

SOUTH DAKOTA DEPARTMENT OF LABOR
Division of Labor and Management

DR. CHRISTOPHER F. KEATING,
Grievant and Petitioner,

HF 1 U, 2004/05
HF 11 G, 2004/05

v.

JAMES W. ABBOT AND
UNIVERSITY OF SOUTH DAKOTA,
Respondents.

DECISION

This involves a grievance appeal and an unfair labor practice petition before the South Dakota Department of Labor pursuant to SDCL Chapter 3-18 and SDCL Chapter 1-26. Dr. Keating (Keating) appears pro se. Robert B. Frieberg, of Frieberg, Nelson & Ask, L.L.P., represents Respondents (USD).

Factual and Procedural Background:

Keating began employment as an associate professor in the physics department at USD at the beginning of the 1999/2000 academic year. He continued in that employment during the 2000/2001, 2001/2002, 2002/2003 and 2003/2004 academic years.

On or about June 9, 2004, Keating was notified that he was being considered for non-renewal of his tenure track contract. The June 9, 2004, letter signed by his supervisor, Dr. Christina Keller, Director of Physics, and by Donald Dahlin, Vice President for Academic Affairs, included the following:

Pursuant to Section 8.6 of the COHE contract, we are writing to inform you that The University of South Dakota is considering non-renewal of your contract based on concerns about your adherence to the standards of civility found in Appendix G of the Contract.

As provided in Section 8.6, if you wish, we want to provide the opportunity for you to meet with us on this matter. To that end we have scheduled a meeting at 4:30 p.m. on Tuesday, June 22, 2004[,] in Slagle 103.

A meeting was held June 22, 2004, at which time Keating was given an opportunity to present reasons why the non-renewal action should not be taken. Following this meeting, on June 29, 2004, University President Abbott notified Keating by mail that USD intended not to renew his tenure track contract. Abbott's letter included the following:

This letter is to notify you that, as provided in section 8.6 of the collective bargaining agreement, I will be recommending to the South Dakota Board of

Regents that your tenure track contract not be renewed for academic year 2004-2005.

This decision is based on the recommendations I have received from your supervisor, the Dean of the College of Arts and Sciences, and the Vice President for Academic Affairs. In those recommendations concern has been expressed about, as you have said, "the long-term problems of tensions and hostilities" between yourself and other members of the department, especially Dr. Keller. In this context and given your failure to adhere to the standards of civility called for [in] Appendix G, I believe it is in the best interests of the department and the University that your contract not be renewed.

Instead, as provided in section 8.6.3, you will be given a one year term contract for the next academic year.

Appendix G reads as follows:

Universities play a special role in preparing students to lead the complex social organizations through which businesses and professions operate and through which free people govern themselves. Students must be taught, and they must be shown through the example given by institutional employees, that members of stable, effective and prosperous social organizations observe norms of conduct under which all participants treat one another civilly and carry out their respective tasks in a constructive and informed manner. Complex social organizations derive their strength from the cooperation of those who participate in them. By virtue of their special role in preparing future generations of leaders, universities have a particular concern with conduct that destroys the bonds of cooperation and common purpose on which society rests by demeaning members of the community, and such conduct cannot be tolerated in an institution whose very purpose is to shape the skills and conscience of the rising generations.

Faculty members are responsible for discharging their instructional, scholarly and service duties civilly, constructively and in an informed manner. They must treat their colleagues, staff, students and visitors with respect, and they must comport themselves at all times, even when expressing disagreement or when engaging in pedagogical exercises, in ways that will preserve and strengthen the willingness to cooperate and to give or to accept instruction, guidance or assistance.

Pursuant to his non-renewal, Keating was offered and accepted a one-year term contract for the 2004/2005 academic year.

Analysis and Decision

Keating filed a number of grievances between June 27 and August 1, 2004. The grievances were considered under the grievance procedure provided by the COHE Agreement. Keating's grievances were each denied at the local grievance level. Ultimately, Keating appealed five grievances denied by the Board of Regents to the Department of Labor, Division of Labor and Management (Department).

