CECELIA FIZER,

Grievant,

v.

Docket No. 06-HE-435

Sue Keller

Senior Administrative Law Judge

CONCORD UNIVERSITY,

Respondent.

D E C I S I O N

Cecelia Fizer ("Grievant"), employed by Concord University ("Concord") as an Assistant Professor of Mathematics, filed a level one grievance on October 9, 2006, after a requested leave of absence was denied. For relief, Grievant requested approval of the leave of absence and:

[A] formal policy enumerating all categories and associated weights/points assigned to each of the categories used in faculty evaluations, including anonymous student evaluations; and,

In the event anonymous student evaluations remain part of the faculty retention/promotion decision making process, a statistically valid and reliable instrument be adopted which considers variable[s] such as course level, student level, student achievement, institutional mission, values, attitudes, and students' habits of mind that affect both academic success and performance beyond the classroom; and,

Any other appropriate relief.

The parties agreed to waive consideration at level one. The grievance was denied at levels two and three, and appeal to level four was made on November 22, 2006. Grievant, represented by Bob Morgenstern and Christine Barr, Staff Representatives of the American

Federation of Teachers/AFL-CIO, and Concord counsel, Assistant Attorney General Elaine L. Skorich, agreed to submit the grievance for decision based upon the lower-level record. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on December 29, 2006.

Issues and Arguments

Grievant argues that the leave of absence was improperly denied based on criteria taken from her annual performance evaluation. She further asserts that the denial was discriminatory and arbitrary and capricious, since another faculty member had been granted a similar request for a leave of absence to complete his doctoral degree. Concord denies that the decision was either improper or discriminatory, but was reasonable based on the fact that Grievant had been granted one leave of absence as well as financial aide. The following facts essential to this matter have been derived from the testimony and evidence made part of the level three record.

Findings of Fact

1. Grievant was initially employed by Concord in 1994 as Director of Developmental Math and Instructor of Mathematics. In 2002, Grievant was reassigned as a non-tenure track Assistant Professor. In 2004, Grievant transferred to a tenure-track position.

2. Grievant was granted a leave of absence for the 2000-2001 academic year, during which time she completed her Masters degree, and began working on a doctoral degree in education.

3. Concord has additionally granted Grievant $3450 to further her graduate studies.

4. In September 2006, Grievant requested an unpaid leave of absence for one year, beginning January 2007. The purpose of the leave was to complete her doctoral degree. 5. The requested leave was denied by Vice President and Academic Dean, Dean W. Turner.

6. One other leave of absence has been granted to a Concord faculty member within the past five years. No other requests were denied.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va.

Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 29-6A-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Initially, it is noted that while the reason for the requested leave of absence is laudable, Grievant has no right to a leave of absence for educational purposes. The Concord Faculty Handbook states:

Concord College is not authorized to grant sabbatical leaves or to extend financial assistance to members with less than six years of service. Nor can it grant more than a limited number of sabbaticals to those who do qualify. However, the college does wish to encourage all of its faculty members to pursue terminal degrees, if needed, or to engage in other professional growth activities and to return after these activities are carried out. Consequently, requests for leaves of absence are considered and, where justified, approved. Approval of such requests obligates the college to reappoint the individual at the end of the year of leave and to give individual at least the same consideration in regard to salary as if employment had continued.

Nevertheless, it is appropriate to review Grievant's claim that the decision to deny the request was incorrectly based on student reviews included in her performance evaluations, and/or was discriminatory. In his level three testimony, Dean Walker stated that he had considered the fact that in both of Grievant's tenure-track evaluations student reviews of her classes were below the Division and University averages, and that without improvement in this area, her continued employment was not likely. Additionally, he stated that faculty members usually completed their degrees when Concord was not in session, and that it was not Grievant's critical year, making it necessary for her to complete the degree at this time. Dean Walker acknowledged that another faculty member had been granted a leave of absence to complete his terminal degree, but noted that it was during that individual's critical year. (See footnote 1) **No other requests for an educational leave of absence have been submitted.**

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained

its 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 view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

Additionally, an action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of thecase." *Eads, supra (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001).

Grievant did not file a grievance contesting either evaluation, and they are now accepted as valid. Grievant offers no authority for her argument that performance evaluations should not be considered when determining whether a leave of absence is to be granted. To the contrary, a leave of absence is a privilege, and consideration of past performance and future employment was not arbitrary and capricious.

Because another faculty member had previously been granted an educational leave of absence, Grievant claims that she was subject to discrimination. *W. Va. Code* § 29-6A-2(d) defines discrimination as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that "[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004).

There is no indication that any faculty member had been granted two leaves of absence within a seven year period. As to the faculty member who had been granted a leave of absence, there is no indication that he had received poor performance ratings, andit was necessary for him to complete his degree within his critical year to gain tenure. Thus, Grievant did not establish that she was similarly situated to another faculty member.

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. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 29-6A-6.

2. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its 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 view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

3. The decision to deny a second request for a leave of absence based upon poor performance reviews was not arbitrary and capricious or clearly wrong.

4. *W. Va. Code* § 29-6A-2(d) defines discrimination as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." 5. The essential factor in discrimination claims under the grievance statutes is whether the grievant was treated differently than similarly situated employees. *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004).

6. Grievant has failed to prove that she was treated differently from a similarly situated employee.

Accordingly, the grievance is DENIED.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) 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 9, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***The critical year for tenure-track faculty is the year that tenure is considered.***