based on false information and misleading statements,” and that he was afforded “no due process in the proper format.”

2. Grievant is employed by Respondent as a non-tenured, Assistant Professor of Music.

3. During the 2004-2005 school year, Respondent's Faculty Retention Committee recommended that Grievant be issued a terminal contract for the 2005-2006 school year. The recommendation was passed up the evaluation chain, and WVSU President Hazo Carter issued Grievant a terminal contract as recommended.

4. Grievant received notice that WVSU would issue him a terminal contract on April 20, 2005, but did not file this grievance until June 8, 2005. 5. The Faculty Retention Committee (FRC) makes a yearly review of non- tenured faculty, each year up to seven years. It reviews information from the Dean of the faculty member's college, the head of his or her department, and the employee's portfolio. The FRC's recommendation, if it is for non-retention, is passed up to the Vice President for Academic Affairs, who reviews the information and makes a recommendation to the President of the University. The President makes the actual decision to keep the faculty member or to issue a terminal contract for the following year.

6. Dr. David Wohl is the Dean of the Department for Arts and Humanities, Grievant's department. The information he provided to the FRC was his opinion that Grievant should not be retained, and supporting documentation of Grievant's performance and behavior.

7. Dr. Wohl had a negative experience with Grievant on the matter of a student's grade appeal in September 2004. Grievant did not respond to inquiries in a timely manner. Dr. Wohl concluded that, while Grievant had a right to follow his own grading policy or formula, the policy must be spelled

out in the course syllabus, but it was not. Dr. Wohl's investigation also uncovered strong evidence that Grievant had falsified the grades he recorded. Because of Grievant's behavior in the appeal process, he was issued a formal disciplinary reprimand for insubordination, which he did not grieve or otherwise challenge. The student's appeal was eventually granted, because the grade he received could not be supported, although Grievant stridently argued the grade was justified.

8. Brenda Vanderford, Associate Professor of Music, is a member of Grievant's department and a member of the FRC. As a member of the FRC, she did not vote on thedecision in Grievant's case, but did provide her written opinion to Dr. Wohl that Grievant should not be retained, and she also provided this opinion to the FRC. She stated her belief that “his apparent lack of integrity, his ability to work well with his colleagues and . . . his ability to accept constructive criticism are reasons for opposing his retention.” She further stated, “I believe him to be a divisive element within our Department and a hindrance to our continued success.” Respondent's Exhibit A.

9. Barbara Ladner, Coordinator of General Education, related to Dr. Charlotte Giles, Chair of the Music Department, and to Dr. Wohl her experience with Grievant while he was team-teaching a class called General Education 100, Origins, in the fall semester of 2003. She related that he was added to the schedule just before the semester started, so had little time to prepare, but issues arose during the semester that caused her concern. She stated Grievant did not attend all team meetings until the team began meeting in Grievant's office, that he seemed to ignore or misunderstand the suggestions of his team members, and that his lectures were sometimes barely relevant to the intended topic. Grievant also failed to follow the team grading procedure that was clearly spelled out in the course syllabus. Ms. Ladner concluded that “Dr. Ingle expressed a desire to fulfill his team responsibilities, but communication difficulties often undermined that goal.” Respondent's Exhibit B.

10. Another colleague of Grievant's, Dr. J. Truman Dalton, wrote to Dr. Giles and Dr. Wohl in February 2005 stating that he had “very serious reservations about retaining him as a faculty member.” Dr. Dalton stated “Although he relates well to some students, I have observed that he as alienated many others and maintains a combative and contentious relationship with colleagues in the music department. He has great difficultyin accepting the opinions of others when they do not agree with his own.” Respondent's Exhibit L.

11. Dr. Giles' formal evaluation of Grievant for the FRC, completed in February 2005 criticized Grievant for his inability to accept constructive criticism from colleagues, incomplete syllabi, and using

a grading scale that was below the college standard. She stated Grievant “rarely considers the opinions of others” and “does not respond to colleagues, chair or dean.” Her overall evaluation was “Poor (needs extensive improvement). She remarked that Grievant “is often if not always combative.” Although she did observe and remark on some positive aspects of Grievant's teaching, she did not recommend Grievant's retention.

Discussion

Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. (See footnote 1) West Virginia Code § 29-6A-3(a)(2) provides that “any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing.” Respondent points out that it was unable to assert a timeliness argument until the first default hearing, because there was no level one or two conference at which to make the assertion. “In cases involving state employees where there is no Level II hearing, the timeliness defense must be raised at or before the Level III hearing.” (See footnote 2)

However, the timeliness argument was also disposed of in the previous decision by reference to the fact that, had a level one conference been held, the issue could have been raised. One of Respondent's arguments at the default hearing was that Grievant's supervisor was under no obligation to respond to an untimely grievance.

Respondent is correct that it would normally have two chances to assert a timeliness defense. However, where the employer fails to comply with the grievance procedure in such a way as to eliminate the level one and two conferences from the due process afforded the grievant, it effectively waives the right to make the assertion later. Respondent's default at level one, obviating levels one and two, effects an estoppel preventing the later assertion of the defense.

