THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

DALLAS BRANCH,

Grievant,

v. **Docket No. 06-HE-403D**

Sue Keller

Senior Administrative Law Judge

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Dallas Branch, Jr. ("Grievant"), employed by West Virginia University ("WVU") as an Associate Professor, filed a level one grievance on April 24, 2006, stating "Dean's Office Professional Development Plan is punitive and will not permit promotion." For relief, Grievant requests "[t]o permanently end discussion and reference to the Professional Development Plan that is non-developmental, punitive, and coercive." Grievant additionally asks for $5,000.00 compensation for teaching an overload class taught during the Fall 2006 semester, and attorney fees. By Order dated November 6, 2006, Grievant's claim for a default ruling was granted. A default remedy hearing was conducted on November 28, 2006, in the Grievance Board's Westover office. Grievant was represented by Alex J. Shook, Esq., of Hamstead, Williams & Shook, PLLC, and WVU was represented by Assistant Attorney General Samuel R. Spatafore. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before December 18, 2006.

Issues and Arguments

Initially, WVU seeks to have the matter dismissed based upon Grievant's failure tofile a level three appeal. WVU argues that the finding in the first default hearing that Grievant had failed to properly file

a level three appeal in the correct office takes precedence over the second ruling finding a default. In the alternative, WVU argues that the requested relief is contrary to law and clearly wrong. Grievant asserts that WVU failed to rebut the statutory presumption that he prevailed on the merits of the grievance, that the Associate Dean lacks the authority to change an assignment without consent, and that the plan was punitive, and contrary to the spirit and developmental nature of the review process, and will impede his progress towards promotion.

The following findings of fact have been derived from the record developed in the level four default proceedings.

Findings of Fact

1. Grievant has been employed by WVU since 1987, and has held the position of Associate Professor in the Department of Sport and Exercise Studies in the School of Physical Education at all times pertinent to this grievance.

2. As a full-time, tenured faculty member, Grievant is evaluated annually in the areas of teaching, research, and service. To be eligible for promotion to full professor at WVU, it is necessary to earn ratings of “excellent” in the areas of teaching and research.

3. Associate Dean Lynn Housner noted in Grievant's 2004 evaluation that his sole publication was an abstract, while two annual peer-reviewed articles are the minimum required for promotion. Dean Housner also stated that Grievant had not been involved in any grant writing. He rated Grievant's performance in research as “satisfactory.” He further noted that:

I would evaluated Dr. Branch as not making satisfactory progress toward promotion. This is the fourth time since 2000 that I have evaluated Dr. Branch as not making progress. The lack of progress is due to poor performance in the area of research. For Dr. Branch to make progress he should focus on presenting and publishing more data-based, peer- adjudicated research articles as the 'lead' author in a systematic program of work. He also needs to begin to engage in grant writing to support research activities. Since his promotion and tenure he has not continued to build on his research with new research initiatives, I think the time has come to adjust Dr. Branch's work effort to include the teaching of undergraduate courses. This is a need identified by the Sport Management faculty and since there has been little progress toward promotion, we need to adjust his teaching load.

4. After assuring the administrators that more research was forthcoming, Grievant was not assigned any additional teaching responsibilities for the 2005-2006 academic

year. 5. Grievant's 2005 performance appraisal included the same recommendation by Dr. Housner, who noted that it was now the fifth time since 2000 that Grievant had not made satisfactory progress toward promotion. He elaborated on the 2004 review, stating:

Last year I suggested that it was time to adjust Dr. Branch's work effort and increase his teaching load. This is [a] need identified by the Sport Management faculty and since there has been little progress toward promotion, this would be a logical adjustment to make. He assured the dean and myself in a meeting last spring that he would improve in research and would increase his commitment in scholarship. Though there has been some improvement, the research activities are not sufficient in quality or quantity to support promotion. Dr. Branch needs to rethink his activities and consider moving to a teaching/service load.

6. Grievant's teaching assignment was increased for the Fall 2006 semester when he was assigned an additional undergraduate class, Introduction to Sport Management. Grievant has not been assigned an additional course for Spring 2007.

7. Grievant's 2006-2007 Faculty Performance Agreement consists of the same number of work units as in 2005-2006, three units of which continue to be allocated for research.

8. Other faculty members in the School of Physical Education who were not producing research at a level to gain promotion have been assigned an adjusted teaching load similar to that of Grievant.

9. In April 2006, Grievant filed a grievance challenging the assignment of an additional class to his teaching load. After the grievance was denied at level two, Grievant delivered a level three appeal to the wrong administrative office.

10. Grievant's subsequent claim for default was denied, and the grievance remanded to level three for processing. 11. A level three hearing was not scheduled, and Grievant prevailed on a second claim for a default ruling.

Motion To Dismiss

WVU argues that Grievant failed to file a level three appeal, therefore, this grievance should be dismissed. To the extent that this issue was raised in the prior default claim it will not be revisited. Although Grievant did file his level three appeal at the wrong office, he was in substantial compliance with the statutory requirement that an appeal be filed. WVU also argues that it was not directed to

conduct a level three hearing in the default order, and that Grievant again neglected to file an appeal. The default claim was denied and the grievance was remanded for processing at level three. There was no need for Grievant to file an appeal to level three, and the direction to conduct a hearing was inherent in the language of the order. Accordingly, the Motion To Dismiss is denied.

