

DAVID F. GRAF, M.D.

v. Docket No. 95-BOT-065

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY

DECISION

___Grievant, David F. Graf, employed by the Board of Trustees as an Associate Professor at West Virginia University, filed a level one grievance on August 20, 1992, in which he complained that resident evaluations of faculty members were completed on forms which were “unfair” in that “untrue, slanderous, [and] malicious” comments could be made with no accountability and with no opportunity for rebuttal or other recourse by the faculty member. Further, the purpose of the evaluations was not made clear to the residents and “the policy of written evaluation of faculty is not uniformly [sic] applied to all faculty members in all departments.”

Grievant also complained of “improper incentive payments and incentive plan, apparent reprisal, and violation of terms of appointment.” He concluded that the cited violations infringed upon his constitutional and due process rights and state law, constitute discrimination, favoritism, harassment, and constitute a substantial detriment to or interference with his job performance, and health.

Dr. Edward Stullken, Grievant's immediate supervisor and Chair of the Department of Anesthesiology, issued a level one decision dated August 26, 1992, in which he granted the decision, in part, after determining that the resident evaluation process “should be better delineated.” He also denied the grievance in part, finding that use of the evaluations was not unfair, and did not constitute reprisal, discrimination, favoritism, or harassment. Dr. Stullken further concluded that the evaluations did not violate Grievant's constitutional or due process rights, the terms of his faculty appointment, or any other faculty rights, and were not detrimental to his job performance.

By memorandum dated August 26, 1992, Grievant appealed to level two. A hearing at that level was delayed, but was eventually conducted on April 16, 1993, June 2, 1993, March 22 and 23, 1994, June 7, 1994, and October 26, 1994.

Grievant filed a second complaint on October 7, 1994, in which he alleged that the dual track system and Promotion and Tenure Guidelines utilized by the School of Medicine are invalid because

they were not approved by the faculty and do not afford due process as required by the West Virginia Constitution. Grievant again alleged reprisal, favoritism, discrimination, and harassment.

William H. Hutchens, III, Associate General Counsel at WVU, issued a level one decision on behalf of Dr. Stullken, dated October 14, 1994. Mr. Hutchins denied the grievance with the exception that he granted the request to reformulate the incentive plan used by the Anesthesiology Department to more accurately reflect individual productivity. Appeal was made to level two on October 14, 1994. A level two hearing was convened on October 18, 1994, and continued on October 21, 1994.

By memorandum dated October 28, 1994, Grievant appealed both matters to level four, alleging defaults in both grievances, or, in the alternative, requesting hearings on the merits. The grievances were remanded with directions that the hearings were to be concluded and decisions issued within a specified period of time. WVU complied, issuing decisions denying the grievances on January 25 and 27, 1995. Grievant advanced both matters to level four on February 1, 1995. The grievances were consolidated for hearing held on April 5 and 6, 1995, and became mature for decision with the conclusion of briefing on October 10, 1995.

Those issues pursued by Grievant at level four are set forth as follows: [\(See footnote 1\)](#)

1. Grievant should be promoted from the rank of Associate Professor to full Professor at WVU.
2. Resident evaluations of Grievant as a WVU medical faculty member are defective on a number of grounds and are used for improper purposes actually and potentially prejudicial to him.
3. Grievant has been improperly denied the proper amounts of periodic bonuses paid disparately to him as contrasted with other WVU medical faculty members in its Anesthesiology Department.
4. Grievant has not received the proper number of nonclinical days during which he could engage in extraclinical activities as a faculty member.
5. WVU has improperly abdicated its responsibility for overseeing "credentialing," or the supervision of medical staff privileges of WVU medical faculty members performing clinical work at West Virginia University Hospitals, Inc. (WVUH), with WVUH having disclaimed and disavowed any such credentialing authority.
6. That the adverse actions of WVU are infected with retaliation, reprisal, discrimination, favoritism and harassment.

For relief, Grievant requests that he be promoted to Professor of Anesthesiology, to have the resident evaluation program formulated and applied properly, to be granted the appropriate allotment of nonclinical days, to require that WVU, not WVUH, has authority over his medical staff privileges, to be granted equitable remedies in the form of incidental monetary relief for the salary payments and bonuses that he has been denied because of the improper refusals of WVU to promote him and extend to him the bonuses which he should have received.

I. Promotion

Grievant was initially employed by West Virginia University as an Assistant Professor of Anesthesiology in 1979. He was promoted to Associate Professor in 1983, and granted tenure in 1985. Grievant applied for promotion to Professor in September 1994, but withdrew the request prior to consideration. Grievant testified that he withdrew his application after he learned that promotion and tenure guidelines in use since 1990 would be applied. He asserts that these guidelines were never properly approved or implemented, and the guidelines in effect during 1979 or 1981 should be used to evaluate his application. Other reasons given for withdrawing the application for promotion were that two colleagues, who had exhibited behavior openly hostile to Grievant, were appointed to the promotion and tenure committee, that Dr. Robert D'Alessandri, Dean of the Medical School, had testified in a prior matter that Grievant was "not promotable," establishing prejudgment at that level of review, and the long history of retaliation by WVU administrators. Consideration of all these factors led him to conclude that promotion was not attainable. Rather than risk staining his record with a denied request for promotion, the application was withdrawn. Grievant requests that, in consideration of the foregoing, he be granted a promotion retroactive to at least 1988, when he opines that he should have been promoted under the 1981 promotion and tenure guidelines. WVU argues that Grievant's withdrawal renders the issue moot.

Grievant cannot prevail on this issue. Although the record indicates that Medical School faculty previously were automatically considered and not required to apply for promotion until 1992, there is insufficient evidence to warrant a finding that Grievant was entitled to a promotion in 1988. The record does establish that Grievant was a member of the promotion and tenure committee from September 1991 through September 1994. As a member of the promotion and tenure committee, Grievant should have known, contrary to his assertions otherwise, what guidelines would be applied to his own application. Further, throughout this period of time he had not felt compelled to challenge

the validity of the guidelines.

Grievant's concerns that his promotion might be denied based upon prejudgment, hostile committee members, and retaliation, are not entirely without basis; however, these factors were not determinative that promotion would be denied. To second guess the various levels of the promotion process at this time would be improper. Until Grievant is in fact denied a promotion, he has no claim upon which relief can be granted.

II. Resident Evaluations

Grievant does not dispute that WVU may have a confidential evaluation program for residents to be used as feedback for the purpose of improving faculty performance. However, Grievant asserts that he is entitled to know the identities of any persons whose evaluations directly and adversely affect his employment status, compensation, faculty rank, and staff privileges. Specifically, Grievant challenges the use of resident evaluations in the determination of salary bonuses, the award of hospital credentials and promotion.

WVU asserts that all faculty members are subject to resident evaluations and all faculty members are given the opportunity to rebut the results. The use of resident evaluations is necessary as a tool in the accreditation process and in the determination of faculty incentive payments. Confidentiality is necessary to insure candor and participation. WVU concludes that Grievant has failed to prove that he has suffered any losses, remunerative or otherwise, as a result of the evaluations.

Resident evaluations are relatively brief, consisting of ten questions for which the student may rate the instructor from (1) "Strongly disagree" to (5)"Strongly agree" or choose UA (Unable to Assess). Two questions request the students to rate the attending physician and the rotation as Excellent, Good, Average, or Poor. Comments are "welcomed." The evaluation form clearly states: Residents and faculty should understand that this evaluation may be used by WVU, WVUH, Inc., and the dept. for faculty and program evaluation purposes, including, but not limited to: accreditation, clinical faculty, performance, merit pay, promotion and tenure, faculty development, credentialing for hospital privileges, quality assurance and peer review. The identity of the evaluator will be confidential in accordance with applicable WVU and WVUH, Inc., policies and law.

The scores are averaged and the faculty member is given a score between one and five. This information is then utilized by WVU for the purposes listed above.

Grievant complains that the anonymous nature of the evaluations precludes the opportunity to confront his accusers. This narrow construction is misrepresentative of the entire picture. First, a number of students complete an evaluation every semester; however, the rating given to the faculty member is a composite score. Thus, there is no accuser, but simply an overall rating of Grievant's teaching performance from the viewpoint of the students. Second, Grievant is permitted to file a response and is not deprived of the opportunity to rebut the ratings. Evaluations completed by well-educated, adult students are a valuable tool in the overall review of a faculty member's performance. The need for the anonymous nature of the evaluations is readily apparent. A faculty member may wield a great deal of power over students, who are by the nature of the system in a subordinate position. Grades, and even careers, might well be at risk. To require that residents place their names on the faculty evaluations would compromise the integrity of the instrument.

