KENNETH A. HART

v. Docket No. 95-BOD-198

BOARD OF DIRECTORS/W.VA. NORTHERN COMMUNITY COLLEGE

D E C I S I O N

Grievant, employed by Respondent West Virginia Northern Community College (WVNCC) as an Associate Professor, grieves WVNCC's denial of his request for promotion to full professor and maintains the school misapplied and misinterpreted its allegedly less than clear policies on promotion. At issue is whether Grievant's prior work experience and other non-academic activities in the electronics field meet WVNCC's eligibility criteria for promotion in the critical area of professional development. The case became mature for decision on February 13, 1996, upon receipt of the last of the parties' level four written fact/law proposals. (See footnote 1)

I.

The underlying facts in this case are not in dispute. WVNCC initially hired Grievant in 1984 as an instructor in its electronics program, a technical/vocational teaching assignment as opposed to a pre-baccalaureate, general education teaching assignment. Pursuant to WVNCC's hiring and advancement in rank policy in place at that time, "Revised Policy No. 3-001," technical or vocational faculty who held "less" than a bachelors degree at the time of the initial appointment were required instead to have two years' "related job experience." Grievant held no degree in higher education in 1984 and was hired for the position based on his work experience.

Notably, under the Revised Policy No. 3-001 in effect in 1984, technical and vocational faculty without a bachelors degree could not be initially hired and assigned above the rank of assistant professor. Technical and vocational faculty with at least a bachelors degree and ten years' work experience, or a combination of work and teaching experience, could be initially hired as an associate professor, while those with a bachelors degree and fifteen years' work experience and/or work and teaching experience could be hired as a full professor.

Prior to his employment at WVNCC, Grievant's training in electronics, and some of his related

work experience, occurred while he was in the military. He later worked in electronics in the private sector, and acquired several years' work experience in the electronics field.

After joining the faculty at WVNCC, Grievant completed seventy hours of college credit at the school, earning an associate degree (AA) in electronics technology, and progressed over time through the ranks from instructor to associate professor. At the level two hearing, Garnett Persinger, then Interim Vice Presidentfor Academic Affairs and Student Development, discussed at length some aspects of Grievant's prior promotions. (See footnote 2)

Ms. Persinger related that, about the time Grievant received his AA, a promotion and tenure committee recommended Grievant's promotion, with reservations, to the rank of assistant professor. The committee further recommended that Grievant attain at least fifteen hours beyond the associate degree, or, hopefully, a bachelors degree prior to any further promotional considera tions (associate professor). Additionally, when a promotion committee later recommended Grievant's promotion to associate professor, it was based upon the mutual expectation and understanding that Grievant would complete a bachelors degree. See T.23-24. Grievant never disputed any of Ms. Persinger's statements, at the hearing or anytime thereafter.

WVNCC adopted a new "Faculty Evaluation, Promotion and Tenure Regulation," effective January 1990, which superseded Revised Policy No. 3-001. In order to attain the rank of full professor, the technical and vocational faculty member had to meet the following criteria:

Minimum of Master's Degree if entry was with no degree or with Associate Degree or Master's Degree + 30 hours if entry was with Bachelor's Degree (or equivalent as specified in the development plan)

Successful achievement of the development plan

Four years at WVNCC as Associate Professor

Evaluation scores over the last four years that result in an average percentile above the 66th percentile

Grievant applied for the rank of full professor for the 1994-95 school year, presumably at some point in 1993 during the 1993-94 school year. The request was denied. Grievant appealed that decision within the institution, and the appeals committee upheld the decision not to promote for the 1994-95 school year. The chair of the appeals committee, in an August 1, 1994, appeal report

(copied to Grievant), observed that a developmental plan for Grievant's "final" promotion should have been as "carefully set out, pursued and documented as a degree program would be." The letter concluded that,

with help from his chair, with retroactive planning (that is, an analysis and effective presentation of his past achievements) and perhaps with some further evidence of academic development (why couldn't he take our courses?) [Grievant] should be able in a year or so to present a more impressive argument to be his division's (and [WVNCC's]) first full professor with no baccalaureate degree.

