

**SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT**

**WILLIAM C. FULLER, M.D.,
Grievant,**

HF No. 7 G, 2003/04

v.

DECISION

**UNIVERSITY OF SOUTH DAKOTA and
SOUTH DAKOTA BOARD OF
REGENTS,
Respondents.**

This matter comes before the Department of Labor based on Grievant William C. Fuller's Petition for Hearing on Grievance filed pursuant to SDCL 3-18-15.2. Thomas K. Wilka represented Grievant William C. Fuller (Grievant). Tom Frieberg represented Respondents University of South Dakota and South Dakota Board of Regents (hereafter Respondent). The Department of Labor conducted a hearing on June 22, 2004, in Sioux Falls, South Dakota. Upon consideration of the live testimony given at hearing and the evidence presented at hearing, Grievant's Petition for Hearing and request for relief is hereby denied.

Issues:

Whether Respondents' termination of Grievant's BOR contract misinterpreted, violated, or inequitably applied the BOR tenure policy, the BOR reduction in force policy, or the faculty handbook for the USD School of Medicine.

Facts:

Based upon the record and the live testimony at hearing, the following facts are found by a preponderance of the evidence:

1. The University of South Dakota School of Medicine (USD School of Medicine) is a four-year medical school that operates under the governance of the South Dakota Board of Regents.
2. From the time of February 1987 until his retirement on June 30, 2004, Dr. Robert Talley served as Dean of the USD School of Medicine.
3. Grievant was an employee of the USD School of Medicine for 27 years and had more seniority as an employee than any other doctor, including Dr. Talley.
4. From 1990 to 2001, Grievant was also the Chair of the Department of Psychiatry in the USD School of Medicine.
5. In 2002, the USD School of Medicine was undergoing some significant financial difficulties that triggered the restructuring of the USD School of Medicine's clinical educational programs.

6. The administration of the USD School of Medicine determined to pursue a "Mission-based Management" approach to delivering clinical education.
7. The administration determined that only clinical faculty who were deans and administrators, department chairs, and those involved in the Family Practice Department would be retained as employees with the bulk of the faculty becoming independent contractors.
8. Upon learning of the restructuring, several members of the Psychiatry Department requested that they be given special consideration when the restructuring took place.
9. Dr. Talley and some members of the Psychiatry Department held a meeting to address specific concerns over the restructuring, although Respondents made no assurances of special accommodations.
10. On April 22, 2002, Dr. Talley notified 53 faculty members within the USD School of Medicine that their contracts of employment with the USD School of Medicine would not be renewed for the 2002-2003 school year, but that their faculty status would be retained under independent contractor status.
11. This notice was sent in accordance with the deadlines established under the COHE bargaining contract and the employment contracts of each faculty member.
12. The compensation would be on a contractual basis and would be based upon the amount of time actually spent with the students.
13. Of the 53 clinical faculty members who were terminated, 17 were tenured.
14. Before the April 22, 2002, notification, Grievant had a tenured appointment as a Professor of Psychiatry.
15. BOR Policy No. 4-23 sets forth reduction procedures.
16. The procedures contain a qualifier that allows for the retention of personnel with "special skills essential to the effective operation of the system, the institution, and their programs".
17. In addition to the employees who fell within the three areas identified as essential to the operation of the USD School of Medicine, Dr. Talley decided to retain two additional faculty members as employees, Dr. Bhatara and Dr. Soule.
18. Dr. Talley retained Dr. Bhatara to maintain the requirements of a grant. Dr. Bhatara's tenure expired with the grant.
19. Dr. Talley retained Dr. Douglas Soule, a psychologist with joint appointments in the Psychiatry Department and the Family Practice Department within the USD School of Medicine.
20. Dr. Talley retained Dr. Soule because he has special skills in teaching communication to medical students and was retained as a Family Practice Department faculty member.
21. Grievant's history of obtaining hospital, research, and federally funded grants is unmatched by any employee of the Medical School.
22. On May 21, 2002, Dr. Talley denied Grievant's step 1 grievance.
23. At the step 2 grievance level, Acting President Donald Dahlin upheld Dr. Talley's decision.
24. Pursuant to step 3 of the grievance procedure, Grievant argued his case before Hearing Officer Celia Miner.

