WEST VIRGINIA EDUCATION EMPLOYEES GRIEVANCE BOARD
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W. JOSEPH WYATT

v. Docket No. BOR2-87-044-1

MARSHALL UNIVERSITY

DECISION

On July 21, 1986 Dale F. Nitzschke, president of Marshall University, issued a decision to grievant, an assistant professor of psychology at Marshall University, denying tenure. Grievant appealed that decision to the Board of Regents (BOR) and an evidentiary hearing was conducted by a hearing examiner appointed by the BOR. On January 27, 1987 the hearing examiner recommended to the BOR that President Nitzschke's decision be affirmed, which recommendation was followed by the BOR; that proceeding is pending on appeal in the Circuit Court of Kanawha County. Meanwhile, on January 15, 1987, prior to the action of the BOR on the tenure issue, grievant made application to Donald Chezik, chairman of the department of psychology at Marshall University, to teach certain courses during the first term of summer school. Upon learning that he would not be allowed

to teach a summer session grievant requested a meeting with Dr. Chezik within three days in accordance with W.Va. Code, 18-29-1, et seq. A meeting was held on February 16 and on February 18, 1987 Dr. Chezik informed grievant that because grievant's employment had been terminated by President Nitzschke on March 31, 1986 he (Dr. Chezik) did not have the authority to hire grievant for the summer session. Grievant pursued the grievance to President Nitzschke on February 25, 1987, alleging that the denial of a summer teaching position was predicated upon the continuing practice of discrimination against grievant by Dr. Chezik. (Grievant's Exhibit 6). By memorandum dated March 3, 1987 President Nitzschke informed grievant that tenure had no effect in selection of teachers for summer school and that the decision was made by the department chairperson in consultation with the dean, the final decision to be made by the vice president for academic affairs. Grievant appealed that decision to the Education Employees Grievance Board on March 6 and an evidentiary hearing was conducted on August 4, 1987.[1]

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[1] The hearing had been continued upon motion of the parties; there was no transcript of any previous hearing and the grievance was heard de novo at level four. Findings of fact and conclusions of law were submitted by the parties August 24 and August 27, 1987.

The procedural history of this protracted grievance commenced in the fall of 1980, when Dr. Wyatt began his teaching career at Marshall University after being recruited by Dr. Chezik. His career was relatively uneventful until November 1984, when he was given an extremely critical evaluation by Dr. Chezik.[2] Thereafter, in November 1985, grievant received another adverse evaluation from Dr. Chezik and elected to pursue that grievance in accordance with W.Va. Code, 18-29-1, et seq.[3] In that grievance Dr. Wyatt alleged the 1985 evaluation to be unfair and discriminatory and on July 18, 1986, after five days of evidentiary hearings at level four, a decision was rendered finding, inter alia, that the 1985 annual review of grievant by Dr. Chezik was arbitrary and amounted to an

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[2] Grievant had appealed that evaluation internally (BOR Policy 52) and the grievance committee of the college of liberal arts had recommended that he be reevaluated; the university personnel committee had also concluded that grievant had been treated unfairly by Dr.Chezik. However, President Nitzschke had failed to appoint another committee to assess grievant's abilities. Prior to that evaluation grievant had received excellent evaluations from Dr. Chezik.

[3] The statutory grievance procedure had become effective on July 1, 1985 and section one thereof offered employees of institutions of higher learning such as grievant the option of pursuing grievances via Policy Bulletin No. 52 or W.Va. Code, 18-29-1, et seq. See Thomas A. Braun v. West Virginia University Hospital, Inc., Docket No. 30-86-043. Nothwithstanding, grievant had been advised by President Nitzschke that he should utilize the BOR procedure instead of the statutory procedure.

act of discrimination against grievant as contemplated by W.Va. Code, 18-29-2(m). See, W. Joseph Wyatt v. Marshall University, Docket No. 06-86-086.[4]

At the level four hearing of the instant grievance the evidence was uncontroverted that on January 15, 1987 grievant submitted a request to teach three named subjects the first term of summer school. (Grievant's Exhibit 1). Typically, these requests are honored by the chairman and when grievant received no response to the request he made inquiry to the department secretary on February 13 requesting to see the tentative summer school schedule Dr. Chezik had prepared. Grievant was surprised to find that he was not on the schedule but that the names of two teachers who had testified for and

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[4] The hearing examiner appointed by the Board of Regents on the issue of tenure had given no weight to Dr. Chezik's evaluation in his recommendation to affirm the decision to deny tenure, citing the above finding that Dr. Chezik had become unfairly prejudiced against grievant. (Hearing Examiner's Exhibit 1, page 7). That decision is replete with references to Dr. Chezik's "open, known and fully accounted for" prejudice against grievant but the hearing examiner found that the dispute was personal and did not prejudice the decision to deny tenure; that the prejudice of Dr. Chezik had been insulated by the process. (Id at 12,13). Accordingly, this was the second specific finding of the discriminatory policies practiced by Dr. Chezik. As to the binding effect of these findings of fact in 42 U.S.C., §1981 cases, see University of Tennessee v. Elliott, 106 S.Ct. 3220 (1986). See also, Mellon - Stuart Co. v. Hall, 359 S.E.2d 124 (W.Va. 1987) as to administrative res adjudicata.

otherwise supported Dr. Chezik in the previous grievance proceeding were selected. The teachers, Cynthia Holstein and Patty Perdue, had recently received their Masters degree at Marshall, had no full time teaching experience and had less seniority than grievant. Accordingly, the following day, February 14, grievant requested an informal meeting with Dr. Chezik (Grievant's Exhibit 2) and a meeting was held on February 16. At that meeting grievant expressed his belief that the denial to teach summer school was unfair and Dr. Chezik's response was that by virtue of grievant's being denied tenure, he (Dr. Chezik) was not permitted to put grievant on the summer school schedule.[5] On February 18, 1987 Dr. Chezik gave his written response to grievant wherein reference was made to two memoranda from Dr. Nitzschke regarding grievant's employment as follows:

> "Specifically, I call your attention to the enclosed copies of Dr. Nitzschke's memos. In the memo dated March 31, 1986, it is stated "...you will not be reappointed at the conclusion of the 1986-87 year (May 1987). Your appointment for 1986-87, for one year only, will be your final appointment for Marshall University..."

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[5] Grievant requested Dr. Chezik to recall any other case in which a teacher on a nine month contract in the psychology department desiring summer work had been denied and none could be recalled in his eighteen years in the department, seven of which were as chairman. Grievant made a final request that Dr. Chezik change his decision to no avail.

> And, in the memo dated April 7, 1986 it states: "...I have outlined therein the reasons...not to retain you as a faculty member after the Spring Semester of 1987...
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> My interpretation of these memos is that your employment at Marshall University has been explicitly and unequivocally terminated by the President effective May 1987. It would seem odd to me for an institution to terminate someone's employment and then consider immediately rehiring them; I confess in all honesty, it seems strange that a person so terminated would make such a request." (Emphasis in original). (Grievant Exhibit 3).

Accordingly, by letter dated February 25, 1987 grievant pursued the grievance to President Nitzschke, noting that the refusal to place him on the summer 1987 teaching schedule was "...arbitrary, discriminatory, unfair, and represents reprisal for my having filed another grievance", listing the following reasons:

> "1. The Greenbook, p. 82 allows non-tenured faculty to teach 7 seven years. I came to Marshall in the fall 1980. Clearly the Greenbook would not prohibit my teaching summer school 1987.
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> 2. I am the first 9 month psychology faculty member to ever be denied teaching during the following summer.
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> 3. Other psychology faculty, most recently Dr. Steven Cody last summer, have taught the summer before leaving Marshall.
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> 4. There is no written psychology department policy regarding summer teaching, except that in time of financial exigency seniority will be the rule. Three less senior people than me are on the present schedule for summer 1987.