Discussion

"Upon finding a default occurred, it is presumed the grievant prevailed on the merits of the grievance, and the respondent must prove by clear and convincing evidence that to grant the remedy requested would be contrary to law or clearly wrong. This standard requires a 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." *Headley v. Div. of Highways*, Docket No. 04-DOH-397D (Aug. 22, 2005). The employer may rebut the presumption by presenting clear and convincing evidence that the basic facts underlying the asserted presumption are not true. *Bailey, et al. v. Dep't of Health and Human Res. and Div. of Personnel*, Docket No. 03- HHR-167D (June 30, 2004). The WVU "Policies and Procedures for Annual Faculty Evaluation, Promotion, and Tenure 2004-2005" states that annual evaluations will be used "to guide the faculty member in areas in which improvement may be needed, and . . . provides the opportunity to develop changes in responsibilities that reflect the strengths of the individual and the needs of the university." The testimony of both Dean Brooks and Associate Dean Housner establishes that it exactly what occurred in this case.

Faculty at WVU are evaluated annually in the areas of teaching, research, and service. Significant contribution must be made in two of the three areas, as evidenced by ratings of "excellent." For those individuals who are not fully promoted, teaching and research must be the two areas in which significant progress must be made. Dean Dana Brooks testified that to receive a rating of "excellent" in research and a recommendation for promotion, the faculty member must produce two peer reviewed articles annually, as either lead or associate author.

Associate Dean Housner testified that it is not required for all faculty to aspire to full professor, and those individuals may elect teaching and service as their areas of significant contribution. While promotion may not be attained, evaluations establishing "excellent" performance in these two areas would make the individual eligible for merit pay, which he would not get if ranked less than excellent in research. In this instance, Dean Housner has suggested that Grievant switch his areas of interest

to teaching and service, areas in which he excells. Grievant, however, insists that he wants to be considered for full promotion, and is not interested in switching his areas of emphasis. This results in a situation wherein Grievant is allocated time for conducting research which he is not producing, while a need exists for classroom instruction. WVU argues that it would be contrary to law to rescind the professional development plan because other faculty who were not producing adequate research for promotion have also been assigned an increased teaching load, and to exempt Grievant would result in discrimination. WVU further argues that rescinding the plan would be clearly wrong when Grievant has failed to produce adequate research to justify the amount of time he has been granted for that activity, and a need for classroom instruction exists. Finally, WVU asserts that to grant the requested relief would undermine the authority of its administrators to develop faculty assignments in a manner which is equitable and meets the needs of the school.

In essence, WVU has established that Grievant has not been meeting the performance expectations for a full-time faculty member who is seeking promotion. It is the purpose of the annual evaluation and performance agreement to insure that a faculty member is successfully advancing in either pursuing promotion, or demonstrating excellence in teaching without seeking promotion. There is no evidence that the performance plan was intended to be punitive, but rather, is being used to insure that Grievant completes an equitable assignment. Grievant continues to be assigned time for research and scholarly work. He may also continue that work outside of school hours and during the summer break to pursue his goal of promotion. Meanwhile, the addition of a class to his teaching assignment helps WVU meet the need to provide instruction, and is fair and equitable to other faculty members. WVU is also correct in its concern that to allow Grievant to continue to function as he has for the past several years would constitute discrimination when other similarly situated employees have been assigned increased teaching responsibilities. Finally, it appears that Grievant's concern is not that he was assigned an additional class to teach, but rather the nature of the class that he was assigned. Grievant testified that he agreed to teach an additional graduate-level class, which he believed needed a better instructor, but did not agree to teach an undergraduate class. Of course, a faculty member may not pick and choose which assignments he will accept, and Grievant agrees that Associate Dean Housner has the ultimate authority in making determinations to meet the program needs. Therefore, WVU has established that notwithstanding the default, to grant the requested relief would be contrary to law and clearly wrong.

In addition to the foregoing findings of fact and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. "The grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud." *W. Va. Code* § 29-6A-3(a).

2. The language in *W. Va. Code* § 29-6A-3(a)(2) creates a presumption that the grievant prevailed on the merits of the case when the employer does not timely respond to the complaint, resulting in a default. *Lohr v. Div. of Corr.*, Docket No. 95-CORR-157D (Nov. 15, 1999).

3. “Upon finding a default occurred, it is presumed the grievant prevailed on the merits of the grievance, and the respondent must prove by clear and convincing evidence that to grant the remedy requested would be contrary to law or clearly wrong. This standard requires a respondent to produce evidence substantially more than a preponderance of theevidence, but less than that required to prove the matter beyond a reasonable doubt.” *Headley v. Div. of Highways*, Docket No. 04-DOH-397D (Aug. 22, 2005) citing *Lohr, supra*.

4. The employer may rebut the presumption by presenting clear and convincing evidence that the basic facts underlying the asserted presumption are not true. *Bailey, et al. v. Dep't of Health and Human Res. and Div. of Personnel*, Docket No. 03-HHR-167D (June 30, 2004).

5. WVU has met its burden of proving that rescinding the professional development plan would be clearly wrong and/or contrary to law.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, 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.

DATE: JANUARY 25, 2007 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE