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W. Joseph Wyatt

v.

Docket No. 06-86-086

Marshall University

DECISION

Grievant, W. Joseph Wyatt, is an assistant professor of psychology and director of the psychology clinic at Marshall University. He has a Ph. D. in Clinical Psychology from West Virginia University and began full time at Marshall in the fall of 1980, having been recruited by the chairman of the psychology department, Dr. Donald Chezik.¹

For the first years at Marshall, grievant's annual evaluations by Dr. Chezik had been "glowing reports", announcing how the psychology clinic had "grown under his leadership" but as of November, 1984 grievant was perceived as of such

¹Dr. Wyatt first went to Marshall in the fall of 1979 on a part time basis prior to receiving his doctorate. He also previously served on the staff at the Prestera Mental Health Center in Huntington.

narrowness of orientation that he would"...be hard pressed to instruct a course in general psychology even at a fundamental and superficial level." Grievant appealed that 1984 evaluation and the grievance committee of the College of Liberal Arts recommended that he be reevaluated by the Psychology Department.² Dr. Wyatt carried that appeal to the University Personnel Committee, and the committee concluded that Dr. Wyatt had been unfairly denied merit pay and that Dr. Chezik's evaluations were unjustifiably negative.³ On May 23, 1985 Dr. Robert Maddox, associate academic vice president, reviewed the committee report and concluded that Dr. Wyatt had received "due process" on the question of merit pay and the 1984 evaluation and concurred with Dr. Chezik on the basis that "...decisions on work

² Dr. Wyatt was critical of this procedure because it, in effect, placed Dr. Chezik in the position of reviewing his own work; upon review thereof Dr. Chezik did not find fault with his earlier report.

³ In 1984 Dr. Chezik had done two evaluations of Dr. Wyatt --one for merit pay and one for annual review; the committee investigated only the evaluation for merit pay. Two investigators appointed by the committee, Professors Nedra Lowe and William Radig, interviewed seventeen witnesses and concluded that Dr. Chezik had not been fair, impartial and objective in his analysis of Dr. Wyatt. In the report Professor Lowe expressed concern that in 1982 Dr. Chezik had written that Dr. Wyatt was "imminently qualified" to sit on a Psychology Licensing Board but in 1984 had written that grievant was not qualified to teach an Introduction to Psychology course.

performance are best dealt with by trained professionals in that discipline on the departmental level." On June 5, 1985 Dr. Wyatt requested Dr. Nitzschke, President of Marshall University, to appoint another committee which would include several psychologists to assess his professional accomplishments, but this was not done. Grievant did not pursue the 1984 evaluation further at that time.

On November 15, 1985 Dr. Chezik delivered a copy of the 1985 annual review of grievant's performance and that afternoon Dr. Wyatt and Dr. Chezik had a conference concerning the evaluation.⁴ On December 4, 1985 grievant filed a written grievance pursuant to Code, 18-29-1, et seq., asserting that the 1985 annual review was arbitrary and unfair and manifested an example of continuing unfair treatment by Dr. Chezik; he requested that the 1984 and 1985 annual reviews and the 1984 merit review be expunged from his personnel file. Receiving no response within the prescribed time, on December 13th, grievant sought to advance his grievance to Dr. Nitzschke and was advised on December 18, 1985 that he had not complied with Code, 18-29-4(a)(1), by failing to schedule a conference and discuss the grievance with Dr. Chezik.⁵ Dr. Nitzschke added that he did

⁴ Dr. Wyatt states that he requested that Dr. Chezik change the evaluation but that Dr. Chezik neither agreed nor refused to do so; that he (Dr. Chezik) spent the hour responding to grievant's complaint that the evaluation was unfair and did not accurately reflect grievant's performance.

⁵ In a memorandum dated December 16, 1985 to President Nitzschke, Dr. Chezik had stated that he had not responded to the grievance because he was "...not sure what or how to respond." Dr. Chezik also noted that he had asked Dr. Wyatt to postpone his grievance until after the decision to grant Dr. Wyatt tenure was made and Dr. Wyatt refused.

not believe that Code, 18-29-1, et seq., was an option for pursuit of these grievances and suggested grievant utilize the Board of Regents Policy Bulletin 15 to pursue the matter as grievant had ostensibly done in 1984. Grievant filed his request for a level four hearing on January 13th and hearings were commenced on February 12, 1986.⁶

At the outset of the hearing on February 12, 1986 counsel for Marshall University filed a written motion to dismiss that portion of the grievance relating to the 1984 annual review and the 1984 merit review on the basis that Code, 18-29-1, et seq., was not retroactive and that grievant could have utilized the alternative grievance procedure; that on the 1985 grievance Dr. Wyatt had not "filed" a written grievance and did not go through the informal conference as required by Code, 18-29-4(a)(2). In the alternative, counsel for Marshall

⁶ Evidentiary hearings were conducted on February 12 and 20, April 23 and 24 and May 27, 1986. The May 27, 1986 hearing was upon a motion by grievant to submit additional evidence which grievant contends was not available until April 23, 1986, after the grievance had been submitted to the hearing examiner. This evidence consisted of portions of a letter from the subcommittee on promotion and tenure to the dean of the College of Liberal Arts recommending tenure for grievant, in part, for what a majority of the subcommittee saw as "...inappropriate activity by the department chairperson acting against (grievant)." Counsel for Marshall University objected to the evidence on the basis that the evidence was submitted without proper foundation and pertained to an issue not properly before the hearing examiner, i.e., the question of tenure. This evidence was cumulative in nature and was given only slight consideration and then only in relation to the letter submitted by counsel for Marshall University.

requested a bifurcated hearing to determine initially the jurisdictional questions prior to proceeding to a hearing on the merits. The motion to dismiss was granted as to the 1984 portion of the grievance with the understanding that grievant would be permitted to adduce evidence on the 1984 evaluations as it pertained to grievant's allegations of a continuing type of harassment and/or discrimination.⁷

⁷ The motion to dismiss the 1985 grievance on the procedural defect was denied as was the motion to bifurcate the hearing. See, State ex rel. Norton v. Stone, 313 S.E.2d 456, 460 (W.Va. 1984). Cf. Bailey v. Worker's Compensation Commission, 296 S.E.2d 901 (W.Va. 1982). Counsel for Marshall was permitted, however, to develop that evidence during the presentation of evidence on the merits and to renew the motion at the close of grievant's evidence, their evidence and at the close of all of the evidence. Upon review of that ruling, it is apparent that it would have served no useful purpose to require grievant to return to Dr. Chezik to confer about the evaluation and the law does not require the doing of a useless act. State ex rel. Board of Education of Kanawha County v. Casey, S.E.2d (W.Va. 1986), Justices Neely and Brotherton dissenting. See also, Code, 18-29-4(c).

Grievant testified that during the first few years at Marshall he experienced a very good relationship with Dr. Chezik, who praised his work and his qualifications and was highly complimentary in general. However, on August 10, 1983, while he was not teaching or otherwise under contract at Marshall, he telephoned the psychology department and Dr. Chezik requested that he attend a meeting of the counseling services advisory committee that afternoon. Grievant was not a member of that advisory board as was Dr. Chezik and grievant informed Dr. Chezik that he would attend if he could -- that he had a number of other things to do. Grievant did not attend the meeting and shortly after the fall semester commenced grievant testified that Dr. Chezik confronted him in an angry manner and informed him that his failure to attend the meeting was evidence of a lack of commitment to the psychology department.⁸ Grievant testified that two months later he received a very negative annual evaluation but did not appeal or file a grievance.

Grievant states that thereafter an anti-Joe Wyatt mentality was promulgated in the psychology department whereby in the

⁸ Grievant testified that he informed Dr. Chezik that he did not have the right to make such a demand when he was not under contract to Marshall and that Dr. Chezik responded that "these extra things determine your annual evaluation".

spring of 1984 he was informed by a student that Dr. Chezik had "taken Dr. Wyatt apart" in a class that day. After he received his 1984 evaluation he felt that Dr. Chezik had made an implicit decision to get rid of him and he knew that his career could not survive two below-average evaluations.

Dr. Chezik, on the other hand, testified that the evaluations were based upon student complaints and the other criteria involved in the evaluation process; that it required some time for him to become familiar with grievant's performance and that the complaints had only commenced in 1983. He added that the refusal of Dr. Wyatt to attend the meeting was merely one aspect of Dr. Wyatt's negative attitude.

Numerous witnesses for Dr. Wyatt and Dr. Chezik testified, including a professor at West Virginia University College of Psychology, faculty members of the departments of psychology and liberal arts at Marshall and students and employees of the department. Most of the witnesses were in agreement that the subject matter involved in this grievance had "split" the psychology department at Marshall University and was a negative influence. Some believed that it was an outgrowth of the historical philosophical differences the "clinicians" and "behaviorists" exemplify which had grown out of proportion and the opinions on Dr. Wyatt's abilities and accomplishments

varied from highest praise to the conclusion that the evaluations were insufficiently negative.⁹

As is here pertinent, the West Virginia Supreme Court has recognized that the determination of a teacher's qualifications is not limited to a narrow inquiry into his academic credentials but encompasses a wide spectrum of qualities, not all of which may have the same significance. There is obviously a need to permit a latitude of discretion as the issue cannot be framed with mathematical precision or exactitude. What is not and should not be tolerated is a wholly arbitrary and capricious selection process where the competent suffer.

