CONLEY K. McMULLEN

Grievant,

v. **Docket No. 96-BOD-473**

BOARD OF DIRECTORS/WEST LIBERTY STATE COLLEGE,

Respondent.

D E C I S I O N

Grievant, Conley K. McMullen, employed by the Board of Directors as a professor at West Liberty State College (WLSC or Respondent), filed this complaint with WLSC Interim President Donald C. Darnton on June 6, 1996, in which he alleged "I was issued a terminal contract for West Liberty State College academic year 1996-97 for reasons that are arbitrary, capricious, and false. I am requesting a new probationary contract. In addition, I am requesting the creation of a tenure procedure that will allow me to receive tenure on what was the original schedule (1996-97)." (See footnote 1) Following an evidentiary hearing, WLSC President Ronald M. Zaccari denied the grievance by decision dated October 31, 1996. Grievant elected to bypass consideration at level three as is permitted by W. Va. Code §18-29-4(c), and advanced the matter to level four on November 6, 1996. Hearings were conducted at level four on March 11, April 23, and May 13, 1997. The matter became mature for decision with the submission of proposed findings of fact and conclusions of law by both parties on June 17, 1997. (See footnote 2)

Background

Grievant was initially appointed as a probationary faculty member at WLSC in August 1991,and was completing his fifth year of service as an associate professor of biology when he applied for tenure during the 1995-96 academic year. By letter dated May 15, 1996, WLSC Interim President Donald C. Darnton notified Grievant that he would be issued a terminal contract for the 1996-97 academic year. President Darnton stated that the Chair of the Department of Biology and Chemistry, the Dean of the School of Natural Sciences, Health Professions and Mathematics, the Academic Dean, and the Interim President, had unanimously recommended the action.

In response to Grievant's request for reasons for his non-retention, President Darnton advised that the decision had been made in consideration of statutory directives set forth in W. Va. Code

§18B-1-1, that the college refocus its mission, and restructure its existing resources and programs to establish curricula which would attract students to disciplines which are career oriented with employment potential. To that end, the School of Natural Sciences, Health Professions and Mathematics had proposed to refocus the biology curriculum toward biotechnology, microbiology, and molecular biology. President Darnton continued to explain that current faculty resources in biology lacked the background and expertise to achieve the shift.

Further, it was anticipated that twenty-one faculty positions would be reduced campus-wide, therefore, it was unlikely that additional resources could be made available to the biology department. These factors limited flexibility to faculty who were not yet tenured. Because there were only two non-tenured faculty in biology, both specialists in botany, and both on track for a tenure decision in spring 1997, it had been determined that Dr. Seeber could contribute more than Grievant to the new direction of the department, based upon his stronger academic background in physiology, and experience in physiology and biotechnology. Grievant's background emphasis in plant taxonomy, plant morphology and plant anatomy was found to be less relevant to the refocusedcurriculum and the general needs of the department. Dr. Darnton summarized that the decision to not renew Grievant's contract was based upon ongoing program change and the determination that his professional background did not closely fit the future needs of the department.

Argument

Grievant argues that the decision regarding his non-retention was arbitrary and capricious and without basis in fact, for the following reasons:

1. Grievant's non-retention had been predetermined by Dr. H. A. Cook, Dean of the School of Natural Sciences, Health Professions, and Mathematics, as evidenced by the fact that he had made virtually the same recommendation to Academic Dean Steven Rowe in 1995.

2. Because Dean Rowe had rejected the recommendation in 1995, the same reasons are not a sufficient basis for Grievant's non-retention in 1996, and are not justified by the intervening appointment of committees and the exchange of numerous memoranda.

3. The WLSC Long Range Strategic Plan requires that the school's goals be achieved by faculty retraining, resignation, and use of adjunct, part-time, and temporary faculty to avoid layoffs during a program redirection. Grievant asserts that Respondent failed to comply with the foregoing by:

(a) Failing to give him the opportunity to retrain. Grievant asserts that the biotechnology classes

offered at WLSC would introduce and prepare students as entry-level laboratory technicians, or refresh secondary school teachers, and will not require the instructor to have a Ph D or Masters level expertise to teach the classes. Grievant proposes that he could complete course work to retrain in biotechnology, and/or with some updating, could teach courses now taught by other members of the department who may have existing expertise in areas related to biotechnology. Grievant notesthat WLSC has a past practice of permitting faculty the opportunity to retrain.

(b) Failing to consider team teaching. Grievant asserts that biotechnology is an interdisciplinary study which includes his *specialty*, plant taxonomy, and that it is frequently taught at small schools with limited resources by professors with different backgrounds and expertise.

(c) Failing to consider that one or more tenured professors in the department may intend to resign but have not yet advised the administration.

(d) Failing to learn whether there may be one or more tenured professors in the department who would be willing to retire if early retirement incentives are offered.