The Department's jurisdiction over grievance appeals depends on a grievant's compliance with the local grievance procedure and is limited to those grievances presented to the Board of Regents at Step Four of the COHE grievance procedure.

These grievances can be summarized as follows:

1. Keating alleged that his non-renewal was a disciplinary action, and as a disciplinary action, the administration failed to properly follow Section 8.6 and Section 15 of the COHE Agreement.
2. Keating alleged a violation of Section 7.8.3 of the COHE Agreement, arguing his non-renewal was in retaliation for his participation in a grievance claim made in the fall of 2003, on which a decision was issued May 2004.
3. Keating alleged that his years of service were improperly calculated, the notice of renewal and the contract offer made under section 8.6.3 was improper, and that the applicable provisions were 8.6.2 and 8.6.4.
4. Keating argued that the university must fairly and equitably apply the COHE Agreement and, in doing so, should commence a disciplinary action against Dr. Keller.
5. Keating is alleging that he was discriminated against as a veteran.

During the hearing before the Department, Keating's allegation that he had been denied veteran's preference was denied as untimely, and his allegation that the COHE Agreement had been inequitably applied was denied for lack of evidence of any inequitable application of any terms of the COHE Agreement.

The remaining grievances, as well as Keating's allegation of unfair labor practice, present the following issues:

Issues:

1. Whether USD misinterpreted, misapplied or violated Section 8.6 of the COHE Agreement when Keating's tenure track contract was non-renewed.
2. Whether USD misinterpreted, misapplied or violated Section 7.8.3 or Section 8.6 of the COHE Agreement by retaliating against Keating for his participation in a grievance claim.
3. Whether USD improperly calculated Keating's years of service under Section 8.6 of the COHE Agreement.

Keating also alleged an unfair labor practice, which presents the additional issue: Whether USD committed an unfair labor practice under SDCL 3-18-3.1(1) by denying Keating's right to freedom of expression.

Analysis and Decision

The burden of proof is on the party alleging the grievance. Rininger v. Bennett Co. Sch. Dist., 468 N.W.2d 423 (SD 1991).

"If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved . . . it may be appealed to the department of labor[.]" SDCL 3-18-15.2.

Pursuant to a perfected appeal to the department of labor, "[t]he department of labor shall conduct an investigation and hearing and shall issue an order covering the points raised, which order is binding on the employees and the governmental agency." Id.

"Deference is not given to the [board's] decision by the department in a grievance review under SDCL 3-18-15.2. . . . Rather, the department issues a binding order based upon its own investigation and hearing." Cox v. Sioux Falls Sch. Dist. No. 49-5, 514 N.W.2d 868 (SD 1994), SDCL 3-18-15.2.

Grievant, as an employee of USD, is subject to the South Dakota Board of Regents/Council of Higher Education COHE collective-bargaining agreement.

"Grievance" is defined in the COHE Agreement at Section 7.3.1 as

[A]n alleged misinterpretation, misapplication or violation of a specific term or provision of this agreement; provided that the allegations supporting the claimed grievance asserts a specific factual basis for the complaint that, if proven, would establish that an action attributable to the administration deprived the individual employee of a right arising under such term or provision. A faculty unit member may not rely upon mere conclusions, general allegations and speculative statements to establish a factual ground for the claim that a provision has been misinterpreted, misapplied, or a violation. Faculty unit members must cite specific facts and circumstances known to them first hand or to another first hand who is willing to testify to their existence or established through official governmental publications or other published documents, whose authenticity and reliability cannot reasonably be doubted, together with such factual inferences as may be drawn from such facts. Any other grievances authorized by law, and which do not constitute a grievance under this definition, may be processed in the forum designated for the hearing of such grievances.

Whether USD misinterpreted, misapplied or violated Section 8.6 of the COHE Agreement when Keating's tenure track contract was non-renewed.