Also during Summer 1994, certain administrators and faculty representatives examined current faculty evaluation practices and promotional criteria and recommended several changes and guidelines to be followed in the future. Of some concern was the use of evaluation "percentiles" to rate faculty performance. Another concern was the structure of professional development plans, used primarily to enhance teaching performance and to support promotion requests.

Among other things, a "Draft" document entitled "Guidelines for the Professional Development Plan" was completed in August 1994. This document states that at the time of an initial hire, or at the time of a promotion to a new rank, the faculty member must develop a professional development plan specifying all growth activities to qualify for an initial promotion or further promotion in rank. The activities must be cited by the faculty member on the development plan prior to participation in the activities, "except for those faculty who are 'grandfathered' according to the provisions below." Faculty members who were eligible to be "grandfathered" were those already employed by May 16, 1994:Faculty in this category may include courses and other appropriate professional development activities in the initial professional development plan that occurred prior to the development of the plan if the activities were not used to meet eligibility requirements for the last promotion. A professional development plan must be developed and approved by the chairperson and the Vice President for Academic Affairs/Student Development. Faculty who are eligible for promotion during the 1994 evaluation cycle must complete the professional development plan by September 30, 1994. All other faculty members who wish to be included in this provision must complete the professional development plan by January 1, 1995.

Grievant had never previously developed a professional development plan for promotion in rank. Thus, in order to be considered for a promotion for the 1995-96 school year, Grievant was required to

submit a development plan to his division chairperson, Michael Koon, by September 30, 1994, for approval. On or about September 26, 1994, Grievant submitted a written plan to Mr. Koon in which he requested that some of the experience he held when first hired at WVNCC, specifi cally nineteen years' work experience, be considered appropriate developmental activities. He essentially claimed those years were "unused" to date because only two of his original twenty-one years' work experience had been required for his initial employment as an instructor in 1984, leaving nineteen remaining years that had never been credited for prior promotions. (See footnote 3)

Additional items cited by Grievant to be considered as professional development activities were his serving as the Electronics Technology Contest Chairman for the West Virginia Vocational Clubs of America Skills Competition in 1991 and 1992 and his being certified as a Senior Industrial Technologist by the National Association of Industrial Technology. Grievant noted in the letter that he had not discussed the development plan with Mr. Koon, but was submitting it anyway because of the fast-approaching deadline. Some informal interaction occurred between Grievant and Mr. Koon following Grievant's submission of the development plan in September 1994. While Mr. Koon never memorialized either the acceptance or rejection of Grievant's plan in writing, he informed Grievant at an initial meeting that the plan was unacceptable because it lacked Grievant's commitment either to obtain a bachelors degree or to engage in any other current professional growth activities. At a follow-up conversation, Mr. Koon relayed to Grievant some information he had acquired about the requirements for a "Regent's" bachelors degree at West Liberty State College. (See footnote 4)

Mr. Koon told Grievant that, at a minimum, he would have to accrue fifteen hours in residence at the school to obtain the Regent's degree, regardless of how much credit he could carry into the program. In turn, Grievant indicated to Mr. Koon that he was not interested in any course work leading to a bachelors degree, and that he would essentially rely upon what he had listed on the plan in terms of a promotion request. In short, Grievant was not interested in altering a plan deemed unacceptable by Mr. Koon. It is understandable that, under those circumstances, Mr. Koon did not formally act one way or another on Grievant's plan, that is, to approve or disapprove of it in writing. See, T.33-49.

Thereafter, by letter dated December 2, 1994, to Mr. Koon, Grievant formally requested promotion to full professor for the 1995-96 year. Among other things, Grievant stated he had fulfilled the activities listed on the professional developmental plan of September 1994. (See footnote 5) After

reviewing Grievant's promotion request, none of thepersonnel involved in promotion concerns, including Mr. Koon, Ms. Persinger and a peer review committee, recommended Grievant for promotion to full professor.

Still later, by letter dated April 3, 1995, WVNCC President Linda Dunn informed Grievant that, after reviewing the recommendations of his division chair, the peer review committee and the appropriate academic administrator, she was reappointing him to his current rank of associate professor for the 1995-96 academic year. She also advised him to discuss promotional criteria with his division chair "for further clarification."