5. Dr. Chezik did not even inform me that he was leaving me off the summer teaching schedule. I found out by accident.

6. Although I have been denied tenure, and that is Dr. Chezik's only reason for the summer teaching denial, that is presently under review by the Board of Regents. However, even if upheld that denial would not preclude summer teaching." (Grievant's Exhibit 6).[6]

By memorandum dated March 3, 1987 President Nitzschke responded to grievant's allegation by outlining the manner in which summer school assignments were made as follows:

> Whether or not anyone teaches summer school--any summer--whether they are tenured or non tenured, permanent or full-time or temporary, full professor, assistant, associate or instructor has absolutely no bearing whatsoever on their being selected to teach. That selection and assignment is made by the department chairperson in consultation with the respective dean and with final concurrence by the Vice President for Academic Affairs. No faculty person in any department of any college anywhere in the university has an unqualified "right" to teach summer school. A summer school assignment is clearly not part of the regular contractual arrangement a faculty member may have with the university. Those decisions are discreet and separate from any other arrangement in force between the individual and the university. (Grievant's Exhibit 7).[7]

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[6] Grievant noted in the letter that Dr. Chezik's unfairness toward him had been well documented and grievant attached the findings of three independent internal reviews at Marshall and two external procedures, all finding a continuing history of unfairness "...that continues unacknowledged by the Marshall University administration..." (Id at page 2).

[7] Grievant received the memorandum on March 6, 1987 and, as noted earlier, appealed the "decision" (footnote cont.)

Grievant contends that President Nitzschke's response vitiated the reason given by Dr. Chezik and, in that posture, the matter should have been resolved on the basis of seniority; instead, he urges, it is clear that the decision of Dr. Chezik was the product of the continuing discrimination against grievant and as reprisal for the previous grievances.[8] Grievant concludes that he was denied a hearing by President Nitzschke as required by W.Va. Code, 18-29-4 and that the allegations and proof of discrimination are undisputed; that the denial of summer employment was arbitrary, capricious and as a result of discrimination and/or reprisal, which President Nitzschke has allowed to remain unchecked through the past several years. Grievant seeks $3,000.00 in salary plus $34.35 in other expenses he would have avoided had he been employed and this grievance

(footnote cont.)

to the Education Employees Grievance Board, noting that President Nitzschke had conducted no hearing on the grievance. (Grievant's Exhibit 8). Admittedly, grievant had no "right" to teach summer school but where the "privilege" to apply to teach existed school officials could not act arbitrarily. State ex rel Bowen v. Flowers, 155 W.Va. 389, 184 S.E.2d 611 (1971).

[8] As evidence of the intensity of the animosity of Dr. Chezik grievant testified that on June 1, 1987, the first day grievant was off the payroll, Dr. Chezik telephoned him at home at 8:40 a.m. insisting that grievant remove his personal belongings from his office, that if he did not remove them immediately he (Chezik) would personally remove them without any assurance that they would be any place but in the hallway or the street. Grievant urged Dr. Chezik to not do that, advising him that his belongings (footnote cont.)

avoided.[9]

Counsel for Marshall University contends that grievant's assertion that he was not given the job because of discrimination and/or reprisal is pure speculation; that the absence of a level two hearing renders that proposition "even more etheral." Counsel concludes that this grievance should be denied or remanded to level two for a hearing into issues which can only be speculation at this stage.[10]

(footnote cont)
were boxed up in his office and he would remove them as soon as possible. Grievant then telephoned Dean Gould, who observed that Dr. Chezik's conduct appeared to be unreasonable.

Grievant, in his proposed findings of facts and conclusions of law, notes that Dr. Chezik was recently replaced as chairman of the psychology department.

[9] Counsel for Marshall did not contest the amount of salary grievant would have received and it was confirmed by Mr. Burdette, administrative assistant to the director of university relations, the only witness for the respondent. This witness also confirmed that neither grievant nor the two teachers who were given the summer positions sought by grievant would be returning in September.

As a general rule costs are not recoverable in absence of statute, Nelson v. W.Va. Public Employees Insurance Bd., 300 S.E.2d 86 (W.Va. 1986) and W.Va. Code, 18-29-1, et seq., makes no provision therefor. Accordingly, costs are not generally awarded in the grievance procedure for these types of expenses.

[10] At the level four grievance hearing counsel for respondent acknowledged that, since no level two hearing had been held by President Nitzschke or a designee and no findings of fact or conclusions of law had been rendered, he had no way of knowing the basis of President Nitzschke's decision other than to imply that he found no discrimination by Dr. Chezik.

