CHRISTOPHER GRUEN

v. Docket No. 94-BOD-256

WEST VIRGINIA BOARD OF DIRECTORS/CONCORD COLLEGE

DECISION

The grievant, Christopher Gruen, is employed by Concord College as an Assistant Professor of Social Work. On May 13, 1994, he received notification from Concord President Jerry Beasley that he would be issued a terminal contract for the 1994-95 school year. (See footnote 1) On June 2, 1994, the grievant protested the notification in a conference with his supervisor, Division Chair John Seago. (See footnote 2) On Monday, June 6, 1994, Mr. Seago responded that there would be no reconsideration, at least on his part, of the decision to issue the contract. The grievant then presented Mr. Seago a grievance form, signed by him on that date, which contained the following "statement of the grievance":

> On May 13, 1994, I received a letter from President Beasley informing me of non-retention, and that my teaching contract for 94-95 will be terminal. I feel this action is violative of BOD policy series #36 in that it is arbitrary, capricious and is not based on fact. As relief, I hereby request that this action be reversed and that I be retained.

Mr. Seago signed and dated the form in the area denoted "Level I decision issued by." He also provided the grievant a letter in which he acknowledged signing the form and confirmed that there was no basis for retracting the terminal contract.

At approximately 1:00 p.m. on June 6, the grievant proceeded to President Beasley's office to file the grievance at Level II. (See footnote 3) President Beasley was out of town and his secretary was away from her desk. The grievant placed the form on her desk and left. The President's secretary returned shortly thereafter, discovered the form and retained it until President Beasley's return on the morning of Friday June 10. After reviewing the form, President Beasley directed that it be forwarded to Acting Director of HumanServices Donna East with instructions that she arrange a Level II hearing.

Ms. East received the form sometime on June 10. Realizing that four days had passed since the

grievance was filed at Level II, she immediately made several unsuccessful attempts to reach the grievant at his residence. At some point, she left a message on his answering machine asking him to contact her office. Ms. East also mailed a letter to the grievant's campus office address on that date in which she made the same request. The grievant retrieved the telephone message that evening but did not call Ms. East until the morning of Monday June 13, 1994. During their conversation, Ms. East advised that President Beasley had appointed Professor Kevin O'Sullivan to act as Level II hearing evaluator but that Mr. O'Sullivan would only be available from 8:00 a.m. to 10;00 a.m. during the next two weeks. Ms. East asked the grievant if he would be amenable to scheduling the hearing after the end of June when Mr. O'Sullivan's schedule would be more flexible. The grievant responded that he would have to consult his union representative on the matter and that he would call Ms. East once he had done so. The grievant made no other statements regarding Ms. East's inquiry. The grievant then called his representative's office and left a message for her to contact him. The representative did not contact him until that night. The grievant did not contact Ms. East again on June 13.

On Tuesday, June 14, Ms. East called the grievant's residence in the afternoon and left a message on his answering machine. Shedid so again on the afternoon of June 15. On June 16 she mailed the grievant another letter in which she asked that he come to her office. The grievant either chose not to respond to the calls and letter or he was out of town.

On June 20, 1994, the grievant presented Ms. East the following letter addressed to President Beasley:

> As you are aware, on June 6, 1994, I submitted my grievance to you for hearing at Level II. This is regarding your decision to issue me a terminal teaching contract for the 1994-95 academic year. To date no hearing has been scheduled on this matter.
>
> West Virginia Code 18-29-4(b) requires that a hearing be conducted within five (5) days of your receipt of such an appeal. Further West Virginia Code 18-29-3(a) indicates that "the number of days indicated at each level specified in section four of this article shall be considered as the maximum number of days allowed..." This section further states that "If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness or illness, the grievant shall prevail by default."
>
> Since there has been no mutual agreement to extend time limits, I am hereby notifying you that I believe Concord College to be in default. Further, as a result of this default I am asserting a claim that my relief must be granted and that the terminal teaching

contract for the 1994-95 academic year be rescinded and that I be retained in a probationary status.