Grievant's remaining complaint, that the resident evaluations should not be used to evaluate his performance for purposes other than to improve his teaching skills, is without merit. Resident evaluations constituted only a portion of Grievant's teaching evaluation. Peer evaluations from the department chair, the Dean, and possibly others, should also be completed and made a part of Grievant's performance evaluation for purposes of promotion, bonuses, etc. Thomas J. LaBelle, Provost and Vice President for Academic Affairs and Research, has advised that the review of teaching effectiveness is not to be made only through the student evaluation process, but in a variety of ways, including peer evaluations, review of syllabi and other evidence of course content. (Level II Transcript-Retaliation, Exhibit 9).

Grievant's concern that resident evaluations were the sole indicator of his teaching abilities was supported by the scores he was allocated for the December 1994 incentive disbursement. At that time, Grievant's score for teaching was 2.35, the same score as that from the resident evaluations. Although it is understandable that this situation would arouse Grievant's suspicions, it is not beyond the realm of possibility that other factors were considered and the overall score was coincidentally the same as the resident evaluations. Therefore, it cannot be concluded that the teaching score was solely determined by the resident evaluations.

III. Bonuses

The Department of Anesthesiology Incentive Compensation Plan, revised November 10, 1994 (Level II Transcript-Retaliation, Exhibit No. 81), provides incentive monies, not salaries, made

available to the Chair “for rewarding activities which are needed to create a positive environment for continued growth and development.” The incentives, or bonuses, are to be disbursed quarterly. Faculty members are evaluated in five categories, service (30%), teaching (35%), research/scholarship (20%), [\(See footnote 2\)](#) administration (10%), and first call duties (5%). [\(See footnote 3\)](#) Each faculty member is rated in each category as Excellent (4 points), Good(3 points), Average (2 points), or Below Average (0 or 1 point). A rating of 5 points may be given at the Chair's discretion for service “far beyond normal expectations.” The points are then weighted by the categorical percentage factor and the points totalled. For example:

Service 4 points x 40 = 160 points

Teaching 2 points x 35 = 70

Research/Scholarship 3 points x 10 = 30

Administration 1 point x 10 = 10

First Call Duties 1 point x 5 = 5

Total Weighted Points 275

The total points earned by all faculty are divided into the available incentive monies to obtain a dollars per point value. For each individual, his or her total points earned are multiplied by the dollars per point value to yield their total incentive, or bonus, payment.

The points in each category are to be assigned by the department Chair based upon the following:

Service is measured in total charges generated by the faculty member during the period.

Teaching is to be measured based on several factors, including:

- awards for teaching excellence
- auditing of lectures
- lecturing effectiveness assessed from seminars
- Promotion & Tenure evaluations

Research is based on several factors, including:

- principal investigator of a scientific hypothesis
- scientific publications in peer-reviewed journals

- presentations of scholarly work at national meetings
- initiating, chairing, or participating in national, scholarly meetings or activities
- publishing invited reviews of a scholarly nature
- recognition of research accomplishment, including ability to attract grant funding, editing or reviewing for national journals, serving on national research panels, and serving as moderator at national meetings, etc.

Administration measured by several factors, including:

- providing intramural committee work or administrative work related to the institution
- serving on various committees
- organizing CME courses
- assisting with recruitment
- assisting with chair responsibilities

First Call Duties faculty with the highest number of First Call assignments will receive 4 points. A further distribution will be assigned to remaining faculty based on the result of dividing the number of each individual's First Calls, multiplying by 4, and rounding to the nearest hundredth.

Grievant submitted numerous lists documenting incentive payments from 1986 through 1995. A review of these records indicates that Grievant's incentive plan payments were the highest one or two quarters, but generally were mid-way between the highest and lowest granted. These records do not include the individual scores allocated to the participants. Neither do the records support a finding that Grievant's incentive payments have been lower than his personal average prior to initiating grievance claims. On the contrary, Grievant received the highest payments awarded for the period of May through August, 1989 and January through April, 1990. Since 1990 Grievant's payments have been mid-range. In any event, Grievant has failed to prove that he has been deprived of any incentive monies to which he was entitled.

IV. Nonclinical days

Documentation on this issue is sparse, with March 1994 through February 1995, the only period of scheduling submitted into the record. During that time, Grievant was apparently assigned eleven nonclinical days, the least number assigned to any faculty member in the Anesthesia Department.

One other faculty member was allocated eleven days, two received twelve days, one received sixteen days, three were given seventeen days, one was assigned nineteen days, and two received twenty-one days. Twenty-four, twenty-five, twenty-eight, and thirty days were assigned other faculty.

Although Grievant received only one-third the number of nonclinical days assigned to other faculty during this period of time, and he was one of two faculty members who received the least number of days, his assignment was not remarkably dissimilar to many of his colleagues. It is clear that Grievant desires to have more non-clinical time and that he needs this time to complete research necessary for promotion. However, Grievant has not proven that he consistently receives less nonclinical time than other faculty members or that he is entitled to more nonclinical time. Of course, WVU is encouraged to allocate what is for all practical purposes, a benefit, in a fair and equitable manner.

V. Credentialing

Grievant fails to state a claim for which relief may be granted in this matter. He objects to WVUH having any control over his staff privileges, but, at this time, alleges no harm from the procedure currently in place. [\(See footnote 4\)](#) At this time, Grievant's complaint regarding this issue falls within the category of a moot or abstract question, the decision of which would avail nothing in the determination of controverted rights. As such, it is not cognizable in the grievance procedure. Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 20, 1996).

VI. Reprisal, retaliation, discrimination, favoritism, harassment

W.Va. Code § 18-29-2 provides the following definitions:

Discrimination - "any differences 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."

Harassment - "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."

Favoritism - "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

Reprisal - "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

Grievant's claim is that since he began pursuing the moonlighting issue in 1985, culminating in an

award in excess of one million dollars, WVU has subsequently taken adverse actions against him, set forth in issues one through five, supra. He claims that the adverse actions following his grievance occurred within such a period of time that retaliatory motivation can be inferred. In consideration of the foregoing discussion relating to the issues of promotion, resident evaluations, bonuses, nonclinical days, and credentialing, it must be determined that Grievant has failed to establish a prima facie case of reprisal, retaliation, discrimination, favoritism, or harassment, as defined in W.Va. Code §18-29-2. ([See footnote 5](#)) In addition to the foregoing facts and discussion it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

___1. In a non-disciplinary grievance, it is incumbent upon the grievant seeking relief pursuant to W.Va. Code §§18-29-1, et seq., to prove all of the allegations constituting the grievance by a preponderance of the evidence. Robateau v. Cabell County Bd. of Educ., Docket No. 95-06-213 (March 15, 1996).

2. Grievant has failed to prove that the promotion and tenure committee applied improper or invalid guidelines to his application for promotion or that he has otherwise been wrongfully denied promotion.

3. Grievant has failed to prove that the resident evaluations used by the Department of Anesthesia are defective or used for any improper purposes.

4. Grievant has failed to prove that he has been denied a fair number of nonclinical days or substantially fewer nonclinical days than other members of the Department of Anesthesia.

5. The issue of credentialing falls within the category of abstract or advisory questions. The Grievance Board does not address such questions, which would avail nothing in the determination of controverted rights. Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 20, 1996); Dunleavy v. Kanawha County Bd. of Educ., Docket No. 20- 87-102-1 (June 30, 1987).

6. Grievant has failed to establish a prima facie case of reprisal, discrimination, favoritism, or harassment. Accordingly, the grievance is DENIED.

Any 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. 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.

Date: May 29, 1996 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

[Footnote: 1](#)

¹At level four Grievant specifically withdrew from consideration a number of issues which had been addressed at level two, including those relating to on-call duties, the dual track classification system, and malpractice insurance.

[Footnote: 2](#)

²Research is applied to tenure track faculty while scholarship is applied to clinical track faculty.

[Footnote: 3](#)

³These percentages apply to tenure track faculty, including Grievant. The percentages vary for clinical track faculty in that service is weighted at 40% and research/scholarship at 20%. The remaining three categories remain the same.

[Footnote: 4](#)

⁴Grievant filed a lawsuit against WVUH in 1988, after it had taken certain actions relative to his medical privileges at that facility. Grievant prevailed in that matter and has articulated no current controversy with regard to this issue.

[Footnote: 5](#)

⁵For a more detailed discussion of the analysis used to evaluate whether an employer has engaged in a prohibited personnel practice, such as reprisal, see Conner v. Barbour County Bd. of Educ., Docket No. 93-01-154 (April 8, 1994).