II.

Grievant bears the burden of proving by a preponderance of the evidence that WVNCC erred when it did not promote him to full professor. See Baroni v. Fairmont State College, Docket No. 92-BOD-271 (Feb. 11, 1993). In higher education, promotions are not a statutory right nor a reward for a faculty member's years of service. Rather, in accordance with the West Virginia Board of Director's Policy Bulletin No. 36, a promotion is based upon excellence in teaching, service to the institution and/or community, ongoing professional development and other relevant factors. Grievant maintains that WVNCC's promotional policies for technical and vocational faculty, especially in the area of professional development, are vague and unclear. He also claims he has never been properly credited for the work experience he had when first hired by WVNCC. (See footnote 6) The record does not support these claims.

Although WVNCC does not currently have a detailed formula specifying what each technical/vocational faculty member must do to advance in rank, policies and basic guidelines for such promotions are in place and have been in place from thetime Grievant began his employment in 1984. Grievant acknowledged that he had been told in the past that he would have to go back to school to become eligible for full professor. T.50.

The problem with past promotional practices was that all faculty members were bound to follow prescribed steps to advance in rank, with little room for any individual choice, however desirable. This situation was altered somewhat due to the recommendations and working plans developed during staff improvement meetings in Summer 1994. Affected faculty could design their own professional development requirements, subject to approval, and qualify for promotion with perhaps less than an

advanced or terminal degree in their field, basically by participating in relevant activities other than formal course work. These persons could also ask that past experiences or activities not considered for a previous promotion be credited for a current promotion request.

However, nothing in the directives and/or guidelines developed in Summer 1994 ever suggested that the affected technical and vocational faculty could entirely forego current professional development activities. Moreover, the guidelines suggest that a faculty member must assume some responsibilty for the development of an appropriate, individualized professional development plan.

Nevertheless, the essential thrust in Grievant's promotion request/proposal was that the work experience he attained before his initial employment at WVNCC in 1984 be credited as satisfying the criteria for a full professorship in 1995-96. Further, it does not appear from the existing record that Grievant ever formally sought help from his division chair to construct a precise, appropriate professional development plan or, on his own, to formulate a meaningful personal plan of past and current professional development activities in support of a possible promotion to the advanced rank of full professor. Without a doubt, Grievant is generally regarded by his students and WVNCC's administration as an excellent teacher in his field. To keep abreast in the electronics field relative to his teaching, Grievant engages in electronic repair work (not for profit), learns new computer systems and/or applications on his personal computer, and reads current, related technical journals and publications on an ongoing basis. In addition, Grievant participates in various college committees, oversees the organizational and curricular concerns within the electronics technology program and formally advises his students, (See footnote 7) Although all of the faculty at WVNCC are probably engaged in similar activities on an ongoing basis in order to satisfactorily perform their duties, based on the strength of these types of activities, and on his past work experience, Grievant claims entitlement to full professor rank.

Grievant simply does not agree that he should be required to participate in any formal, current professional development activities other than keeping current in his field by engaging in "hands on" electronics and reading technical publications. In his view, the work experience he attained before his initial appointment should satisfy requirements toward the rank of professor, especially since, according to him, he has never been "credited" with the entirety of his prior work experiences, at the time of his initial appointment or in relation to prior promotions. Together with Grievant's belief that his past work experiences should count toward promotion to full professor in 1995-96, he believes he

deserves the promotion because he has been doing "a good job since his last promotion." T.45.

Additionally, Grievant does not contend that a degree does not exist for the electronics technology field, that there are no available schools within driving distance he could attend, or that he is otherwise unable to earn an in-field degree. He also never claimed he is precluded in any way from participating in relevant non-degree programs or activities in order to attain some current (or ongoing) professional development. He simply maintains that his past work experience was never properly or fully credited and that it should "count for something." (See footnote 8) In fact, Grievant contends that, for teaching purposes, his past work experience is more valuable to him than any current course work in an academic setting could be. According to him, experience, not academics, counts, and he seemingly faults higher education for being "one of the only fields that values years of education over years of experience." (See footnote 9)

Grievant's comparison of labor to academia reflects his misunderstanding of, and therefore his disagreement with, the concept of professional development. While longevity on the job may qualify the worker, even a highly-skilled worker in commerce and industry, for promotions and salary advancements, that is usually not the case for a professional.