Because June 20 was a state holiday, Ms. East could not immediately contact the College's counsel. On June 21, counsel advised her to file an appeal of the alleged default to Level IV as provided for in W.Va. Code §18-29-3(a). She completed the letter of appeal on June 21 and mailed it to the Grievance Board's central office in Charleston on June 22. The letter was received June 23. A hearing was held August 11 and September 29, 1994, for thepurpose of determining if and when a default had occurred; whether the College had timely appealed to Level IV; and whether the relief sought, i.e., the retraction of the terminal contract, was "clearly wrong or contrary to law" within the meaning of Code §18-29-3(a).

At the conclusion of the proceedings on August 11, 1994, and after the parties had presented oral argument, the undersigned ruled that the grievant had effected a proper appeal of his grievance to Level II on June 6 by placing the grievance form on President Beasley's secretary's desk; pursuant to W.Va. Code §18-29-4(b), the College had until June 13, 1994, to conduct a Level II hearing and did not; the grievant did not make any representations or take any actions which caused the College to delay scheduling a Level II hearing within five days and; since, under Code §18-29-4(b), holding a hearing is a prerequisite to making a response to the grievance, a default had occurred on June 13. (See footnote 4) After a closer review of the evidence of record, those rulings are here affirmed.

On the issue of whether the College had timely appealed to Level IV, the undersigned preliminarily ruled at hearing that thefive day period provided for in the statute for such appeals begins to run from the date the default occurred and that the College failed to file within that period. The parties were provided the opportunity to provide written legal argument on that issue and the College was allowed to present evidence on the question of whether the relief sought was "clearly wrong or contrary to law."

The College presented extensive evidence on the grievant's work history at Concord and the circumstances surrounding Mr. President Beasley's decision not to retain the grievant after the end of the 1994-95 school year. (See footnote 5) Objecting to this presentation on the grounds that it was not relevant to the inquiry, the grievant chose not to present rebuttal evidence. The parties submitted briefs in support of their positions on October 24, 1994.

Because the undersigned finds that the College has not shown that the relief sought is "clearly

wrong or contrary to law", it is not necessary to decide whether its appeal to Level IV was timely. (See footnote 6) In making this determination, the statute mandates that it be presumed that "the employee prevailed on the merits of thegrievance." For the reasons hereinafter discussed, it is clear that in light of that presumption, the relief is appropriate. (See footnote 7)

West Virginia Board of Directors personnel policy (See footnote 8) in effect at all pertinent times herein provides:

> The president of an institution shall make all tenured, probationary, and temporary faculty appointments at the institution after consultation with appropriate faculty and other collegiate units, and report those actions to the chancellor.

. . . . .

> When a full-time faculty member is appointed on other than a temporary or tenured basis in any or the institutions of higher education in the State College System, the appointment shall be probationary.

. . . . .

> During the probationary period, contracts shall be issued on a year-to-year basis, and appointments may beterminated at the end of the contract year. During said probationary period, notices of nonreappointment may be issued for any reason that is not arbitrary, capricious, or without factual basis.

These provisions and the pronouncement in Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977) that "an administrative body must abide by remedies and procedures it properly establishes to conduct its affairs" provide the backdrop for the inquiry into whether the relief is proper.

Clearly, the grievant's allegation that his non-retention was arbitrary and capricious and not based on fact in violation of the policy constitutes his claim on the "merits" of the case. The statute mandates that the inquiry into the propriety of the relief be premised on a finding that the grievant has shown by a preponderance of the evidence that the College issued the contract in question for reasons which were arbitrary, capricious and without factual basis and that the action taken was, therefore, in violation of the above policy. Given this finding and the above pronouncement in Powell, it is difficult to discern what relief other than that requested would be appropriate. The remedy certainly "flows" from the infraction of policy and is not disproportionate to the offense.

Moreover, the Grievance Board has held, in cases factually similar to the present one, that rescission of certain contracts and/or the issuance of new ones are the proper remedies for a showing that the employer acted arbitrarily and capriciously. See, e.g., Webb v. Shepherd College, Docket No. 87-287-2 (Sept. 30, 1988). Further, the West Virginia Supreme Court of Appeals, inPowell, supra, deemed the same remedy appropriate upon a finding that the employee therein had been denied certain procedural due process rights afforded her under policies of the West Virginia State Board of Education. Accordingly, the undersigned concludes that the retraction of the terminal contract is not "clearly wrong or contrary to law."

