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LETTER DECISION AND ORDER

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HF No. 11G, 2016/17 – B. Lynn Gordon v. South Dakota State University and the South Dakota Board of Regents

Dear Counsel:

The Grievant, Dr. Barbara Lynn Gordon, PhD, filed a grievance petition with the Department of Labor and Regulation, pursuant to SDCL 3-18-15.2, against Respondents, South Dakota State University and the South Dakota Board of Regents (Respondents). A hearing on the above matter was conducted by the Department on February 6, 2018. Attorney Bob Pesall represented Grievant and Eric Rasmussen represent Respondents. Both parties have submitted post hearing briefs and the Department being advised fully, hereby makes this Decision.

QUESTION PRESENTED

DID RESPONDENTS VIOLATE, MISINTERPRET, OR INEQUITABLY APPLY THE COHE AGREEMENT BY FAILING TO IMPLEMENT A CONSTRUCTIVE PLAN IN ACCORDANCE WITH THE NEGOTATED AGREEMENT BEFORE NOT RENEWING GRIEVANT'S CONTRACT?

FACTS

Grievant, Dr. Barbara Lynn Gordon, was employed by Respondents as a professor at South Dakota State University from 2013 until 2016. Gordon, a native of Nebraska, had an extensive background in agriculture. Grievant received a Bachelors of Science degree from North Dakota State University and went to work for the University of Minnesota as a county extension educator in west central Minnesota. Grievant also completed a master's degree and later went to work for a national cattle association based in Texas. Grievant then took a job with the State of Nebraska's Department of Agriculture, completing her PhD in 2011. After a series of budget cuts, Nebraska eliminated Grievant's position.

It was at that time that Grievant accepted a position with Respondents as a regional field extension specialist. Grievant was in this position for approximately a year and a half when she accepted a newly created position as an assistant professor and state ag leadership specialist in extension in August of 2013. Seventy percent (70%) of the position involved extension actives while the remaining thirty percent involved teaching responsibilities. Grievant's duties included working with South Dakota State University faculty and providing adult education and outreach to the community on agricultural topics, teaching classes in the University's Ag Education major, and conducting scholarly research.

The position was designated as tenure-track by the Board of Regents meaning that Grievant was to be evaluated on a yearly basis for six years. The guidelines for evaluation and tenure were outlined in the Council on Higher Education (COHE)

agreement which was in effect between all of the state-run colleges and universities and their faculty members. Pursuant to the agreement, Grievant was eligible to apply for tenure during the sixth year of employment. Grievant's direct supervisor was Dr. Andrew Stremmel, PhD. Dr. Stremmel was responsible for evaluating Grievant's performance annually according to the Council of Higher Education agreement (Agreement).

Concerns with Grievant's performance first surfaced in 2015. During Grievant's annual review, Dr. Stremmel presented Grievant with several negative student evaluations. Per the COHE agreement, 25 percent of a member's overall teaching effectiveness score is derived from student evaluations. If a faculty member's supervisor has an issue with the scores, he/she are to meet with the faculty member within thirty days of the end of the preceding semester. Neither Dr. Stremmel nor any other administrator ever had a meeting with Grievant to discuss these surveys.

Grievant again received notice of unsatisfactory performance in February 2016. On February 11, Grievant met with Dr. Stremmel to discuss her annual performance review. Also present was Karla Trautman, SDSU's interim director of extension. Grievant was surprised by Trautman's presence since Trautman was not her direct supervisor and all previous meetings involved only Grievant and Dr. Stremmel. It was at this meeting that Stremmel informed Grievant that he was recommending that the University not renew Grievant's contract and Grievant would not return after the current term. Grievant testified that Dr. Stremmel never brought up the COHE agreement. However, in a follow up e-mail dated March 28, 2016, Dr. Stremmel indicated that he would work on a constructive plan and provide it to Grievant at a later date.