The imporantce of conducting a hearing and making (footnote cont.)

In addition to the foregoing factual recitation the following specific findings of fact are appropriate.

FINDINGS OF FACT

1. Grievant was initially employed as assistant professor of psychology and psychology clinic director at Marshall University on September 1, 1980 and remained so employed until May 1987. The historical background of grievant's employment experience and previous grievance activity has been set out in detail elsewhere in this decision and will not be specifically reiterated in these findings of fact.

2. On January 15, 1987 grievant filed a written request with Dr. Donald Chezik, then chairman of the department of psychology, for employment to teach one summer term at Marshall in accordance with a notice soliciting such applications. Ostensibly, Dr. Chezik denied the request but did not respond to grievant's application; instead, grievant learned of the denial from the secretary of the psychology department.

3. On February 4, 1987 grievant initiated the grievance procedure by requesting an informal meeting with Dr. Chezik

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(footnote cont.)

findings of fact and conclusions of law was stressed to Dr. Nitzschke in Mooney v. Marshall University, Docket No. 06-6-150 (July 7, 1986), a salary disparity grievance. It was noted therein that there, as here, the entire issue had been obscured by the failure to comply with W.Va. Code, 18-29-6 and that henceforth such grievances would be remanded. This grievance will not be remanded because the parties herein stated at the hearing that no useful purpose would be served thereby.

and the meeting was held on February 16, 1987 with no resolution. On February 18, 1987 Dr. Chezik wrote a memorandum to grievant asserting that the reason for the refusal was due to his lack of authority to employ grievant because it would be contrary to President Nitzschke's directions outlined in two memoranda.

4. Grievant pursued the grievance to President Nitzschke on February 25, 1987 and President Nitzschke failed to hold a hearing as required by W.Va. Code, 18-29-4(b). Instead, the grievance was denied on the basis that the decision as to who taught summer schools was to be made by the department chairperson, i.e., Dr. Chezik. Accordingly, the sole reason asserted by Dr. Chezik for the refusal was vitiated and it was incumbent upon the respondent to show that Dr. Chezik's decision was not the product of discrimination.

5. Notwithstanding, no evidentiary hearing was ever conducted by Dr. Nitzschke or anyone at Marshall University and no decision was rendered as contemplated by W.Va. Code, 18-29-6 or otherwise. Similarly, no evidence was offered to refute grievant's sworn testimony as to the discriminatory practices engaged in by Dr. Chezik or that the decision to deny employment was made solely by Dr. Chezik as part of those practices. While grievant did not have a "right" to teach summer school, under the evidence of discrimination involved in this grievance and previous proceedings, he did have a right to expect that the decision to reject his application would be predicated upon legitimate considerations. The testimonial and circumstantial

evidence presented in the grievance preponderates and is undenied that the decision by Dr. Chezik to reject grievant's application to teach summer school was motivated solely by his hostile and adverse predisposition toward grievant, as reprisal for grievant's previous experiences with Dr. Chezik in the grievance process and as reward to his supporters, all as contemplated by W.Va. Code, 18-29-2(m), 2(o) and 2(p).

CONCLUSIONS OF LAW

1. The provisions of W.Va. Code, 18-29-4(b) and W.Va. Code, 18-29-6, the hearing and decision requirements, are mandatory and will be enforced by the hearing examiner. Frances N. Mooney v. Marshall University, Docket No. 06-86-150.

2. In a grievance filed pursuant to W.Va. Code, 18-29-1, et seq.,the burden is upon the party alleging discrimination, favoritism and/or reprisal to prove by a preponderance of the evidence a prima facie case thereof; the burden then shifts to the opposing party to present evidence to refute or avoid the evidence adduced.

3. The decision to deny grievant a summer teaching position at Marshall University was made by Dr. Chezik and was based upon considerations involving discrimination, favoritism and reprisal as contemplated by W.Va. Code, Ch. 18, Art. 29, section 2, subsection (m), (o) and (p) as a matter of law.

Accordingly, the grievance is granted and grievant is awarded $3,000.00; the request for expenses in the amount of $34.35 is denied.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell County and such appeal must be filed within thirty (30) days of receipt of this decision. (W.Va. 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: September 29, 1987