W.Va. Code §18-29-3(a) further provides that, "if the [Level IV hearing examiner] finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted so as to comply with the law and to make the grievant whole." Implicit in this language is that the examiner must order the remedy implemented upon a finding that the employer has failed to fulfill its burden. Hoff v. Bd. of Trustees/W.Va. University, Docket No. 93-BOT-104 (June 30, 1994).

Accordingly, Concord College is hereby **ORDERED** to rescind the grievant's terminal contract for school year 1994-95 and issue him a probationary contract of employment for that year. The College is further **ORDERED** to remove any and all references to the terminal contract from the grievant's personnel file.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Mercer County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. 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. Any appealing party must advise this office of theintent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: November 30, 1994

Footnote: 1As discussed herein, Board of Directors personnel policy provides that faculty members who, like the grievant, are not yet tenured may be issued a terminal contract for the next school year for reasons which are not "arbitrary or

capricious." The issuance of such a contract is essentially a dismissal with a one year notice.

Footnote: 2The meeting was held pursuant to W.Va. Code §18-29-4(a)(1) which provides,

> *Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedulea conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.*

Footnote: 3W.Va. Code §18-29-4(b) provides that "within five days of receiving the decision of the immediate supervisor, the grievant may appeal the decision to the chief administrator."

Footnote: 4The evidence on these issues was essentially uncontroverted and supported the foregoing recitation of events. The College's focus was upon the June 13, 1994 conversation between Ms. East and the grievant and it attempted to show that the grievant made statements which led Ms. East to reasonably conclude that she and he were making "good faith efforts" to schedule a hearing. This evidence was submitted as supportive of an estoppel theory to toll the time allotted for holding the hearing. The testimony of Ms. East and the grievant clearly demonstrated that no such statements were made and that Ms. East, as of the afternoon of June 13, 1994, had no basis for believing that the grievant had agreed or would agree to hearing outside the statutory deadlines. Accordingly, it is not necessary to decide herein whether equitable theories such as estoppel are even available to an employer to toll the time for responding to a grievance at a particular level.

Footnote: 5Because the controlling statute is a relatively new one and provides little guidance as to when relief is "clearly wrong or contrary to law", the undersigned gave the College wide latitude in the presentation of evidence on that question.

Footnote: 6At least part of the basis for this approach is that the grievant at no time asserted that the College's filing was untimely. Contrary to prior Grievance Board holdings to the effect that only the parties should raise issues dispositive of a grievance, see, e.g., Brown v. Logan County Bd. of Educ., Docket No. 90-23-177 (Oct. 31, 1990), the undersigned raised the matter at the Level IV hearing in the course of identifying the issues. It is also the most expedient approach.

Footnote: 7In reaching this conclusion, the undersigned has thoroughly reviewed and analyzed all evidence of record and the parties' briefs. It is noted that the College advances numerous theories in support of its position, some of which are wholly inapplicable to the facts of the case. For example, despite that the pertinent statute does not authorize the Grievance Board to do so, the College urges that the default "be set aside" in order that its "onerous consequences" might be avoided. Other arguments are even more tenuous.

It is further noted that in its brief, the College raises for the first time the issue of the grievant's refusal to sign and return his contract for the 1994-95 school year. It asserts that at the end of the 1993-94 school year and the expiration of the grievant's contract for that year, it had no contractual relationship with the grievant and since he simply refused the "offer" of a terminal contract for the following year, he relinquished his right to any contract. Without ruling on the merits of this argument, the undersigned notes that it was never raised prior to or at the Level IV hearing and the grievant, therefore, was never afforded the opportunity to provide a response thereto or present evidence on his reasons for declining to sign the contract. Accordingly, the argument was not properly raised and is not addressed further herein. See, Marshall v. W.Va. Housing Authority, Docket No. 90-HDF-256, (August 28, 1991).

Footnote: 8This policy is entitled "Title 131 Procedural Rule, State College System of West Virginia, Board of Directors, Series 36 and is the same policy reference as "series #36" in the grievant's original filing.