⁹ The hearing examiner was particularly impressed with the testimony of Dr. George Ward II, who has been in the psychology department at Marshall for twenty-three years and chaired the department from 1967-80. In his opinion, job relevant factors were not considered in the reports and nonrelevant factors were over emphasized. He felt that a double standard had been used against Dr. Wyatt and that no other professor had reached Dr. Wyatt's level in the area of accomplishments. He stated that the charge that grievant could not teach a course in Introductory Psychology was ludicrous and that the evaluations were biased. He concluded that the evaluations would have a devastating impact on grievant's career. Another witness for Dr. Chezik concluded that Dr. Chezik was "building a tenure case" against grievant.

Mindful of these principles the following additional specific findings of fact are appropriate.

FINDINGS OF FACT

1. Grievant is employed at Marshall University as a non-tenured assistant professor of psychology. He holds a Ph.D. in Clinical Psychology from West Virginia University and has been employed at Marshall on a full-time basis since August, 1980.

2. As part of the routine functioning of Marshall University non-tenured faculty are evaluated annually by the chair of the department in which they are employed. There

¹⁰ The Morton case dealt with tenure and the right of the teacher to a "due process" hearing by an unbiased hearing tribunal on that question. See also, State ex rel. Norton v. Stone, 313 S.E.2d 456 (W.Va. 1984) and the follow up thereto, State ex rel. Norton v. West Virginia Board of Regents, No. 16907, a per curiam mandamus order issued on April 3, 1986, directing respondent to grant petitioner tenure as a faculty member at West Liberty State College, Justices Neely and Brotherton dissenting.

is also a process of evaluation for merit pay purposes which also involves an evaluation by the chair of the department. The chairman of the Psychology Department at Marshall is Dr. Donald Chezik.

3. In the 1982 annual evaluation of grievant by Dr. Chezik he reported that, based upon student evaluations and comments and his own observations, grievant showed very desirable teaching characteristics and that no complaints had been made about his teaching or classroom behavior; that grievant had been a strong asset to the department of psychology; that he had served on several departmental committees and had shown both cooperation and a strong "pro-departmental" attitude and that the Department's Psychology Clinic had grown substantially under his leadership.

4. The 1984 annual evaluation of grievant was considerably different in that grievant was perceived as having a narrow perspective on psychology and a tendency to discount perspectives that were not "behavioristic." The 1984 merit review was more critical and Dr. Chezik made references to a committee member's suggestion that grievant knew so little about anything but radical behaviorism that grievant "...would be hard pressed to instruct a course in general psychology even at a fundamental

or superficial level." Dr. Chezik concluded that these "deficiencies" were sufficiently serious so as to render the decision on grievant's tenure in doubt.

5. Grievant appealed the 1984 merit pay evaluation and the 1984 annual evaluation via the institutional grievance procedure and the College of Liberal Arts committee recommended that grievant be re-evaluated. Grievant pursued the matter to the faculty personnel committee and the two investigators assigned to investigate the grievance, William J. Radig, associate professor of accounting, and Nedra K. Lowe, assistant professor of developmental and general education studies, acting on the merit review, concluded that grievant had been held to a different standard than other faculty members; that there was more emotion involved in the original denial of merit pay than was prudent. They acknowledged that they were untrained in the discipline of psychology and could not substitute their judgment for the departmental evaluation of faculty but felt qualified to point out situations in which faults perceived in a faculty member had been magnified out of proportion. They noted that the statements made by Dr. Chezik in a memo dated 11/2/84 to grievant were "scathing" and appeared too strong, an observation with which Dr. Chezik agreed. They found this to be representative of the excessive emotion involved in the matter.

6. Grievant pursued his complaints of discrimination in the 1984 annual and merit evaluations to Robert F. Maddox, vice president for academic affairs, and on May 23, 1985, Dr. Maddox found no denial of "due process" in the manner by which grievant was evaluated.

7. In 1985 grievant received several nominations for "Outstanding Professor of the Year", an honorary award by the Faculty Merit Foundation of West Virginia, Inc. from psychologists around the State and ex-students of grievant. Grievant did not receive the award but did receive a nomination certificate from the Foundation.