Grievant met with Dr. Stremmel on an unrelated matter on May 11 and inquired about the constructive plan. Dr. Stremmel advised that he would be putting together a plan soon. After Grievant had not heard from Stremmel, she sent him an e-mail on May 17 again inquiring about the constructive plan. Grievant testified that as of May 21, 2016, she was officially off contract for the year and wanted the matter resolved before then. Dr. Stremmel advised they would meet on May 19 to discuss the constructive plan. Due to a personal matter, Dr. Stremmel was not able to attend the May 19 meeting and it was rescheduled for May 24, 2016.

Grievant did finally meet with Dr. Stremmel and Dave Hanson, a human resources representative for SDSU, on May 24. It was at this meeting that Dr. Stremmel presented Grievant with a document entitled "performance concerns." This document outlined areas in need of improvement and the necessary steps to achieve this goal. At no time was a COHE representative informed or consulted on the drafting of this document. Neither did Dr. Stremmel solicit input from Grievant. Grievant inquired about COHE's role in the formulation of this plan and was advised by Dr. Stremmel that the COHE guidelines did not apply to Grievant¹. Since Grievant was off contract at the time of the meeting, the constructive plan was not implemented until August 2016; the beginning of the next academic semester.

The plan specified that Grievant had to meet the guidelines outlined therein by November 2016. Among the specific guidelines, Grievant was required to contribute three manuscripts to professional, peer-reviewed journals by the November deadline.

¹ Dr. Dwight Adamson, PhD, the former SDSU COHE chapter president testified that COHE was obligated to review constructive plans for both COHE and non-COHE faculty upon request. Dr. Adamson testified that he was never contacted before the drafting of Dr. Stremmel's plan of improvement.

Grievant was also to develop partnerships with people across universities nationwide. Finally, Grievant was required to receive high student surveys for the class Grievant was teaching. Grievant testified that she was also assigned a new class for the fall of 2016 which would make formulating a plan for extension outreach in the time frame established by Dr. Stremmel difficult.

Grievant testified that Dr. Stremmel observed her teaching on two separate occasions during the fall semester and later deemed her teaching adequate. However, Grievant failed to meet the benchmarks in her plan. On December 2, 2016, Dr. Stremmel informed Grievant that her contract would not be renewed for another term, and that they would meet on December 7, 2016 to discuss Grievant's nonrenewal. Grievant stressed that under the agreement, she was entitled to at least five days' notice but was told by Dave Hanson that she was not part of the bargaining unit and therefore the COHE agreement did not apply. The meeting occurred on December 14, 2016. The next day, Grievant received a letter informing her that her contract would not be renewed for the following year.

Pursuant to the agreement, Grievant filed a step 1 grievance with Dr. Stremmel, which was denied. Grievant then filed a step 2 grievance with the SDSU's president, which was also denied. Grievant then appealed unsuccessfully to the Board of Regents. Finally, Grievant then filed an administrative appeal before the Department.

Grievant argues that under the terms of the COHE agreement, Respondents were required to implement a constructive plan of improvement with the input of a COHE representative and Grievant prior to not renewing her contract. Additionally,

Grievant argued that the plan implemented by Dr. Stremmel failed to meet the basic criteria outlined in the agreement. Respondents argue that it was not required to implement a plan of improvement under the agreement and that they had the discretion to not renew Grievant's contract without first implementing a plan.

Analysis

This case involves the interpretation of an agreement negotiated between the Council on Higher Education on behalf of faculty of the state's various public universities and the South Dakota Board of Regents. When interpreting these agreements, the South Dakota Supreme Court has noted, "[t]rade agreements or collective bargaining agreements are contracts under South Dakota law... Disputes over collective bargaining agreements negotiated... are settled by application of general contract principles. Disputes over the meaning of terms in teacher contracts are settled by applying general principles of contract law. *Hanson v. Vermillion Sch. Dist. No. 13-1*, 2007 S.D. 9, ¶ 27, 727 N.W.2d 459, 467–68 (internal citations omitted).