Many professions, including medicine, law and teaching, require the would-be practitioner to attain minimal educational standards before he or she even begins to practice. These workers, once wholly engaged in practice, are expected, both by members within their profession and by the public at large, to perform well and to keep current by reading relevant publications and professional journals. However, these professions also require the practitioner to participate in some form of continuing education or current professional development. In particular, higher education is more demanding of its practitioners than other professions, in part, because of the nature of its teaching mission. It is not unreasonable for WVNCC to require relevant, current professional development activities on the part of itsteaching staff, including the technical and vocational faculty, who desire promotion to full professor, the highest rank possible in academia.

Finally, Grievant offered no data from other technical or vocational-oriented community colleges in the state or nation regarding how such schools determine criteria for faculty advancement to the rank of full professor. Grievant may have been more persuasive had he established that comparable schools grant full professorships based on work experience attained by faculty members prior to hiring, in lieu of degree requirements or carefully planned current professional development. Absent

any such data in the record, the undersigned is without the means to reach any conclusions about the matter. (See footnote 10) See Baroni v. Fairmont State College, Docket No. 92-BOD-271 (Feb. 11, 1993).

In summary, Grievant has not met his burden of proving by a preponderance of the evidence a violation of any laws, regulations or policies relative to WVNCC's decision not to promote him to full professor. Moreover, absent a showing of some other wrongdoing on WVNCC's part, such as arbitrariness or capriciousness, the undersigned cannot substitute her judgment for that of the collective judgment of WVNCC's promotional committee and/or other administrators who evaluated Grievant and declined to approve his request for promotion because he had not metstandards. See Kilburn v. W.Va. State College, Docket No. 94-BOD-1046 (Dec. 29, 1995).

In addition to the foregoing discussion and analysis, the following findings of fact and conclusions of law are made.

Findings of Fact

1. Grievant has taught technical/vocational courses at WVNCC since 1984. Grievant was initially hired and placed in the rank of instructor because he met the requirement of having two years' related work experience in lieu of holding an associate degree in his field.

2. After Grievant's initial placement at the college in 1984, he obtained an associate degree (AA) at the college, and eventually was promoted to the rank of assistant professor and then associate professor during the next several years.

3. Following Grievant's promotion to associate professor, he did not endeavor to pursue a bachelors degree. While, since his last promotion, Grievant has demonstrated excellence in teaching; engaged in satisfactory institutional and community service, such as serving on committees and coordinating some activities; and participated in growth activities normally expected of all teaching staff, including reading journals particular to his teaching field, he has neither obtained any college credits beyond those he earned for an associate degree, nor engaged in any other formal continuing education activity relative to his teaching field.

4. When viewed as a whole, WVNCC's criteria for technical and vocational faculty to advance to the rank of full professor contemplated that the candidate would hold at least a bachelors degree. See level two exhibits, numbers 1, 2, 10, and 11. In addition, the candidate for promotion was required to complete successfully all professional growth activities listed on a professional

development plan particular to the sought-after rank. Any prior accomplishments not previously considered informer promotions could be considered among current acceptable, qualifying activities.

5. At some time during the 1993-94 school year, Grievant applied for full professor for the 1994-95 school year, and the request was ultimately denied. An institutional appeals committee essentially recommended that, in order to support a future promotion request successfully, Grievant should engage in some academic development (earn some more college credits) and effectively analyze and present any past accomplishments he wished to claim.

6. In December 1994, Grievant again applied for the advanced rank of full professor, effective for the 1995-96 school year, primarily based on his belief that the strength of his prior work experience qualified as professional development, under a policy "grandfather" clause, and satisfied all professional development requirements for promotion to professor, as he understood the prevailing promotional criteria.

7. None of the personnel who reviewed Grievant's promotion request recommended a promotion for him, basically because of their perception that Grievant had not satisfied the criteria for appropriate current professional development, one of three areas to be considered in a promotion request, along with teaching excellence and college/community service.