When determining whether the remedy requested is contrary to law or clearly wrong, it is presumed that the grievant prevailed on the merits of the grievance. (See footnote 3) The burden of proof is on Respondent to prove by clear and convincing evidence that the remedy requested would be contrary to law or clearly wrong. Alternatively, Respondent may rebut the presumption created in W. Va. Code § 29-6A-3(a)(2) that the grievant prevailed on the merits, by presenting clear and

convincing evidence that the basic facts underlying the asserted presumption are not true. *(See footnote 4)*

Respondent's strategy in this case is to attempt a rebuttal of the presumption. Grievant alleged in his statement of grievance that the decision to issue him a terminal contract was “based on false information ands misleading statements; no due process inthe proper format; more information is forthcoming.” Respondent must therefore show, by clear and convincing evidence, that Grievant's assertions are not true and that the decision was not based on false information and misleading statements, and that he was afforded proper due process.

Generally, tenure decisions are within an area of broad discretion for the institution. This Grievance Board's review of an institution of higher learning promotion and tenure decisions is "generally limited to an inquiry into whether the process by which such decisions are made conform to applicable college policy or was otherwise arbitrary and capricious." *(See footnote 5)* "The decisional subjective process by which promotion and tenure are awarded or denied is best left to the professional judgement of those presumed to possess a special competency in making the evaluation unless shown to be arbitrary and capricious or clearly wrong." *(See footnote 6)* "Deference is granted to the subjective determination made by the official[s] administering the process." (See footnote 7)

Respondent adequately showed, clearly and convincingly, that the information it relied upon to make its determination was sufficient to cross the low threshold of supporting its subjective decisional judgment. None of the professional educators in involved in Grievant's tenure review was supportive of his retention. They consistently identified as Grievant's major problem his lack of collegiality and cooperation, and his inability to accept constructive criticism focused on improvement. Dr. Wohl also identifiedan occasion calling into question Grievant's honesty and academic integrity, and formally disciplined him for insubordination. The negative aspects of Grievant's evaluation were based on the personal experiences of the observers, so could not have been misconstrued. Given Respondent's discretion in tenure matters, it was justified in reaching it decision against retention.

The following conclusions of law support this discussion:

Conclusions of Law

1. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a

preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97- 42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997). West Virginia Code § 29-6A-3(a)(2) provides that "any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing."

2. In cases involving state employees where there is no Level II hearing, the timeliness defense must be raised at or before the Level III hearing. *Wade v. Div. of Labor*, Docket No. 00-DOL-164 (Feb. 2, 2001) (*citing Greathouse v. Dep't of Transp*., Docket No. 99-DOH-413 (Aug. 21, 2000)).

3. Where the employer fails to comply with the grievance procedure in such a way as to eliminate the level one and two conferences from the due process afforded the grievant, it effectively waives the right to make the assertion later. Respondent's defaultat level one, obviating levels one and two, effects an estoppel preventing the later assertion of the defense.

4. When determining whether the remedy requested is contrary to law or clearly wrong, it is presumed that the grievant prevailed on the merits of the grievance. W. Va. Code § 29-6A-3. The burden of proof is on Respondent to prove by clear and convincing evidence that the remedy requested would be contrary to law or clearly wrong. This standard requires Respondent to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. *Lohr v. Div. of Corr.*, Docket No. 99-CORR-157D (Nov. 15, 1999).

5. Respondent may rebut the presumption created in W. Va. Code § 29-6A-3(a)(2) that the grievant prevailed on the merits, by presenting clear and convincing evidence that the basic facts underlying the asserted presumption are not true. *Roy v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-150D (Sept. 23, 2005); *Bailey, et al. v. Dep't of Health and Human Res. and Div. of Personnel*, Docket No. 03-HHR-167D (June 30, 2004); *Allison v. Div. of Highways*, Docket No. 02-DOH-256D (Mar. 20, 2003). 6. Review of an institution of higher learning promotion and tenure decisions is "generally limited to an inquiry into whether the process by which such decisions are made conform to applicable college policy or was otherwise arbitrary and capricious." *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995). "The decisional subjective process by which promotion and tenure are awarded or denied is best left to the professional judgement of those presumed to possess a special competency in making the

evaluation unless shown to be arbitrary and capricious or clearlywrong." *Ermolaeva v. Shepherd Univ.*, Docket No. 04-HE-299 (Apr. 15, 2005)*(citing Siu v. Johnson*, 748 F. 2d 238 (4th Cir. 1984)). S*ee also Carpenter v. Bd. of Trustees/W. Va. Univ.*, Docket No. 93-BOD-220 (Mar. 18, 1994). "Deference is granted to the subjective determination made by the official[s] administering the process." *Ermolaeva, supra; Harrison, supra*; *Gardener v. Bd. of Trustees/Marshall Univ.*, Docket No. 93-BOT-391 (Aug. 26, 1994).

7. Respondent met its burden of proving by clear and convincing evidence that the assertions underlying Grievant's claim are not true.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County, and such appeal must be filed within thirty days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). 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.

February 22, 2006

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M. Paul MarteneyAdministrative Law Judge

Footnote: 1

Heckler v. Randolph County Bd. of Educ., Docket No. 97-42-140 (Feb. 28, 1998).

Footnote: 2

Wade v. Div. of Labor, Docket No. 00-DOL-164 (Feb. 2, 2001).

Footnote: 3

W. Va. Code § 29-6A-3.

Footnote: 4

Roy v. Dep't of Transp./Div. of Highways, Docket No. 05-DOH-150D (Sept. 23, 2005).

Footnote: 5

Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995).

Footnote: 6

Ermolaeva v. Shepherd Univ., Docket No. 04-HE-299 (Apr. 15, 2005).

Footnote: 7

Id.