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DR. DANIEL F. TWOMEY

v.

DOCKET NO. BOR1-88-003-2

WEST VIRGINIA UNIVERSITY

DECISION

Grievant, Daniel F. Twomey, was employed as a professor in the Department of Management of the College of Business and Economics at West Virginia University until January 5, 1988 when he resigned to accept a position with another institution. Dr. Twomey filed a level four grievance appeal on January 20, 1988 in which he alleged harassment, discrimination and a lack of due process. A level four hearing was held on March 21 at which time both parties indicated that a decision could be based upon the record supplemented with additional testimony. Proposed findings and conclusions were submitted by April 22, 1988.

The grievant addresses several incidents in support of his allegation:

First, that the institution's handling of a previous matter which was processed through the Board of Regents' grievance procedure constituted harassment as the appropriate individuals failed to immediately provide the information which he requested and failed to provide all of the information available thereby depriving him of access to the grievance procedure set forth in W.Va. Code, 18-29-1 et seq.<sup>1</sup>

Documentation submitted by the grievant indicates that his initial request for an appeal of his 1986 evaluation was submitted to Dean Arthur Kraft on or about March 16, 1987 while he was on sabbatical leave in Ireland. The grievant stated his opinion that the evaluation was incorrect and he requested an appeal or a re-evaluation and advice as to all the possible courses of action available. Dean Kraft responded on March 26 that the grievant's request had been forwarded to Dr. Jack Fuller,

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<sup>1</sup>The grievant also raises the issue of whether he was denied due process as a result of the untimely responses from the institution. This board has previously held that no consideration will be given to matters processed through the grievance procedure set forth in Board of Regents Policy Bulletin No. 36. Braun v. West Virginia University, Docket No. 36-86-043. Accordingly, any appeal of this nature must be made through the Policy Bulletin 36 procedure. The information presented relating to this matter will only be considered as it relates to the charge of harassment.

Chairman of the Management Department, as he was the appropriate individual to first consider a re-evaluation. By letter dated April 1, Dr. Fuller indicated his surprise at the grievant's response and advised the grievant that his evaluation had been positive in nature and any negative interpretations were erroneous. Dr. Fuller reiterated his positive comments regarding the grievant's performance and reviewed the financial and academic assistance provided by the department in the furtherance of his professional activities.<sup>2</sup> He requested that the grievant contact him if he had any additional concerns pertaining to the evaluation.

By memorandum to Dr. Fuller and Dean Kraft of May 4 the grievant indicated his assumption that Dr. Fuller's letter of April 1 constituted the first step of the appeals process, that the response was unacceptable and that the matter should proceed to step two. Dean Kraft advised the grievant by memorandum of May 18 that he would be reviewing the grievant's file regarding the evaluation. On June 12 Dean Kraft informed the grievant that he had completed a review of his faculty file and had "...found nothing...that would render a more positive evaluation...".

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<sup>2</sup>This included partial payment of expenses to attend professional meetings, the award of a paid sabbatical leave and a reduction in teaching load to facilitate his research endeavors (release time). Accomodations were also made regarding his class assignments, committee appointments and secretarial services.

On August 6 the grievant requested the matter be appealed to step three. In his memorandum to Provost Frank Franz he stated "[m]y prior requests for information on the appeals process were not answered. Please send me a brief description of the current appeals process or let me know where I might find the information. In particular, I would like to know if there is any possibility of a peer review." On September 4 Provost Franz notified the grievant that the matter would be processed at level three of the Board of Regents grievance procedure which previous correspondence indicated was being utilized. Both Policy Bulletin Number 36 and W.Va. Code, 18-29-1 et seq. were enclosed although Provost Franz advised the grievant that the statutory grievance procedure would not be available to him at that time as once an option was chosen it could not be changed.

On October 23 the grievant appealed to Dr. Thomas Cole, Chancellor of the Board of Regents, for assistance. Again he requested the options available to him and the proper procedure to follow. Chancellor Cole responded on November 18 that an inquiry had been made regarding the grievant's situation and that a prompt resolution would be provided.

A memorandum of November 16 indicates that Associate Vice-President William Vehse had spoken with the grievant and that a committee of the grievant's peers would review his faculty file and make a recommendation concerning the evaluation. The outcome at this level or any other action taken has not been disclosed by the grievant.

The second incident involved the elimination of Personnel Management classes from the schedule in the fall of 1985. According to the grievant this change was unjustly attributed to the faculty by the administration and may have caused hardship for seniors who were deprived of three major classes. Documentation indicates that Dean Kraft notified undergraduate advisors by memorandum of October 30, 1985 that students should be encouraged not to enroll in majors or options eliminated in the 1985-86 catalog as courses from these options might not be offered in the future. Every effort would be made to accommodate students already in the defunct options with course substitutions. An advertisement dated October 31 directed to management majors notified them of a restructuring of the program which reduced the optional tracks from five to two and that courses specific to the former could not be guaranteed.