Keating argues that because he was given reasons for his non-renewal under Section 8.6 of the COHE Agreement, his non-renewal must be treated as a disciplinary action under the Article XV of that agreement. In his own words, Keating wrote: "by stating that I was being considered for non-renewal due to cause the administration was in violation of the nondisciplinary nature of paragraph 8.6. By this statement, the administration made this a disciplinary hearing, and, as such, paragraph 8.6 no longer applies. By making this a 'for cause' action, section XV of the COHE Agreement becomes applicable and section XV has been violated in its entirety."

Because Keating's alleged grievance involves his non-renewal, the Department's review under the terms of the COHE Agreement is limited in scope to a determination of whether USD followed the proper procedures. There is no need to reach the merits of USD's decision to non-renew Keating's tenure track contract.

Section 7.8.2 of the COHE Agreement provides:

If the grievance concerns non-renewal, denial of promotion, or denial of tenure, the grievance review will be limited to determining whether the decision was the result of failure to follow procedures, unless otherwise provided in this agreement. The burden of proof, in such cases, shall rest with the grievant.

Section 8.1 of the COHE Agreement provides that employment of "a faculty unit member at a higher education institution will be one of the following: term, tenure track or tenure." At the time in question, Keating's contract was a "tenure track" contract.

Section 8.3 of the COHE Agreement states:

A tenure track contract is a qualifying appointment offered to a full-time faculty unit member who may be considered for a tenure contract at a later time and shall be of a definite term, not to exceed one fiscal year. **A tenure track contract may be renewed by the Board, subject to procedures for non-renewal of tenure track contracts set forth in Section 8.6.** If a faculty unit member is offered a tenure track contract, the number of years the faculty unit member has served under term contracts may be credited by the Board toward fulfillment of the period necessary for consideration for a tenure contract. (emphasis added).

As stated in Section 8.3, Section 8.6 of the COHE Agreement sets forth the procedure required for non-renewal of a tenure track contract. Section 8.6, in relevant part, reads:

Non-renewal ordinarily terminates employment at the end of an annual contract term. **Non-renewal is not a disciplinary action.** It does not terminate rights under an existing annual contract. **The decision to non-renew is discretionary**

with the administration, provided that it is not based upon reasons expressly forbidden by this agreement. Non-renewal is subject only to those procedural limitations expressly set forth in this section. (emphasis added).

Section 8.6 includes the requirement that the faculty member receive notice of the non-renewal, and have an opportunity to be heard on the proposed action:

Prior to the issuance of a written notice of non-renewal, the faculty unit member's immediate supervisor will provide the opportunity for a meeting with the faculty unit member to apprise the faculty unit member of the proposed action. The faculty unit member will be given at least five (5) working days written notice of such meeting so that both the faculty unit member and the immediate supervisor may arrange to have present a witness or a representative.

Section 8.6 also includes the requirement that "[t]he notice will state the reasons for the decision[.]"

As required by Section 8.6, the June 9, 2004, letter to Keating was signed by his supervisor, provided him notice that USD was considering non-renewal of his tenure track contract, provided the reason for this proposed action, and scheduled a meeting for June 22, 2004.

Keating attended the June 22, 2004, meeting. Following this meeting, on June 29, 2004, President Abbott sent Keating formal notice of non-renewal of his tenure track contract.

The June 29, 2004, notice set out the reason for non-renewal as the "long-term problems and hostilities" between Keating and other members of the department, as well as his failure to adhere to the standards to civility set forth in Appendix G to the COHE Agreement.

Section 8.6 of the COHE Agreement is clear and unambiguous. USD properly applied the procedure provided for non-renewal of Keating's tenure track contract under Section 8.6. Keating failed in his burden to prove any misinterpretation, misapplication, or violation of the COHE Agreement.

Whether USD misinterpreted, misapplied or violated Section 7.8.3 or Section 8.6 of the COHE Agreement by retaliating against Keating for his participation in a grievance claim.

Section 8.6 of the agreement provides: "the decision to not renew is discretionary with the administration, **provided that it is not based upon reasons expressly forbidden by this agreement.**" (emphasis added).

Section 7.8.3 of the COHE Agreement includes the following: “Neither COHE nor its members nor the Board nor its administrators will retaliate or effect reprisals against any faculty unit member for processing or participating in a grievance.