Grievant argues that by failing to implement a constructive plan in accordance with Section 12.5, Respondents violated the terms of the agreement. Section 12.5 provides:

In the evaluation identifies deficiencies in performance of assigned duties that are considered serious by the faculty unit members' department head, dean, or other supervisor, the administration will develop a preliminary constructive plan to remedy the faculty unit members' deficiencies and will provide reasonable assistance to the faculty unit member in achieving the required improvement. The plan will provide for guidance and direction from the administration and for achievement by the faculty unit member, to include the serious deficiencies giving rise to the plan, the corrective action required, and a reasonable time for such correction. The ultimate responsibility for improvement rests with the faculty unit

member; however, it is the responsibility of the administration to assist the faculty unit member in making improvements.

By its plain language, Section 12.5 applies to all “bargaining unit members.”

Section 1.11 of the contract defines a bargaining unit member as “an employee of the Board included in the collective bargaining unit as defined in Appendix A.” There is no dispute that Grievant was a member of the collective bargaining unit. Second, Section 12.5 uses the term “will” which is defined by Section 1.19 as “a verb having the mandatory sense of ‘will,’ ‘shall,’ or ‘must’”. Therefore, whenever Respondents determine that a faculty member’s performance is deficient, the provisions under Section 12.5 mandate the formulation of a conforming constructive plan.

It is undisputed that the plan given to Grievant did not adhere to the provisions of Section 12.5. First, Respondents did not solicit input from Grievant in formulating the plan. Dr. Stremmel simply provided Grievant with his suggestions and gave her a deadline by which to complete them. Second, at no time was a member of COHE informed or provided a copy of Dr. Stremmel’s plan. Even after Grievant asked about COHE, she was informed that she had no right to have a COHE representative involved in the process. Third, Respondents provided no meaningful input to help Grievant meet the goals of the plan. Finally, it was highly unlikely from the beginning that Grievant would be able to meet the goals of the plan within such a short time span. The plan required Grievant work submit three works to scholarly journals within approximately five months. Publication of scholarly work is a long process perhaps requiring up to a year for each work. Grievant was not even provided a plan until late May, 2016; approximately two months after Dr. Stremmel first indicated that he would formulate a plan. In addition, this plan apparently did not take into account the fact that Grievant

was assigned a new class to teach for the fall semester which made improving her extension duties more difficult.

Respondents counter that any procedural irregularities in the plan created by Dr. Stremmel are irrelevant since Respondents were not obligated to provide a constructive plan. They argue that Section 12.5 is not a prerequisite to a decision to not renew a tenure-track employee's contract under Section 9.6, which reads:

Nonrenewal ordinarily terminates employment at the end of an annual contract term. Nonrenewal is not disciplinary action. It does not terminate rights under an existing annual contract. The decision not to renew a faculty unit member's appointment is discretionary with the administration, provided that it is not based upon reasons expressly forbidden by this agreement. Nonrenewal is subject only to those procedural limitations expressly set forth in this section.

Respondents point specifically to language which limits its discretion to not renew a faculty member's contract to reasons expressly forbidden by the agreement. It is true that no section of the agreement specifically forbade Respondents from not renewing Grievant's contract. However, this did not absolve Respondents from their duty under Section 12.5 to formulate a proper constructive plan. Respondents' interpretation clearly contravenes Section 12.5's use of the word "will." "A contract should not be interpreted in a manner that renders a portion of it meaningless." *Estate of Fisher v. Fisher*, 2002 S.D. 62, ¶ 14, 645 N.W.2d 841, 846 (quoting *Bowen v. Monroe Guar. Ins. Co.*, 758 N.E.2d 976, 980 (Ind.App.2001)). Even if Respondents are granted discretion to not renew a faculty member's contract, Section 12.5 implies that they will act in good faith when working with a faculty member whose performance they deem inadequate.

Respondents acknowledge that Section 12.5 uses the term "will" in directing the implementation of a constructive plan. However, they argue that this term must be read

in conjunction with the word “serious” as a mechanism to trigger a constructive plan. Respondents point out that since Section 9.6 grants a chair or department head discretion to not renew a tenure-track employee’s contract, adopting Grievant’s interpretation would require Respondents to provide faculty members charged with serious deficiencies a constructive plan while giving Respondents the ability to simply choose to not renew the contract of a faculty member charged with non-serious deficiencies. It is indeed illogical to suppose that the agreement would provide more rights to faculty whose performance deficiencies were more serious. However, Respondents’ attempt to side-step the use of the term “will” ignores the evidence presented by its own witnesses that Grievant demonstrated what they considered serious deficiencies in her performance.

