THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

AZAM BEJOU,
Grievant,

v. **Docket No. 2021-0075-WVSU**

WEST VIRGINIA STATE UNIVERSITY,
Respondent.

DEFAULT REMEDY DECISION

Grievant, Azam Bejou, is employed by Respondent, West Virginia State University. On August 6, 2020, Grievant filed a grievance against Respondent stating:

> On or about July 31, 2020, Grievant received notice from the Interim President that he was not granting her promotion to rank of Professor. Said denial of promotion was arbitrary & capricious, retaliatory, and without factual basis. Moreover, the applicable Faculty Handbook and policies/procedures related to review of applicants for promotion in rank were violated and the process was flawed.

As relief, Grievant seeks "to be promoted to the rank of Professor in the academic year 2020-2021; to be made whole; all applicable back pay and benefits; and any other relief the grievance evaluator deems appropriate."

Respondent failed to timely respond to this grievance. On August 25, 2020, Grievant filed a Notice of Intent to Force Default. Respondent conceded default. Grievant has therefore prevailed on the merits. Only the default remedy is at issue. On December 3, 2021, Grievant filed a Motion in Limine seeking to exclude from consideration at the default remedy stage any evidence on the merits of the grievance. Grievant requested that the default remedy hearing be limited to the issue of whether the relief sought is a lawful, proper, and available remedy. On December 10, 2021, a hearing on the motion was held before Administrative Law Judge (ALJ) Carrie LeFevre, who ruled in favor of the

motion and excluded evidence on the merits. Thus, the only issue to be addressed is whether the relief sought by Grievant is contrary to law or proper and available remedies.

On December 15, 2021, a default remedy hearing was held before ALJ Carrie LeFevre, pursuant to W. VA. CODE ST. R. § 156-1-7, to determine if the remedy sought by Grievant was proper and available by law. The hearing was held at the Charleston office of the Public Employees Grievance Board. Grievant appeared in person and by counsel, Jeffery G. Blaydes. Respondent appeared by Alice Faucett and Gretchen Murphy, Assistant Attorney General. Respondent moved to dismiss the grievance as untimely. ALJ Carrie LeFevre denied the motion since Respondent had not raised untimeliness prior to the default remedy hearing and only after Grievant had prevailed on the merits. On February 7, 2022, each party submitted proposed Findings of Fact and Conclusions of Law (PFFCL).[1]

On February 18, 2022, Grievant filed a Motion to Strike evidence on the merits from Respondent's PFFCL. On March 7, 2022, Respondent filed a Response to Grievant's Motion to Strike. On April 7, 2022, the task of preparing this Default Remedy Decision was transferred to ALJ Joshua Fraenkel for administrative reasons.

Synopsis

Grievant grieved Respondent's rejection of her request for promotion to full Professor. Respondent did not respond. Respondent had a duty to respond in a timely manner or face default. Default entails two separate hearings: one to determine if a default occurred and another to determine the availability of requested relief. Respondent

[1]As Respondent did not address its timeliness motion in its PFFCL, the motion will not be further addressed.

concedes default. Thus, Grievant prevails on the merits. The only matter at issue is whether the remedy of promoting Grievant to full Professor, with backpay and benefits, is lawful, proper, and available. The Faculty Handbook requires that a candidate for full Professor have a terminal degree in a "field appropriate" to the field of her appointment. Even though Grievant's terminal degree is in education and her field of appointment is business administration, Respondent did not meet its burden of proving that the terminal degree is not in a "field appropriate" to business administration. Accordingly, the remedy is GRANTED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent, West Virginia State University, as an Associate Professor in the Department of Business Administration.

2. Grievant was hired by Respondent as an Assistant Professor in the Department of Business Administration on July 19, 2013, and was later promoted to Associate Professor in said department.

3. Grievant applied for a promotion to full Professor in the Department of Business Administration for the 2020-2021 school year but was denied.

4. On August 6, 2020, Grievant brought this grievance over the denial of her application for promotion to full Professor.

5. The remedy requested by Grievant is a promotion to full Professor, along with backpay and benefits.

6. Respondent did not timely respond to the grievance within the requisite period of time.

7. On August 25, 2020, Grievant filed a Notice of Intent to Force Default.

8. Respondent thereafter conceded default, meaning Grievant prevails on the merits.

9. Thus, the matter proceeded directly to a default remedy hearing.

10. The West Virginia State University's 2018-2019 Faculty Handbook governs Grievant's promotion to full professor.

11. This handbook provides the following for promotion to Professor:

> For promotion to Professor, the candidate must have met the following additional criteria: *terminal degree in a field appropriate to the faculty member's appointment*, plus five years of teaching in a full-time appointment at the rank of Associate Professor, three of which must be "excellent" teaching experience at West Virginia State University. (emphasis added)
>
> (Grievant's Exhibit 1)

12. The handbook also provides similar language for promotion to Associate Professor, which was applied to Grievant upon her promotion to Associate Professor:

> For promotion to Associate Professor, the candidate must meet the following criteria: *terminal degree in a field appropriate to the faculty member's appointment* plus a minimum of five years of teaching in a full-time appointment in higher education, three of which must be "excellent" teaching experience at West Virginia State University (emphasis added)
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> Or
>
> 48 hours past the master's degree in a field appropriate to the faculty member's appointment or completion of all course work except research required in a terminal degree program in a field appropriate to the faculty member's appointment, adherence to professional standards of conduct, accessibility to students, plus five years of teaching in a full-time

> appointment in higher education, three of which must be "excellent" teaching experience at West Virginia State University.

