RONALD L. FASCE,

Grievant,

v. DOCKET NO. 94-BOD-1072

BOARD OF DIRECTORS/WEST VIRGINIA

INSTITUTE OF TECHNOLOGY,

Respondents.

D E C I S I O N

Grievant, Ronald L. Fasce, filed this grievance on July 27, 1994, protesting his issuance of a terminal contract, which he alleges was in reprisal for previously filing a grievance over his denial of tenure and promotion with Respondent West Virginia Institute of Technology. Grievant requests as relief that he be reinstated to his position, and a correction of his employment record to reflect his outstanding service to the institution. Following adverse decisions at the lower levels, Grievant appealed to level four on November 17, 1994. Following several continuances for good cause, hearing was held on April 13, 1995, May 3, 1995, and July 10, 1995. This case became mature at the conclusion of the briefing schedule on August 22, 1995.

Background

Grievant was offered, and accepted, a full-time probationary position as Assistant Professor of Accounting by West VirginiaInstitute of Technology ("Tech") for the 1990-91 Spring term, beginning January 7, 1991 and ending May 13, 1991. Grievant remained in his position as Assistant Professor of Accounting until he was issued a terminal contract in the Spring semester of 1993, for the 1994-95 school year.

Grievant's offer letter stated, among other things:

> This offer is extended with the understanding that the position is probationary in a tenure track with continued reappointment contingent upon successful fulfillment of those criteria described in Section 3 of the Faculty Handbook which includes the Board of Directors Policy Bulletin #36.

R Ex. 1.

Faculty Handbook Section 3/9 outlines the procedures for faculty evaluations as follows:

> The evaluation of the faculty member's teaching effectiveness through the utilization of student evaluation (and classroom observation or other means) will constitute the initial phase of the Faculty Evaluation System. Faculty Evaluation by students (and classroom observation or other means) will occur every year for the first three years for non-tenured faculty members.
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> . . .
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> The results of the student evaluations and the classroom observation reports will be presented to the individual faculty member no earlier that [sic] the **first week of the second semester**. (Emphasis in original).
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> . . .
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> During the initial year of the faculty member's participation in the Faculty Evaluation System, a comprehensive resume will be required. In subsequent year, [sic] the faculty member will only be required to up-date the resume. The faculty member need only respond to those categories in the Guide that are deemed applicable.

R Ex. 2. The Handbook provides a sample comprehensive resume with instructions on how it is to be filled out, both by the faculty member and the Chair of his or her department. Ms. Madhuri Sarin was the Chair of the Department of Accounting and Finance at all times relevant to this grievance.

Grievant received student evaluations in Fall 1991 from his Advanced Accounting, and two Principles of Accounting I classes. In Fall 1992, Grievant received student evaluations from his Managerial Accounting and Principles of Accounting I classes. In Fall 1993, Grievant received student evaluations from his Principles of Accounting, Principles of Accounting I, and Managerial Accounting classes. Jt. Ex. 1.

Grievant received his first faculty evaluation following completion of his comprehensive resume in the Spring semester 1992. Consistent with the guidelines set forth in the Faculty Handbook, Grievant completed the faculty portion of the resume and his Chair, Ms. Sarin, completed her portion. Of

interest in the Spring 1992 evaluation is Grievant's interpretation of the student evaluations conducted in Fall 1991 of his classes, i.e., "very good", compared with Ms. Sarin's comments regarding these evaluations:

> The numerical scores received by Mr. Fasce for Advanced Accounting (taught in Fall, 1991 for the second time) were below the averages of the institution in all categories and were far below the WVIT average in many categories, his overall score being far below the average (2.0 as against the institution average of 4.1). His scores in the two Principles of Accounting classes were also below the institutions average in all but one category. The majority of the comments for all classes contained negative remarks.

