SAM NADLER, JR.,

Grievant,

v. **Docket No. 05-HE-455**

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Dr. Sam Nadler, Jr. ("Grievant"), employed by West Virginia University ("WVU") as a Professor of Mathematics, filed a level one grievance on August 15, 2005, after a disciplinary memorandum was placed in his file by the Department Chair. Grievant seeks removal of the memorandum, and that due process be followed before disciplinary action is taken, and attorney fees. (See footnote 1) Sherman Riemenschneider, Chair of the Department of Mathematics, denied the grievance at level one, as did Interim Dean Rudolph Almasy at level two, and President David C. Hardesty, Jr., at level three. A level four appeal was filed on December 21, 2006, and a hearing was conducted in the Grievance Board's Westover office on April 13, 2006. Grievant was represented by Allan N. Karlin, Esq., and WVU was represented by Samuel R. Spatafore, Assistant Attorney General. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before June 13, 2006.

The following facts have been derived from a preponderance of the evidence made part of the record at level four.

Findings of Fact

1. Grievant has been employed by WVU as a tenured Professor of Mathematics at all times pertinent to this grievance. 2. In January 2001, WVU announced the creation of the Institute for Math Learning ("IML") with the goal of significantly enhancing student performance in mathematics by studying learning styles and developing appropriate curriculum options and instructional techniques. Some members of the Department of Mathematics faculty, including Grievant, have expressed criticism of the program.

3. Following an external review of the IML in 2003, Dean M. Duane Nellis and Provost Gerald Lang jointly issued a memorandum on September 17, 2003, to the Mathematics faculty. They noted

that while much progress had been made, “it is clear that the reviewers recognize that not all the mathematics faculty have been on-board in moving the IML forward in a constructive manner” which was perceived to be undermining the IML's objective. They concluded that “the external reviewers have provided a wake-up call to all math faculty that now is the time to either get engaged in a constructive way in the IML or stay out of the way.”

4. In June 2005, two unidentified students from the Math 124 class taught by Grievant's advisee, PhD student Likin Simon-Romero, spoke with Dr. Riemenschneider regarding the class. They stated that Mr. Simon-Romero had advised they could take their concerns regarding the class directly to the Chair, and suggested that if they would slide copies of their papers under Grievant's office door it would in some way help their grades.

5. Dr. Riemenschneider and Dean Almasy met with Mr. Simon-Romero, who confirmed that he had suggested providing Grievant with class papers, but did not reveal the impetus for the suggestion.

6. Dr. Riemenschneider hand delivered Grievant a memorandum dated August 12, 2005, in which he advised that Mr. Simon-Romeo had been spoken to very strongly forhaving not properly directed the students to follow the chain of command and first speak with the instructor, then the coordinator, followed by the IML Director, and finally the Chair. Dr. Riemenschneider further surmised that the direction to slide papers under Grievant's door gave the students the impression that Grievant had some authority in the matter, which he did not. This action was characterized as “under cutting the authority of the coordinator, the IML Director, and the Chair,” in addition to confusing and misleading the students. Dr. Riemenschneider concluded by stating that Grievant's actions were contrary to the directions given by the Provost and the Dean in the September 17, 2003, letter, and directed him to refrain from such actions in the future.

6. Dr. Riemenschneider did not discuss the matter with Grievant prior to issuing the memorandum, which was also placed in Grievant's personnel file. Upon advice of counsel, Grievant waived the opportunity to submit an explanation and/or rebuttal to the memorandum.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *W. Va. Code* §18-29-6; *Hoover v. Lewis County Bd. of Educ*., Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ*., Docket No. 89-41-232

(Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner oftestifying[; this] determines the weight of the testimony." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). *See Black's Law Dictionary*, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res*., Docket No. 92-HHR-486 (May 17, 1993). (See footnote 2)

WVU asserts there was no misapplication or violation of any policies, guidelines or procedures, that it is unnecessary to discuss a matter prior to placement of such a memorandum in a faculty member's personnel file, and that Grievant may still file a response to the memorandum, if he so chooses. WVU relies on “WVU Policies and Procedures for Annual Faculty Evaluation, Promotion and Tenure 05-06" Section VII, Paragraph 6, which states that a Faculty Personnel File should contain “[o]ther information and records that the chairperson or dean may wish to include. Faculty members may include written responses to such material.” Grievant argues that the investigation conducted by Dr. Riemenschneider was wholly inadequate, and that he did not violate the directions given by the Provost and the Dean in the September 17, 2003, letter or any WVU policy.

Dr. Riemenschneider testified that Grievant has engaged in ongoing behavior undermining the IML program, and that he believed this incident was an attempt by Grievant to collect data which would be used in a non-supportive fashion. Thememorandum was necessary, he explained, to document Grievant's actions. The Chair also stated that he had not discerned Mr. Simon Romero's motive in speaking either with Grievant, or in his suggestion to the students.

Grievant testified that he had simply inquired how his advisee's teaching was proceeding during a routine conversation, when Mr. Simon-Romero stated concerns about some of the tests used in the course. Grievant offered to review the tests to determine whether the concerns should be addressed with the program coordinator. He suggested the students could slide copies under his door to ensure anonymity. Neither Mr. Simon- Romero nor the students testified at level three or four.

Whether Grievant acted appropriately is debatable; certainly questions remain unanswered.

However, this grievance is limited to the issue of whether an employer may place a reprimand in an employee's personnel file without any prior due process. The answer to this question must be “no”. The position expressed by Dr. Riemenschneider, and supported by WVU, is contrary to the basic due process requirement that an employee be given notice and an opportunity to respond prior to the imposition of discipline. Allowing the employee to file a response after the placement is inadequate because no matter how persuasive the response may be, an implication remains that the employee may have engaged in wrongdoing.

In the present case Grievant did not violate any rule, regulation, policy, or even the advisory letter issued several years earlier. Dr. Riemenschneider's own testimony establishes that the memorandum was issued based on his belief that Grievant might be collecting data to support his criticism of the program. It is fundamentally unfair to place a disciplinary document in an employee's personnel file based on speculation. Consistentwith the *W. Va. Code* § 29-6A-5(b) provision which allows an Administrative Law Judge to “provide relief as is determined fair and equitable”, WVU is ordered to remove the August 12, 2005, memorandum from Grievant's personnel file.

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

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *W. Va. Code* §18-29-6; *Hoover v. Lewis County Bd. of Educ*., Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ*., Docket No. 89-41-232 (Dec. 14, 1989).

2. WVU failed to prove that Grievant acted in violation of any policy or regulation which would warrant a letter of reprimand.

3. *W. Va. Code* § 29-6A-5(b) allows an Administrative Law Judge to “provide relief as is determined fair and equitable”.

Accordingly, the grievance is **GRANTED**, and WVU is Ordered to remove the August 12, 2005, memorandum from Grievant's personnel file.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. *W. Va. Code* § 29-6A-7

(1998). 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. However, the appealing party is required by *W. Va.Code* § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: JUNE 22, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

The Grievance Board lacks authority to grant attorney fees.

Footnote: 2

WVU argues that the memorandum is not disciplinary in nature; however, it is essentially a letter of reprimand, and will be considered disciplinary for purposes of this decision.