Keating filed a grievance with Roberta Hackel, USD’s Director of Affirmative Action, alleging that Dr. Keller had engaged in harassment and retaliatory tactics against him. On May 6, 2004, Hackel found no violations. Keating did not appeal from her determination.

Keating argues that the reasons provided for the non-renewal of his tenure track contract were mere pretext, and that, in fact, he was non-renewed in retaliation for his earlier participation in the grievance proceeding filed against Dr. Keller.

To establish a prima facie case of retaliation, Keating must show:

- (1) He engaged in a protected activity;
- (2) He subsequently suffered adverse employment action; and
- (3) A causal link exists between engaging in the protected activity and the adverse employment action.

Leslie v. Hy-Vee Foods, Inc., 2004 SD 59, ¶ 11, 679 NW2d 785.

“Once a prima facie case of retaliation is established, the burden shifts to the employer to produce some legitimate, non-discriminatory reason for the adverse action. If the employer meets this burden, the complainant must prove the proffered reason is a pretext for retaliation.” Keating at all times retains the ultimate burden of persuasion. Id.

There is no dispute that Keating engaged in protected activity. He had a protected right to file a grievance, as provided by Section 7.2 and Section 7.8.3 of the COHE Agreement. There is also no dispute that, thereafter, Keating suffered an adverse employment action when his tenure track contract was non-renewed.

However, Keating failed to prove the existence of any causal connection between his filing or participation in a grievance and the subsequent non-renewal of his contract. It is here that his argument fails.

Keating did not produce any evidence or a single witness in support of his version of the facts. The witnesses present at the June 22, 2004, hearing testified that Keating did not take the opportunity to address USD’s decision to not renew his contract, but spent his time attacking Dr. Keller, thereby further demonstrating his failure to work with his supervisors and his inability to “adhere to the standards to civility set forth in Appendix G to the agreement.”

Because Keating did not establish a prima facie case of retaliation, the burden never shifted to USD to establish a legitimate nondiscriminatory reason for the non-renewal of

Keating's contract. However, the evidence does provide the support for USD's decision. The evidence proves that Keating did not adhere to the civility standards set forth in Appendix G to the COHE Agreement. All of Keating's own witnesses affirmed the fact that he was uncivil, uncooperative, unreasonable in his demands, and disruptive during his employment. Furthermore, these witnesses established that he was unwilling to accept any suggestions from others to improve his behavior.

In McCauley v. SD School of Mines, 488 NW2d 53 (SD 1992), in discussing "the demoralizing effect which [McCauley's] uncooperative conduct had on other staff members" the Court wrote "the college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the administration." There, as in the present case, the evidence shows that Keating had numerous opportunities to work cooperatively with Dr. Keller and Dr. Heaton, but refused to do so.

Keating was not a credible witness. He admitted at the hearing to using this proceeding as well as his other several related proceedings to punish the people involved. He testified that, in his opinion, punishment was a permissible purpose of the system.

In the face of overwhelming evidence, Keating persisted in his argument that he had every right to behave the way he behaved despite the effect it had on the rest of the department.

Keating did not meet his burden of proving a causal link between his participation in a grievance and USD's non-renewal of his tenure track contract.

Keating failed to prove USD misinterpreted, misapplied or violated either Section 7.8.3 or 8.6 of the COHE Agreement in taking the action to non-renew his tenure track contract.

Whether USD improperly calculated Keating's years of service under Section 8.6 of the COHE Agreement.

Section 8.6 of the COHE Agreement provides a schedule according to years of service under a tenure track contract.

Section 8.6.2 controls when a faculty unit member has completed more than two but fewer than four years of service under a tenure track contract. Section 8.6.3 controls in those situations where the faculty unit member has completed at least four years of service under a tenure track contract.

USD applied Section 8.6.3. Keating contends his years of service are fewer than 4, and that Section 8.6.2 should apply.

It is undisputed that Keating received five tenure-track contracts, 1999/2000, 2000/2001, 2001/2002, 2000/2003 and 2003/2004, before his tenure track contract was nonrenewed in June 2004.