R Exs. 3, 6. Sarin repeated these observations in Part VII of the resume, Evaluative Comments to Faculty Member, as well as recommendations that Grievant: 1) Put in more time and effort for class preparation, organization, and lecture presentation; 2) work towards developing a good professional relationship and rapport with the students; encourage them to ask questions and be willing and prepared to answer questions; 3) invite peers to classroom and be open to constructive suggestions; and 4) get involved in professional growth and academic achievement. Grievant acknowledged receipt of this evaluation by signature dated February 24, 1992. R Ex. 6.

During this time and continuing throughout Grievant's service, Ms. Sarin received numerous complaints from students in Grievant's classes regarding his teaching abilities, including two petitions, one received in Fall 1991 (Jt. Ex. 4) and one in Fall 1993 (Jt. Ex. 3). Ms. Sarin suggested to Grievant that classroom observations might prove beneficial, but Grievant refused to let anyone observe his classes. Eventually, Grievant permitted Dean Robert Sanger to visit his classes to discuss, in his absence, any concerns regarding the classes. Dean Sanger visited Grievant's classes on November 17, 1992, in Grievant's absence, and summarized his findings by memorandum to Ms. Sarin. Jt. Ex. 5. Dean Sanger concluded, based on his discussions with the students, that Grievant was "doing a satisfactory job" but that "further improvement . . . is . . . desirable".

Grievant received a second evaluation from Ms. Sarin in May, 1993, along with his comprehensive resume. Ms. Sarin's evaluative comments to Grievant concluded that some of his student evaluations were better than the previous year, but that his "scores in Managerial Accounting were far below the institution average and students expressed concern about lack of class preparation and presentation of lectures. I recommend that Mr. Fasce put in more time and effort for class preparation, and lecture presentation in this course." R Ex. 5.

Grievant refused to sign or accept this evaluation, and Ms. Sarin was forced to send it to him by certified mail. Inst. Ex. 3.

Ms. Sarin continued to receive complaints regarding Grievant's teaching, and voiced her concerns regarding Grievant's teaching abilities to Dean Sanger. R. Ex. 10.

Dean Sanger and Ms. Sarin met with Grievant in Fall 1993 to discuss the ongoing problems and complaints regarding his teaching. Vice President W. Franklin Gilmore met with Dean Sanger on November 9, 1993 regarding Grievant. He met with Grievant later that same day and Grievant told him that Dean Sanger and Ms. Sarin were harassing him and had selected students to spy on him and make complaints about him.

Ms. Sarin recommended to Dean Sanger that Grievant be issued a notice of non-retention by memorandum dated November 15, 1993. Inst. Ex. 1. This recommendation was made at that time based upon the erroneous assumption that notice of non-retention had to be given in the Fall to Grievant. However, the Handbook provides thatfor teachers employed for more than one year, notice is to be given in the Spring, along with a one-year terminal contract. Vice President Gilmore and Dean Sanger had also, in Fall 1993, made a verbal recommendation to President Carrier that Grievant be issued a notice of non-retention. The decision was made to issue Grievant a letter of non-retention in May 1994.

Grievant applied for early tenure and promotion after being employed at Tech for only 3 years in late December 1993 or early January 1994. Vice President Gilmore reviewed Grievant's file, including student and peer evaluations, as part of the tenure and promotion process, failed to see any significant improvement, and spoke with Ms. Sarin at about that time regarding recommending Grievant receive notice of non-retention in Spring 1994.

Grievant was denied tenure and promotion and appealed his denial through the internal procedure established in Policy Bulletin 36 of the Handbook. Grievant's appeal was denied. (See footnote 1)

Dean Sanger recommended to President Carrier that Grievant be given notice of non-retention on May 4, 1994, based upon Grievant's unwillingness or inability to improve his teaching deficiencies. Inst. Ex. 5. Grievant was issued a letter of non-retention and a terminal one-year contract for the 1994-95 school year.

Grievant subsequently filed this grievance alleging that his letter of non-retention was in retaliation

for filing an internal Policy 36 grievance over his denial of tenure and promotion. Grievant also alleged at the Level IV hearing that reliance on student evaluations was improper and apparently, arbitrary and capricious.

Discussion

"Reprisal" is defined in W. Va. Code § 18-29-2(p) as "the retaliation of an employer or agent toward a grievant or other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In order to establish that an action which has been taken constitutes reprisal, the burden is upon the Grievant to show:

a. He engaged in a protected activity;

b. The employer had actual or constructive knowledge that Grievant engaged in the protected activity;

c. He was subsequently treated in an adverse fashion by his employer; and

d. The adverse action followed his protected activities within such period of time that one can infer retaliatory motivation.

If the grievant meets the above burden, the employer may rebut the presumption of retaliatory action by demonstrating that it had legitimate nondiscriminatory reasons for its action. Should the employer succeed in rebutting the presumption, the Grievant may still prevail if the proffered reason for the adverse action is determined to be pretextual. W. Va. DNR v. Myers, 443 S.E.2d 229(W. Va. 1994); Frank's Shoe Store v. W. Va. Human Rights Comm., 365 S.E.2d 251 (W. Va. 1986).

In the instant case, Grievant has established a prima facie case of reprisal. However, Respondent

has proven, through testimony and documentary evidence, that the decision to issue Grievant a letter of non-retention and terminal contract was made by those in authority as early as November 1993. It was agreed upon at that time that, because Grievant was not a one-year probationary employee, his notice properly had to be given in May 1994.

Grievant did not apply for promotion and tenure until January 1994. Obviously, in reviewing Grievant's application, Ms. Sarin, Dean Sanger and Vice President Gilmore had to again evaluate Grievant's teaching effectiveness and again decided that Grievant had not demonstrated that he was qualified to receive tenure and promotion. It was only by coincidence that the decision on Grievant's tenure was made about the same time his non-retention was being discussed. Subsequently, Grievant appealed his denial of tenure and promotion, and later, in May 1994, Grievant received his notice of non-retention, as originally discussed in November 1993.

Grievant has presented no testimony or evidence to support his claim that his non-retention letter was in reprisal for filing his internal grievance. Grievant's claim is not supported by the chronology of events leading up to his issuance of the letter of non-retention.

Regarding Grievant's allegation that reliance on student evaluations in assessing a professor's teaching ability is arbitrary and capricious, the Handbook specifically sets the standard for evaluating probationary employees, which includes reliance on student evaluations. Grievant has offered no other evidence or authority to support his contention that reliance on student evaluations is improper or arbitrary and capricious.

Conclusions of Law

1. Grievant has failed to meet his burden of proving by a preponderance of the evidence that the issuance of a non-retention letter in May 1994 was in reprisal for filing an internal grievance over his denial of tenure and promotion. See Reese v. WVBOT/Marshall University, Docket No. 93-BOT-533 (Oct. 17, 1994).

2. The decision process in non-retention is similar to the decision process in awarding tenure and promotion. The decisional subjective process by which promotion and tenure is awarded or denied is best left to the professional judgment of those presumed to possess a special competency in making the evaluation unless shown to be arbitrary and capricious or clearly wrong. Sui v. Johnson, 784 F.2d 238 (4th Cir. 1984); Carpenter v. Bd. of Trustees/W. Va. Univ., Docket No. 93-

BOD-220 (Mar. 18, 1994).

3. The issuance of a non-retention letter and terminal contract in the instant case was not arbitrary, capricious, or clearly wrong.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Fayette 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 the intent 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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MARY JO SWARTZ

Administrative Law Judge

Dated: September 13, 1995

Footnote: 1 *Grievant subsequently filed a grievance over his denial of tenure and promotion pursuant to W. Va. Code §§ 18-29-1, et seq., through the West Virginia Education and State Employees Grievance Board. This grievance was dismissed by Order dated January 10, 1995, pursuant to W. Va. Code § 18-29-1, which provides that a higher education employee shall have the option of filing grievances in accordance with the provisions of the Grievance statute, or in accordance with the provisions of policies and rules of the governing boards of higher education. Grievant chose his avenue of recourse through the school's internal hearing process as outlined in Title 131, Procedural Rule of the Board of Directors, Series 36, § 15 ("Policy 36").*