By letter of November 6 to Cy Logar, Art Kraft and Frank Franz the grievant insisted that "...dropping human resources management/personnel courses was neither the decision nor the intent of the faculty." However, the letter goes on to say that in 1984 the curriculum committee reviewed the five options and found them to be restrictive so it was decided that fewer options and required courses would provide the students with increased flexibility to structure a program to their unique needs. The grievant noted that the 1985-86 Undergraduate Catalog continued to offer personnel as a major and indicated that it was the faculty's understanding that the personnel courses would continue to be offered as electives on a regular basis "[o]therwise the five options would not have been reduced to two." Pages 214 and 215 of the catalog were attached and indicate that management majors could enroll in the decision science option or the administrative science option which provides preparation for careers in human resources management and several other areas.

Cy Logar, Acting Chairman of the Department of Management, responded to the grievant's letter with surprise that he, as the immediate past Chair, was not aware that the changes had

been made in the program or why. Dean Kraft also responded to the grievant setting forth the rationale for the changes, how the changes came about and reiterating that accommodations would be made on the students' behalf. The grievant responded by memorandum of November 18 to clarify his statement in the letter of November 6 "...that the faculty did not intend to eliminate either personnel courses or the opportunity to specialize in personnel."

Numerous actions by Dean Kraft and Dr. Fuller are cited as harassment by the grievant. He provides various examples of professional travel for which he did not receive full reimbursement, Dr. Fuller's attempt to deny his request for release time, arbitrary denial of his request for a leave of absence, the ineffective forwarding of information pertaining to the grievant as "outstanding teacher" for university level recognition and prohibiting him from engaging in outside consulting activities. Documentation establishes that on November 14, 1986 the grievant requested three hours of release time for the fall term in 1987. In a follow-up letter of November 21 the grievant notes that after his submission of the request for release time Dr. Fuller verbally charged him with having received more financial support for travel than any other faculty member. The grievant

viewed this as an attempt to deny the release time, however, it was apparently granted according to the letter from Dr. Fuller to the grievant of April 1, 1987.

By memorandum dated January 5, 1986 the grievant provided Dr. Fuller with a listing of activities, publications, research and other information to be considered for the Beta Gamma Sigma Outstanding Teaching and Service Awards to be awarded while he was on sabbatical. The grievant states that several faculty members reported that the department had made an ineffective effort in promoting him for the university-wide recognition.

In December, 1984 Dean Kraft issued a memorandum to the Executive Committee in which he directed that faculty should not be absent from a class due to consulting activities and that scheduling an examination or class coverage by a colleague were not acceptable practices. Twelve month employees who are scheduled to work five days per week were directed to take vacation time for paid consultant work. The grievant notified Dean Kraft that the policy was unnecessarily restrictive as consulting was the basis of his research and served as an outlet for the practical application of his skills which in turn contributed to his professional development. He advised Dean Kraft of two activities in which he was involved and asked to be notified if they were unacceptable. Dean Kraft responded that while the policy may restrict some faculty he had no choice

but to follow it.<sup>3</sup>

The grievant subsequently notified Dean Kraft on March 1 of his intent to travel to Europe May 22 - June 7, 1985 for research and academic purposes. On April 9 Dean Kraft advised the grievant that he would be required to take vacation time for the trip to Europe as it did not constitute part of his normal academic, administrative, research or teaching duties. Nevertheless, the grievant filed an out of state travel requisition for the trip to England and Ireland for himself and his spouse in the amount of \$2,890. with an attached statement of justification. No documentation was provided to establish whether the grievant received any reimbursement for this trip. Neither did he provide any evidence regarding trips to San Francisco and New Orleans which he alleges were underfunded.

Upon his return to the United States in June or July, 1987 the grievant requested a leave of absence for the 1987-88 school year which was not granted. The grievant asserts that this was his first request in over fourteen years, it would

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<sup>3</sup>The grievant alleges that Dr. Logar was permitted to continue his consulting work, however, he has presented no corroborating evidence in support of the allegation.

have resulted in no cost to the university and that the request was denied without discussion. No documentation was provided regarding this matter.

Other examples of Dean Kraft's harassment include a memorandum to the grievant of May 29, 1984 in which he essentially reprimands the grievant for not taking a more active role in department management in anticipation of his assumption of the position as Chair on July 1. Upon his selection as Chairman of the department the grievant contends that his wife, who had been teaching Business Law for several semesters as a temporary lecturer, was advised that her reapplication would result in the grievant's loss of the administrative position. Later the job description for the position of temporary lecturer was changed so that she could not meet the qualifications. Documentation indicates that Ms. Twomey was hired as a full-time temporary lecturer for the 1984-85 term.<sup>4</sup>

As a result of Dean Kraft's decisions regarding the above-mentioned trip to England and Ireland the grievant resigned

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<sup>4</sup>It appears that Ms. Twomey's appointment was not renewed due to cutbacks in the number of sections of business law offered by the college. Ms. Twomey has pursued her own grievance in regard to the matter and this information is only being considered in relation to the grievant's allegation of harassment and discrimination.

his position as Chairman of the department. The grievant asserts that the Dean continued his harassment of the entire department by giving them a choice of an Acting Chairman between an abusive and disliked faculty member or someone from outside the department. The disliked faculty member was chosen but left the university prior to assuming the position.