25. At its August 2003 meeting, the Board of Regents affirmed Hearing Officer Minor's recommendation that the grievance be denied.
26. Grievant then submitted his grievance to the South Dakota Department of Labor.
27. The grievance does not seek to overturn a previous decision, finalized on September 17, 2001, by Dr. Talley, to replace Grievant as the Chair of the Department of Psychiatry in the USD School of Medicine.

ISSUE

Whether Respondents' termination of Grievant's BOR contract misinterpreted, violated, or inequitably applied the BOR tenure policy, the BOR reduction in force policy, or the faculty handbook for the USD School of Medicine.

ANALYSIS

SDCL 3-18-1.1 defines a grievance:

The term "grievance" as used in this chapter means a complaint by a public employee or group of public employees based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies or rules of the government of the state of South Dakota or the government of any one or more of the political subdivisions thereof, or of the public schools, or any authority, commission, or board, or any other branch of the public service, as they apply to the conditions of employment. Negotiations for, or a disagreement over, a nonexisting agreement, contract, ordinance, policy or rule is not a "grievance" and is not subject to this section.

The Department's role in resolving a grievance is defined by SDCL 3-18-15.2. SDCL 3-18-15.2 reads, in part:

If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved . . . it may be appealed to the department of labor . . . The 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.

The function of the DOL is to hear the evidence and make a determination if there has been a violation of an existing agreement, policy, rule or regulation. Kleinsasser v. City of Rapid City, 440 N.W.2d 734, 739 (SD 1989). The burden of proof is on the grievant. Rininger v. Bennett County Sch. Dist., 468 N.W.2d 423 (S.D. 1991) (citations omitted). In Rininger, it was held that the burden of proof lies with the grievant. When the respondent school district raised an affirmative defense, the court held that the District carried the burden of proof with regard to that defense and that they were required to prove such an affirmative defense by a preponderance of the evidence. Id. The burden in this matter is on Grievant to show by a preponderance of the evidence that Respondents did not follow procedure in terminating Grievant's tenure.

Grievant was an employee of the University of South Dakota with a written employment contract for a definite term. The contract does not provide any specified grounds for termination of the contract, but provides that it is "subject to and governed by the laws of the State of South Dakota, the policies, rules, and regulations of the South Dakota Board of Regents and the University of South Dakota." The South Dakota statutes that apply are SDCL ch. 3-18; the policies of the BOR that apply are BOR Policy 4:10, Tenure, and BOR Policy 4:23, Reduction in Force (RIF); and the USD policy that applies is Section 3.01 of the USD Medical School Faculty Handbook.

When a public entity adopts a set of rules "within the authority of [that body, those rules are] as binding as if they were statutes enacted by the legislature." Sutera v. Sully Buttes Bd. Of Educ., 351 N.W.2d 457 (SD 1984). When releasing a teacher under a RIF policy, a school district "must abide by its [policy] terms". Gettysburg Sch. Dist. 53-1 v. Larson, 2001 SD 91, ¶ 101.

Grievant alleges that Respondents violated Grievant's employment contract and also BOR Policy Manual 4:23 and 4:10. There is no separate reorganization policy. Therefore, any reorganization that contemplates the elimination of faculty must follow the RIF policy. The only possible avenue for justifying the failure to retain Grievant is Policy 4:10.1.B., Tenure:

A tenure appointment may be extended to a full-time faculty member providing for reemployment from year to year until such time as the faculty member resigns (Section 4:1, Contract Fulfillment), or retires, is terminated or cause (Section 4:14, Termination for Cause), or is terminated pursuant to a reduction in personnel, (Section 4:23, Faculty Member Reduction Procedures), or is terminated subject to the provisions of Section 4:13, Intensive Review of Tenured Faculty.

The Faculty Handbook 2001, USD School of Medicine, 3.01, lists four means of terminating a tenured appointment: ". . .until such time as the individual resigns, retires, is terminated for cause, or is terminated pursuant to a necessary reduction of faculty."

Paragraph 1 of Policy 4:23 allows the Board of Regents to implement a reduction in force when dictated by a variety of circumstances including "financial exigency", and "other reorganization". Dr. Talley recited in his testimony that the financial exigency facing the USD School of Medicine was one reason for the reorganization. The decision to reorganize the USD School of Medicine is not at issue.