13. Grievant has at all relevant times held a terminal degree of EdD in the field of education.

14. The evidence does not show that an EdD is in a field inappropriate to, i.e., unsuited to, the field of business administration.

Discussion

"The default proceeding is usually bifurcated into two hearings." W. VA. CODE ST. R. § 156-1-7 (2008). In the first hearing, it is determined whether default occurred. If default is found to have occurred, a second hearing is conducted to determine whether the remedy sought by the grievant is "contrary to law or contrary to proper and available remedies." W. VA. CODE § 6C-2-3(b)(2). "In making a determination regarding the remedy, the administrative law judge shall determine whether the remedy is proper, available and not contrary to law." *Id*.

Respondent defaulted and acknowledged that it has no statutorily accepted excuse for its default. A default remedy hearing is not an opportunity to present a grievance on the merits because at that phase a grievant is presumed to have already prevailed on the merits. See *Leeson et al. v. Department of Transportation/ Division of Highways*, Docket No. 06-DOH-033D. In the remedy phase of a default grievance, Respondent has the burden of proving by a preponderance of the evidence that the remedies requested by the grievant are contrary to law or contrary to proper and available remedies. W. VA. CODE § 6C-2-3(b); Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018); *See also Hoff v. Bd. of Trustees*, Docket No. 93-BOT-104 (June 30, 1994) and

Flowers v. W.Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993), cited in support of this proposition in *Lohr v. Div. of Corrections,* Docket No. 99-CORR-157D (Nov. 15, 1999). "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), aff'd, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

The relief sought by Grievant is that she be retroactively promoted to full Professor and receive backpay and benefits. For promotion to Professor, the Faculty Handbook requires a candidate to have a terminal degree in a "field appropriate" to her appointment. Respondent contends that Grievant does not meet this requirement and argues that a "field appropriate" really means "field in" or "same field as" the appointment.

It is undisputed that Grievant's EdD is a terminal degree in education and that her appointment was in the field of business administration. Grievant contends that her terminal EdD degree is in a "field appropriate" to her appointment. Grievant argues that "field appropriate" does not mean that the field of her degree and the field of her appointment must be the same. Grievant contends that Respondent interpreted "field appropriate" in the same manner Grievant now advocates when Respondent previously promoted her to Associate Professor under the identical "field appropriate" requirement now at issue.

Respondent presented evidence that accreditation factors have changed since it transitioned from the status of a college to a university in 2004. This has meant that to retain accreditation for its university status, a certain percentage of its Professors should

have terminal degrees in the same field as their appointment. Respondent did not show that this is mandatory in every case, but simply a best practice. Respondent failed to provide the required percentage for retention of its accreditation. Respondent's preference does not make a single promotion to full Professor a remedy that is illegal, improper, or unavailable.

As Grievant has already prevailed on the merits of her grievance, any preference that Respondent may have legitimately exercised is now irrelevant and the only issue is whether the relief is a legally available remedy. This also relates to the attempt by Respondent to place the burden of proof on Grievant in arguing that its decision not to promote Grievant to Professor was never shown to be arbitrary or capricious. Again, this argument overlooks the fact that in conceding its default, Respondent allowed Grievant to prevail on the merits. Now, the only issue is whether the requested remedy is available.

In assessing whether the relief sought is contrary to law or proper and available remedies, it is clear that the Grievance Board has the authority to promote a qualified individual to full Professor. In this case, Grievant has already prevailed on the merits, meaning she is qualified. The record herein establishes that the relief Grievant seeks is lawful, proper, and available. Respondent has not proven by a preponderance of the evidence that Grievant cannot occupy the position of Professor.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. "The default proceeding is usually bifurcated into two hearings." W. VA. CODE ST. R. § 156-1-7 (2018). In the first hearing, it is determined whether default occurred. If default is found to have occurred, a second hearing is conducted to allow

Respondent to demonstrate that the remedy sought by the grievant is "contrary to law or contrary to proper and available remedies." W. VA. CODE § 6C-2-3(b)(2).

2. Respondent conceded to its default in responding to this grievance, meaning Grievant prevails on the merits.

3. In the remedy phase of a default grievance, the respondent has the burden of proving by a preponderance of the evidence that the remedies requested by the grievant are contrary to law or contrary to proper and available remedies. W. VA. CODE § 6C-2-3(b); Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018); *See also Hoff v. Bd. of Trustees*, Docket No. 93-BOT-104 (June 30, 1994) and *Flowers v. W.Va. Bd. of Trustees*, Docket No. 92-BOT-340 (Feb. 26, 1993), cited in support of this proposition in *Lohr v. Div. of Corrections*, Docket No. 99-CORR-157D (Nov. 15, 1999).

4. "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), aff'd, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

5. A default remedy hearing is not an opportunity to present a grievance on the merits because at that phase a grievant is presumed to have already prevailed on the merits. See *Leeson et al. v. Department of Transportation/ Division of Highways*, Docket No. 06-DOH-033D.

6. Respondent failed to prove by a preponderance of the evidence that the remedy requested by Grievant was contrary to law or contrary to proper and available remedies.

Accordingly, the relief requested by Grievant is GRANTED. Respondent is ORDERED to promote Grievant to full Professor retroactively to the date it denied her promotion, and to provide her backpay and benefits retroactively to that date.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 civil action number should be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: April 18, 2022

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Joshua S. Fraenkel
Administrative Law Judge