The grievant argues that these actions of harassment and discrimination resulted in his constructive dismissal from the university. He requests that a means of enforcing grievance procedures be given the Human Resources Department with specified consequences for those who violate the procedures, provide that faculty members be informed before positions, curriculum options and courses are eliminated, that he be reimbursed for expenses incurred when he attended the Academy of International Business and that the requested leave of absence be granted.

The university argues that the incidents cited by the grievant occurred as long ago as 1984 and therefore are not timely raised as grievable issues, that the allegations of the grievant are not supported by the evidence and that, in fact, there has been no harassment of the grievant. On the contrary, counsel appears to suggest that the grievant may be using the grievance procedure to avoid his obligation to West Virginia University

and the taxpayers of this state in repaying the salary he was awarded during the sabbatical leave as he did not fulfill the terms of the leave agreement which required him to serve one full year at West Virginia University upon his return. Finally, the university asserts that the grievant requested the leave of absence in order to accept his present position at Fairleigh-Dickenson University and when it was not granted he submitted his resignation from West Virginia University effective January 5, 1988. As he is by his own voluntary action no longer an employee of the Board of Regents or any other educational institution in West Virginia, the grievant no longer may avail himself of this grievance procedure.

The grievant has failed to establish that he has been the victim of harassment or discrimination. While the appeal of the evaluation may not have been handled properly by university officials there is no indication that the actions were intentionally directed to harass the grievant. In several examples, such as those involving outside consultation and travel expense reimbursement, it appears that university policy was simply applied to the grievant as it was to everyone else. The fact that he found certain policies personally restrictive or unfair does not constitute harassment. If the grievant was treated differently

than other faculty, he failed to prove that allegation. How the change in personnel management classes or the choice of a chairman of the department by the faculty constitutes harassment of this individual is not apparent. His requests for release time and paid sabbatical leave were granted. The request for a leave of absence immediately following the sabbatical was apparently based upon university policy that an individual must offer one year of service upon return from paid leave. The denial of the request or the requirement that the grievant repay salary received while on leave does not seem unreasonable as he failed to complete the one year of service. Harassment by Dean Kraft of the grievant and his wife in their professional and personnel roles is unsubstantiated.

The events listed by the grievant cover a period of nearly four years. The actions complained of were not those of a single individual and there has been no allegation of a conspiracy against the grievant. Finally, the grievant voluntarily, with no coercion or intimidation on the part of university officials, resigned his position effective in mid-term in order to accept his present position which he had secured while on sabbatical. The evidence which has been submitted fails to support the grievant's allegation of constructive dismissal. On the contrary, in a memorandum to Associate Vice-President Vehse the grievant

indicates that he had accepted the offer as of July 15, 1987. An individual who voluntarily relinquishes a position cannot reclaim it through the grievance procedure.

In addition to the foregoing it is appropriate to make the following specific finding of fact and conclusions of law.

#### Findings of Fact

1. The grievant was employed as a professor in the Department of Management of the College of Business and Economics at West Virginia University until his resignation.

2. The grievant recites numerous incidents addressed with specificity within detail in the body of this decision which occurred over approximately a four year period of time and which he alleges to constitute harassment, discrimination and, ultimately, his constructive dismissal from the university.

3. Documentation provided by the grievant indicates that in some instances policy was simply followed, that some of the grievant's allegations were incorrect or had little, if any, direct bearing upon him as an individual.

4. The grievant did not support his charges by calling the appropriate individuals, including his wife, as witnesses who could have provided corroborative testimony.

### Conclusions of Law

1. Harassment is defined as the continual disturbance, irritation or annoyance of an employee contrary to the demeanor expected by law, policy and profession. W.Va. Code, 18-29-3(n).

2. Discrimination is any difference 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. W.Va. Code, 18-29-3(m).

3. The grievant has failed to establish that he has been a victim of harassment or discrimination as defined by W.Va. Code or that said actions constituted his constructive dismissal from the university. It is incumbent upon a grievant to prove the elements of a grievance by a preponderance of the evidence. Burford v. Preston County Board of Education, Docket No. 39-87-203; Morris v. West Virginia University, Docket No. BOR1-87-168-2 and Singh v. West Virginia University, Docket No. 30-86-044.

Accordingly, the grievance is DENIED.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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.

DATED

June 7, 1988

Sue Keller

SUE KELLER  
HEARING EXAMINER