Respondents’ next argument is that Section 12.5 only applies in a situation in which a department head wishes to discharge a tenure-track employee prior to the end of a contract year for serious deficiencies. This section provides: “If the faculty unit member fails to correct the serious deficiencies identified in the constructive plan, the faculty unit member may be subject to the alternative disciplines under Article XV, Code of Professional Conduct- Discipline- Just Cause.” This section does indeed provide a means by which to terminate a poorly performing faculty member prior to the end of a contact year. However, this does not negate the language which makes implementation of a constructive plan mandatory. This position is reinforced by language in Section 9.6 which directly references tenure-track faculty subject to a constructive plan.

Grievant has requested reinstatement to her old position as well as back pay and interest. The Department is vested with the authority to order temporary refinement of

an employee for violation of a negotiated agreement. Our Supreme Court has opined, “a proper test in determining whether reinstatement is the proper remedy for a violation of the teacher evaluation statutes or the collective bargaining agreement is whether a grievant has shown that the violation substantially and directly impaired his or her ability to improve himself or herself and attain continuing contract status.” *Fries v. Wessington Sch. Dist. No. 2-4*, 307 N.W.2d 875, 879 (S.D. 1981).

It is impossible to know whether or not a properly constructed plan with assistance from Respondents would have improved Grievant’s performance. However, even if Respondents had formulated a constructive plan that adhered to the requirements of Section 12.5, they still had the final discretion not to renew Grievant’s contract. As such, Grievant cannot show that violation of this provision substantially impaired her ability to ultimately earn tenure. In addition, the Department notes that it has been nearly one year since Grievant left her job. Since then, Respondents no doubt either hired someone else to take Grievant’s position or reassigned Grievant’s duties to other faculty. Therefore, in all likelihood, reinstatement would cause a significant amount of disruption to SDSU’s students and faculty. The Department finds that reinstatement is not proper in this instance.

This does not render Respondents’ violation of the agreement harmless. Section 12.5 is designed to provide a struggling faculty member with tools necessary to improve his/her performance. It is not a mere formality to dispense with when Respondents deem it expedient to do so. Section 9.6 allows Respondents the ability to offer a non-renewed faculty member one term contract. At a minimum, Grievant should have been awarded one more contract so that a proper constructive plan could have been

implemented. The Department therefore awards Grievant the value of a contract for the 2017-18 academic year.

Under South Dakota law, an aggrieved party has the duty to mitigate a breach of contract to the extent possible. *Ducheneaux v. Miller*, 488 N.W.2d 902, 917 (S.D. 1992). Also, "The burden of proving that damages would have been lessened by the exercise of reasonable diligence on the part of the claimant is on the party that caused the damages." *Renner Elevator Co. v. Schuer*, 267 N.W.2d 204, 207 (S.D. 1978)(citing *Northwestern Engineering Co. v. Ellerman*, 71 S.D. 236, 23 N.W.2d 273; *Kowing v. Williams*, 75 S.D. 454, 67 N.W.2d 780)).

If Grievant engaged in other employment during the pendency of these proceedings, her earnings will offset an award of damages. In the event that Grievant was not so employed, or was under employed, Respondents have the right to challenge Grievant claims as an offset.

ORDER

Grievant's request for reinstatement is DENIED. Grievant's request for damages is GRANTED. Within ten days of the receipt of this decision, Grievant shall provide the Department and Respondents with her earnings from her last day of employment with Respondents until the date of this decision. Respondents will then be given ten days to challenge the amounts provided by Grievant. The Department will then determine the value of the award plus statutory interest.

After that, Grievant's attorney shall submit Proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within 20 days from the date of receipt of the Department's award of damages. Respondents' attorneys shall have 20 days from the date of receipt of Grievant's Proposed Findings of Fact and Conclusions of Law to submit objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Respondents' attorney shall submit such Stipulation along with an Order in accordance with this Decision.

SOUTH DAKOTA DEPARTMENT OF LABOR
& REGULATION

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge