DR. KENNETH BAKER

v. Docket No. 97-BOD-265

BOARD OF DIRECTORS/CONCORD COLLEGE

DECISION

The grievant, Dr. Kenneth Baker, is employed at Concord College as a Professor of Biology. He filed a grievance at Level I, on or about March 15, 1997, alleging that Vice President Dean Turner had improperly “intervened” in the application of his student attendance policy. His claims were rejected at the lower levels, and he appealed to Level IV on May 16, 1997. At a hearing held August 15, 1997, counsel for the College moved to dismiss or deny the grievance on the grounds that the relief sought was unavailable from the Education and State Employees Grievance Board (ESEGB). For the reasons discussed below, the motion was granted.

Background

There is no dispute over the facts of the case. The record developed at Level II reflects that the grievant has a written attendance policy which provides that a student who misses three classes, regardless of the reason, will have his or her final grade for the course reduced by one letter. The grievant distributes the policy to all students on the first day of classes, and requires each to sign a form whereby they agree not to “expect or request” that they be given “special consideration or preferential treatment with regard to testing and evaluation or attendance.”

During the second semester of school year 1996-97, Joy Weikle, a student enrolled in the grievant's Molecular Biology and Human Anatomy classes missed at least three classes in eachcourse because of a kidney-related illness. She provided the college's Student Affairs Office prior notice that she would be absent, and offered the grievant documentation on her medical problems upon her return. He rejected her request for a waiver of the three-day rule and advised that her final grades would be reduced. Ms. Weikle appealed to the Biology and Natural Sciences Department Chairs, and ultimately filed a formal student complaint with Vice-President Turner.

In a March 11, 1997 decision, Vice-President Turner determined that the grievant had not treated

Ms. Weikle fairly, and his attendance policy, to the extent that it made no allowance for documented illnesses, was too harsh, in any event. He prohibited the grievant from reducing Ms. Weikle's final grades, and suggested that he consider revisions to his policy. It appears that she received her grades shortly before the case was appealed to Level IV.

Concord has a written policy whereby instructors are afforded “considerable discretion with regard to attendance policy.” The parties agree that while the College's written policy does not specifically provide exceptions to a particular instructor's attendance policy, it does recognize that illness is a “compelling reason” for absences.

Argument

The grievant asserts that as long as his policy is applied consistently, the College has no authority whatsoever to overrule his decisions. He claims that Vice-President Turner acted arbitrarily and capriciously. The grievant does not seek a reinstatement of his decision to reduce Ms. Weikle's grades. He asks for a ruling that Vice-President Turner acted improperly, and an order enjoining the College from further interference in the application of his attendance policy. The College contends the grievant acted arbitrarily and capriciously when he refused to accept Ms. Weikle's medical excuse. The College also asserts that the grievant cannot obtain injunctive relief in administrative proceedings, and that the case was rendered moot when Ms. Weikle received her final grades.

Conclusions of Law

After careful consideration of the parties' arguments and the foregoing background of the case, and prior Level IV decisions, the undersigned makes the following conclusions:

1.

> Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the ESEGB. Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1993). De minimus relief is also unavailable. Carney v. W.Va. Div. of Rehab. Services, Docket No. VR-88-055 (Mar. 28, 1989).

2.

> Injunctive relief is an extraordinary remedy, particularly in administrative proceedings. Appalachian Power Co. v. W.Va. Public Service Commission, 296 S.E.2d 887 (W.Va. 1982). In the few cases in which cease and desist orders have been issued at Level IV, it was established that the employer had engaged in a pattern of harassment, discrimination or other egregious conduct, and that it was likely that the conduct would continue. See, Helvey v. W.Va. Workers' Compensation Fund, Docket No. 91-WCF-

034 (Mar. 30, 1992); White v. Monongalia County Bd. of Educ., Docket No. 93-30-371 (Mar. 30, 1994).

3.

Since Ms. Weikle has received her grades for the 1996-97 school year, a ruling that Vice- President Turner and/or the grievant acted improperly would provide no practicalconsequences for either party. It would be an advisory opinion.

4.

The grievant does not allege that Vice-President Turner's intervention was part of pattern of interference or that he intended to harass or intimidate. From all indications, the intervention was an isolated incident, and Vice-President Turner was acting consistently with College policy. The grievant has not shown entitlement to injunctive or other relief.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Wyoming 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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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: October 8, 1997