(e) Failing to consider that Grievant could perform duties for the biotechnology program other than teaching, such as organizing externships and setting up programs for school teachers.

(f) Failing to consider that rather than hiring a biotechnology expert, all existing faculty could combine and update their skills to teach biotechnology.

4. Dr. Cook's decision to emphasize animal science in the biotechnology program, instead of emphasizing plant science which would allow utilization of existing faculty resources was arbitrary and apparently intended to exclude Grievant from participation.

5. At the time Grievant was notified of his non-retention, no specific curriculum for the specialized tracks had been proposed; and,

6. Board of Directors policy set forth in 131 C.S.R. 36, Section13.1, provides that a faculty member terminated due to a reduction or discontinuance of a program has the right of first refusal for two years to any available position requiring equivalent competence.

Respondent argues that the decision not to re-employ Grievant was made based upon a determination that the biology department did not need two additional tenured members, both witha specialty in botany, but rather, needed a faculty member with expertise in biotechnology. Therefore, Respondent asserts the decision to release Grievant and recruit another individual with content background which would facilitate the change in direction planned by the department was rational, for

the good of the program, and in compliance with statutory directives.

Respondent further asserts that the Long Range Strategic Plan does not override Policy 36, relating to the reappointment of probationary faculty, and is not controlling of the procedure used in this matter. Respondent notes that retention decisions are ultimately the responsibility of the institution's president, and are made in consideration of the academic programs and curriculum content. Respondent concludes that this particular decision was made after full and proper review at five levels, and was not arbitrary or capricious or without a factual basis.

In response to Grievant's claim that he would be entitled to a right of first refusal on future positions, Respondent denies that to be the case, because there has been no reduction of the biology program or staff. Finally, Respondent asserts that it has no obligation to retain Grievant for retraining under the current circumstances, and that notwithstanding the examples he provided, no probationary faculty member in a similar time frame or position has been retrained.

Discussion

In cases involving the denial of tenure, the Grievant has the burden of proving his case by a preponderance of the evidence. Shackleford v. W. Va. Bd. of Directors/Concord College, Docket No. 96-BOD-414 (Oct. 9, 1997); Kilburn v. Bd. of Directors/W.Va. State College, Docket No. 94- BOD-1046 (Dec. 29, 1995). When evaluating whether a tenure decision was arbitrary and capricious, a narrow scope of review is utilized, specifically, whether relevant factors were considered in reaching the decision, and whether there has been a clear error of judgment. BowmanTransp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982); Gruen v. Bd. of Directors, Concord College, Docket No. 95-BOD- 281(Mar. 6, 1997). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286. Further, the Grievance Board has previously determined that the subjective decisional 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. Sui v. Johnson, 784 F.2d 238 (4th Cir. 1984); Gomez-Avila v. W. Va. Bd. of Trustees, Docket No. 94-BOT-524 (Mar. 14, 1995); Carpenter v. Bd. of Trustees/ W. Va. Univ., Docket No. 93-BOD-220 (Mar. 18, 1994); Kauffman v. Shepherd College, Docket No. BOR1-86-247-2 (Nov. 5, 1986).

Clearly, Respondent was placed under legislative mandate to update programs with streamlined

resources. WLSC's decision to expand the biology department to offer a biotechnology program is consistent with the goals and objectives set forth in W. Va. Code §18B-1-1. That provision states in relevant part that "[a] focus should be created on programs supportive of West Virginia employment opportunities and the emerging high technology industries." It further requires the institutions to "[p]repare a strategic plan of change to refocus its mission and leadership, and restructure its existing resources and programs" to attain the goals.

WLSC prepared a Long Range Strategic Plan, dated November 1, 1995, in compliance with the statutory directive. This rather general statement includes "Assumptions" which are to provide a framework for the goals. The "Employees" section provides that professional development is to be a priority, "to remain current in one's discipline, to adopt new technologies, to retrain, and to increase employment flexibility." It also notes that "[e]mployment demographics andresponsibilities of employees will change."

WLSC elected not to renew Grievant's probationary contract beyond the 1996-97 academic year in accordance with authority contained in Series 36 of the Procedural Rule enacted by the State College System of the West Virginia Board of Directors (Series 36), 131 C.S.R. 36 (1992), which addresses promotion and tenure. That portion of the Procedural Rule relevant to this matter follows:

9.1 Tenure is designed to ensure academic freedom and to provide professional stability for the experienced faculty member. It is a means of protection against the capricious dismissal of an individual who has served faithfully and well in the academic community. . . . Ultimate authority regarding the application of guidelines and criteria relating to tenure shall rest with the institution.