8. In the November 15, 1985 annual review of grievant by Dr. Chezik it was noted, inter alia, that grievant had failed to meet his clinical supervision responsibilities adequately and had been the subject of numerous student complaints; that grievant had fostered dissension within the department of psychology by attempting to recruit students and employees into a campaign to support him and that grievant had solicited students to nominate him for the "Outstanding Professor of the Year" award. Grievant was rated "below average" by Dr. Chezik.

9. The 1985 annual report filed by grievant on October 21, 1985 listed several published and unpublished research articles by grievant, professionally related talks, list of memberships in professional societies, offices held in professional societies at the state and national level, list of professional seminars, workshops, etc., attended in 1985, etc. One important function of the annual report by the faculty member is to apprise the chairperson of these accomplishments and/or activities for purposes of the annual evaluation but these accomplishments were not readily apparent in Dr. Chezik's evaluation. One witness for the employer testified that he would not like to be compared to grievant on the basis of this annual report.

10. Dr. Chezik's explanation of the dramatic change in the nature of the evaluations is that some time was required to become familiar with grievant's performance and for the complaints to surface. Grievant's explanation is that Dr. Chezik became upset with him in August, 1983 when grievant failed to attend a meeting Dr. Chezik had requested he attend; that the evaluations became critical immediately thereafter.

11. There is demonstrable evidence that in 1985 both Dr. Wyatt and Dr. Chezik solicited letters and testimonial

support from students and employees in a recruitment effort, which testimony and letters were thereafter used in various committee hearings, in reports and in the evidence presented in this grievance hearing. These efforts were counterproductive to the efficient operation of the psychology department in general and disruptive of the professor-student relationship.

12. The evidence in this case, both testimonial and demonstrative in the form of statistical graphs, etc., is sharply conflicting and exemplifies the sharp division this grievance has caused in the psychology department at Marshall University. Part of the conflict stems from the basic philosophical difference between the "clinical" and "behavioristic" disciplines and has resulted in the "taking of sides". Dr. Chezik is characterized as "clinician" and Dr. Wyatt a "behaviorist". There are obvious personality difficulties involved as well as some hostility generated as a result of grievant's accomplishment's such as being nominated for the "Outstanding Professor of the Year" award. Other evidence suggests that Dr. Chezik was merely "building a tenure case against Dr. Wyatt".

13. The differences of opinion as to the evaluations of grievant range from a belief that the evaluations are fair

and perhaps insufficiently critical to being "ludicrous", "unfair", "biased", inconsiderate of relevant job factors, unduly emphasizing student complaints as against this grievant, etc.

14. The consensus of the evidence presented by what appears to be the more disinterested witnesses and other objective evidence is that a double standard was, in fact, used against grievant and that he was unfairly treated. Some of these witnesses were also concerned about the devastating effect such an adverse evaluation would have upon grievant's career. In reviewing the evidence, it does appear that in evaluating grievant positive aspects were minimized or a negative aspect attached thereto while negative aspects were unduly or harshly maximized by Dr. Chezik.

15. The 1985 annual review of grievant by Dr. Chezik was arbitrary and biased and amounted to an act of "discrimination" against the grievant.

CONCLUSIONS OF LAW

1. The purpose of Code, 18-29-1, et seq., is remedial in nature and should be interpreted to accomplish the goals set out therein.

2. Code, 18-29-1, et seq., does not require the doing of an act which would amount to an exercise in futility.

3. The effective date of Code, 18-29-1, et seq., was July 1, 1985 and the provisions thereof are not retroactive. Accordingly, any grievance processed prior thereto cannot be the subject of a grievance pursuant to Code, 18-29-1, et seq., but in the discretion of the hearing examiner, evidence of alleged discriminatory conduct is admissible to show a continuing practice or pattern.

4. Code, 18-29-2(m) 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 1985 annual review and/or evaluation of grievant by the chairman of the department of psychology of Marshall University, Dr. Donald Chezik, was discriminatory and arbitrary and constituted a grievance cognizable under Code, 18-29-1, et seq.

Accordingly, it is ordered that the grievant's personnel record be expunged of the 1985 annual review and/or evaluation and if another evaluation is to be done, it is to be done by an impartial evaluator or evaluators.

Either party may appeal this decision to the Circuit Court of Kanawha County or Cabell County and such appeal must be filed within thirty days of receipt of this decision.

(Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.



LEO CATSONIS
Chief Hearing Examiner

Dated: July 18, 1986