In Paragraph 2 of the RIF Policy, the guidelines, including retention priority for seniority, to be followed in a RIF are "subject to the need to retain personnel with special skills essential to the effective operation of the system, the institutions, and their programs." Grievant failed to demonstrate that Respondents failed to follow any of the guidelines. The evidence shows that Respondents considered the "special skills essential to the effective operation" of the USD School of Medicine in selecting the faculty retained.

The BOR policies do not require seniority to dictate who is retained in a reorganization. The merit and success of Grievant's career thus far with the USD School of Medicine is not in question. Board of Regents Policy 4:23 does not automatically give tenured faculty members with the most seniority the right to retain tenured employment. The RIF procedure identifies guidelines to be used by the administration. The administration is given flexibility and discretion to retain those employees who have special skills essential to the effective operation of the system. This is exactly what Dr. Talley did in furtherance of the Mission-based Management strategies being implemented by the USD School of Medicine. Dr. Talley identified the general categories of employees who needed to be retained as employees.

Dr. Talley clearly set forth the rationale implemented by the USD School of Medicine in determining which clinical faculty members would be retained as employees of the USD School of Medicine. Only three categories of employees were retained, deans or administrators, department chairs, and family practice faculty members. These positions were deemed essential to the continuing efficient operations of the USD School of Medicine and deemed to be consistent with the overall mission of the USD School of Medicine.

The two exceptions to the above categories were identified and justified by Dr. Talley. First, Dr. Bhatara was retained as an employee because his employment was funded through a grant that required his continued status as an employee of the USD School of Medicine. When the grant expired, his tenured employment with the USD School of Medicine expired. Grievant failed to demonstrate that he should have been retained instead of Dr. Bhatara simply because of his seniority over Dr. Bhatara. The guidelines do not require Respondents lose grant money in order to maintain retention priority. Furthermore, Dr. Bhatara's "retention" was not retention as contemplated by the "guidelines." His tenured employment was maintained through the term of the grant and then his tenure ended. Grievant made no showing that the criteria used to determine Dr. Bhatara's temporary retention should have applied to him.

The second was Dr. Douglas Soule who was a psychologist with a dual appointment between the Department of Psychiatry and the Department of Family Medicine. Dr. Soule was deemed to have special skills in the area of teaching communication to medical students. Dr. Talley felt Dr. Soule's skills were essential to the communication program. Grievant would seem to argue that the retention of Dr. Soule was in violation of the RIF policy because he has seniority over Dr. Soule and because he is also capable of teaching communication courses to medical students. Respondents were not bound by seniority. Respondents determined that Dr. Soule had those "special skills essential to the operation" of the USD School of Medicine. Grievant's evidence failed to show how this determination was in violation of the RIF guidelines.

Grievant attempted to demonstrate that Dr. Talley allowed personal animosity towards Grievant to cloud his judgment in failing to reconsider the termination of Grievant's tenured status. While Grievant presented evidence that proved discord between

Grievant and Dr. Talley, Grievant's evidence fails to support a finding that Dr. Talley, as Dean of the USD School of Medicine, misinterpreted, violated, or inequitably applied BOR Policies in assessing the needs of the USD School of Medicine and not retaining Grievant's tenure. Grievant's argument that he was held to a higher standard than Dr. Soule or Dr. Bhatara is rejected.

Grievant also argued that Respondents should have made some effort to relocate him to a different faculty position pursuant to RIF Policy 4:23.2.J. Grievant failed to demonstrate that some suitable faculty position was vacant and that he "is qualified to perform the duties of the position and fulfills all of the qualifications specified for the vacant position", which is what RIF Policy 4:23.2.J. requires in the event of a relocation.

Grievant has failed to meet his burden under the law to demonstrate that the termination of his tenure misinterpreted, violated, or inequitably applied the BOR tenure policy, the BOR RIF policy, or the faculty handbook for the USD School of Medicine.

Respondents shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Grievant shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions to submit objections thereto or to submit proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Respondents shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 7th day of December, 2004

SOUTH DAKOTA DEPARTMENT OF LABOR

Heather E. Covey
Administrative Law Judge