9.2 In making tenure decisions, careful consideration shall be given to the tenure profile of the institution, projected enrollment patterns, staffing needs of the institution, current and projected mission of each department/division, specific academic competence of the faculty member, and preservation of opportunities for infusion of new talent. The institution, while not maintaining 'Tenure Quotas,' shall be mindful of the dangers of losing internal flexibility and institutional accountability to the citizens of the state as a result of an overly tenured faculty. Tenure may be granted only to people in positions funded by monies under the control of the State College System Board.

9.3 Tenure shall not be granted automatically, or for years of service, but shall result from action by the president of the institution following consultation with appropriate academic units.

* * *

13.1 A faculty member's appointment may be terminated because of the reduction or discontinuance of an existing program at the institution as a result of program review, in accordance with appropriate rules relating to review of academic programs, provided no other program or position requiring equivalent competency exists. If, within two years following the reduction or discontinuance of a program, a position becomes vacant for which the faculty member is qualified, the president shall make every effort to extend first refusalto the faculty member so terminated.

The decision to not grant Grievant tenure falls squarely within the provisions of Board of Directors Policy, Series 36, Section 9.2. Respondent has proven that in making the decision consideration was given to the tenure profile of the department, current and projected enrollment patterns, staffing needs, the projected mission of the department, and the specific academic background of the faculty members. The biology department needed expertise in biotechnology. It is undisputed that Grievant lacks that expertise.

Although many options were open to Respondent, including Grievant's suggestions that he be allowed the opportunity to retrain, the reassignment of classes to other faculty, and team teaching, it cannot be determined that Respondent's chosen route was arbitrary and capricious. Retraining for Grievant would require a delay in implementing the biotechnology courses. The reassignment of classes or team teaching may have been feasible, but would have required considerable planning and the redirecting of many, if not all, faculty members' assignments. While it is understandable that Grievant believes WLSC should have done whatever was necessary to insure his continued employment, it was not the most efficient alternative for his employer.

By recruiting another instructor, WLSC realigned a situation in which it had two instructors with the same specialty, and allowed it to immediately offer classes in biotechnology, taught by an individual with a specialty in that area, without disrupting or reorganizing the entire biology department. Respondent's decision to not grant Grievant tenure was not arbitrary and capricious, but was well reasoned and consistent with Board of Directors' Policy. While the WLSC Long Range Strategic Plan indicates that faculty retraining is to be considered, it does not mandate such action in the presence of overriding considerations such as those set forth in this matter. Finally, it cannot be held that Grievant is entitled to a position vacancy for which he is qualified within the next two years. Board of

Directors Policy 36, Section 13.1 makes this option available to a faculty member whose appointment may have been terminated as a result of a reduction or discontinuance of a program. First, Grievant's employment was not terminated. As a non-tenured member of the faculty, Grievant was re-employed on an annual basis, pending an award of tenure. Grievant simply was not re-employed after the 1996-97 academic year. Second, Grievant's employment was not interrupted due to a program reduction or elimination. WLSC simply had an abundance of instructors in the area of botany, and needed to secure an instructor in biotechnology. Under these circumstances, Section 13.1 does not apply and Grievant has no right to recall.

In addition to the foregoing discussion, it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant has been employed by the Board of Directors as an associate professor of biology at West Liberty State College since August 1991.

2. In October 1995, Grievant applied for tenure.

3. By letter dated May 15, 1996, Grievant was notified that he would be issued a terminal contract for the 1996-97 academic year.

4. The decision not to retain Grievant had been recommended by the Chair of the Department of Biology and Chemistry, the Dean of the School of Natural Sciences, Health Professions and Mathematics, the Academic Dean, and the Interim President.

5. The reason stated for the action was a duplication of faculty members with a specialtyin botany, and a redirection of the program to biotechnology, an area in which Grievant offered no expertise.

6. Respondent did not terminate Grievant's employment, but rather declined to offer him tenure.

7. Respondent did not reduce or discontinue an existing program.

Conclusions of Law

1. In a grievance challenging non-retention of a probationary faculty member, the grievant has the burden of proving each element of his complaint by a preponderance of the evidence. Gruen v. Bd. of Directors, Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997); Fasce v. Bd. of

Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995).

2. The decision process in non-retention is similar to the decision process in awarding tenure and promotion. The 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, Docket No. 93-BOD-220 (Mar. 18, 1994).

3. Grievant failed to establish that WLSC's decision not to renew his contract as a probationary faculty member beyond the 1996-97 academic year, and/or to grant him tenure, was arbitrary and capricious or without factual basis. See 131 C.S.R. 36 §10.4 (1992); Kilburn v. Bd. of Directors, 94-BOD-1064 (Dec. 29, 1995).

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio 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: April 14, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

The parties apparently agreed to waive consideration at level one. In any event, Grievant's immediate supervisor would have lacked authority to grant the requested relief.

Footnote: 2

This matter was subsequently transferred to the undersigned for administrative reasons.