It is also undisputed that Keating was on military leave for eight months and eight days in 2001/2002, and two months and one day in 2003.

Keating argues that despite the fact that he received five tenure-track contracts, his actual time of service was only 3.86 years after deducting his time in military service.

Section 8.4, entitled "Contract Year", describes contract years in terms of various nine-month individual appointment contract periods. Keating received five tenure track contracts. USD's offer to Keating, on the occasion of his 5th tenure track contract, is in evidence as Exhibit 46. It contained an offer, accepted by Keating on May 17, 2003, of a tenure track contract, documented four prior years, and was to run from August 15, 2003, to May 19, 2004. 2003/2004 was Keating's 5th contract year of service.

Keating failed to prove that USD incorrectly calculated his years of service under Section 8.6. USD correctly treated him as a faculty unit member having more than 4 years of service.

Under Section 8.6.2, a faculty unit member having more than two, but fewer than 4 years of service is entitled to written notice of non-renewal before December 15 of the current year of employment. Under Section 8.6.3, notice is not required until April 1 of the contract year.

USD's notice to Keating under Section 8.6.3 was late. It was to be furnished by April 1, 2004, and was not provided until after that date.

Section 8.6.4 provides a penalty for late notice under Section 8.6.2. Section 8.6.4 provides no penalty for late notice under Section 8.6.3. The reason for the penalty provision provided for late notice under Section 8.6.2 is apparent from the language of the agreement. The reason for the notice provisions in section 8.6, and the reason for the penalty for late notice is: "to facilitate the relocation of faculty unit members who are not to be rehired." Section 8.6.2 requires for earlier notice in those cases where a faculty unit member is not to be rehired. Under Section 8.6.3, a later deadline is provided, and the affected faculty unit member is offered a one-year contract after notice of non-renewal. Keating was offered a contract for the 2004/2005 academic year and accepted.

Section 8.6.4 does not provided a remedy for late notice of non-renewal under 8.6.3. Keating failed to prove any right to a remedy for late notice of non-renewal.

Whether USD committed an unfair labor practice under SDCL 3-18-3.1(1) by denying Keating's right to freedom of expression.

Keating has alleged that USD committed an unfair labor practice under SDCL 3-18-3.1(1) by "interfering with, restraining, or coercing [him] in the exercise of [his] rights guaranteed by law."

Keating admitted certain derogatory statements he made toward both his department chair, Dr. Heaton, and toward his supervisor, Dr. Keller, including referring to Dr. Keller as a "lieing (sic) backstabbing sneak" but argues he was engaging in protected speech under the first amendment.

As with a grievance, Keating has the burden of proof to show that USD committed an unfair labor practice.

A public employee is protected by the First Amendment with respect to comments on matters of "pubic interest", that being any matter which can be "fairly characterized as constituting speech on a matter of public concern." Pickering v. Board of Education, 391 US 563 (1968). Matters of public concern include matters of political, social, or other concern to the public. Connick v. Myers, 461 US 138, 147 (1983).

Keating's criticism of his supervisors did not rise to the level of speech protected by the First Amendment. Keating was not speaking as a concerned citizen on a matter of public importance. His comments were personal attacks of a private nature, and were not comments made on matters of public interest or public concern. Keating was expressing fault with how his supervisors dealt with him, not on how his supervisors actions were affecting matters of public concern or the functioning of a public institution.

Keating failed to meet his burden of proving that USD committed an unfair labor practice under SDCL 3-18-3.1(1).

Counsel for USD shall submit proposed Findings of Fact and Conclusions of Law, and an Order, consistent with this Decision, within 10 days of the receipt of this Decision. Keating shall have 10 days from the date of receipt of USD's proposed Findings of Fact and Conclusions of Law to submit objections or submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for USD shall submit such stipulation together with an Order consistent with this Decision.

Dated: October 13, 2006.

SOUTH DAKOTA DEPARTMENT OF LABOR

Randy S. Bingner
Administrative Law Judge