8. The college president followed the various recommendations not to promote Grievant, and she reappointed Grievant to his current rank of associate professor for the 1995-96 school year.

Conclusions of Law

1. In non-disciplinary matters, the grievant bears the burden of proving the allegations constituting the grievance by a preponderance of the evidence. Canfield v. W.Va. Univ., Docket No. 90-BOT-127 (Sept. 28, 1990); Durrett v. Fairmont State College, Docket No. 89-BOR-122 (Feb. 20, 1990). 2. WVNCC's present criteria for promotion to the rank of full professor, which requires a technical or vocational faculty member to hold at least a bachelors degree if the initial hiring was based on no degree or an associate degree, or the "equivalent as specified in the development plan," is neither arbitrary or capricious.

3. Grievant has not met the criteria for the rank of full professor because he has not engaged in adequate professional development activities subsequent to the time he was granted the rank and status of associate professor. See, e.g., Baroni v. Fairmont State College, Docket No. 92-BOD-271

(Feb. 11, 1993).

4. Grievant has not demonstrated a violation of law, regulation or policy in this matter.

5. Grievant has not proved an abuse of WVNCC's discretion or otherwise established his entitlement to be promoted to the rank of full professor as a matter of law.

The grievance is accordingly **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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

Administrative Law Judge

Date: March 6, 1996

Footnote: 1

After receiving adverse decisions at the lower grievance levels, Grievant appealed to level four and requested a decision based on the existing record. WVNCC, however, requested a hearing to supplement the record. Eventually, the parties agreed that WVNCC could augment the record at level four by other means, and it filed an affidavit from one of its administrators on or about January 11, 1996.

Footnote: 2

It was impossible to ascertain the exact date Grievant received his AA degree, or the dates he advanced in rank from instructor to assistant professor, because he did not supply any testimonial or documentary evidence on the subject. Although Ms. Persinger apparently referred to documentation pertaining to Grievant's past promotions while she testified, her testimony was not precise about dates. Moreover, no written data regarding Grievant's acquisition of the AA degree and his movement through the ranks from instructor to associate professor was made part of the record.

Footnote: 3

Although Grievant claimed he had attained twenty-one years' work experience in the military and private sector before joining the teaching staff at WVNCC, he never submitted any resume or other documentation listing his employer(s) and, most along with the actual dates of service.

Footnote: 4

The Regent's baccalaureate degree program is specifically designed for non- traditional students whose life experiences may be counted toward fulfilling some, but not all, credits toward a bachelors degree.

Footnote: 5

While there was mention at the level two hearing that Grievant had also submitted some kind of "portfolio" in support of his promotion request, this material was not entered as evidence.

Footnote: 6

At one point in the level two hearing, Grievant stated that, under the regulations in effect in 1984, he could and should have been initially hired as an assistant professor, rather than as an instructor. Of course, it is far too late for Grievant to raise an issue about something that occurred in 1984, especially in light of the fact that he apparently agreed to the appointment at the time it was made.

Footnote: 7

Grievant also claimed he helps his students with problems when they contact him by telephone at home during non-teaching hours.

Footnote: 8

Most likely, Grievant's past work experiences would "count" toward a Regent's degree.

Footnote: 9

See Grievant's written request for promotion, dated December 2, 1994.

Footnote: 10

It is noted that, in a one-sentence letter dated December 18, 1995, Grievant requested the grievance be decided in his favor "by default," and he gave no reasons or legal support for the request. The undersigned responded by letter of December 19, 1995, and generally informed Grievant that a default issue had not been raised at the lower grievance levels or when the case was appealed to level four, and that there was no procedure contained in W.Va. Code §18-29-3 for a grievant to pursue a default claim at level four. Grievant repeated his request for a "finding" in his favor "by default" in the cover letter with his fact/law proposals and cited his reasons in the body of that submission. Whether Grievant had a meritorious default claim is irrelevant, because he failed to pursue a claim of default at the lower grievance levels. Code §18-29-3 does permit an employer to "request a hearing before a level four hearing examiner" in the event a grievant prevails by default.