

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WENDI KAPPERS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 07-2773
)	
SEMINOLE COMMUNITY COLLEGE,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on October 19, 2007, in Sanford, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Wendi Kappers, pro se
656 Dartford Court
DeBary, Florida 32713

For Respondent: Sandra K. Ambrose, Esquire
Stenstrom, McIntosh, Colbert, Whigham,
Reischmann & Partlow, P.A.
1001 Heathrow Park Lane, Suite 4001
Lake Mary, Florida 32746

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent wrongfully terminated Petitioner's continuing contract of employment.

PRELIMINARY STATEMENT

On or about April 26, 2007, Respondent, Seminole Community College ("SCC"), notified Petitioner that her employment contract would be cancelled at the end of the next school term. Petitioner filed a "Petition for Reconsideration of Decision to Terminate Continuing Contract" with Respondent. The Petition was forwarded to the Division of Administrative Hearings so that a formal administrative hearing could be conducted. The hearing was held on the date set forth above, and both parties were in attendance.

At the final hearing, Petitioner called the following witnesses: John DelGado, SCC faculty member; Susan Dooley, professor and program manager at SCC; Alan Kraft, professor and program manager at SCC; Melinda White, program manager at SCC; Dick Hamann, college information officer at SCC; Ben Taylor, faculty member at SCC; Dr. Carol Hawkins, vice president for Education Program and chief learning officer at SCC; Angela Kersenbrock, dean of Career and Technical Education at SCC; and Leon Portelli, IT department chair at SCC. Petitioner did not testify on her own behalf, but offered 13 exhibits into evidence; Exhibits 1 through 4, 6 through 8, and 10 through 13 were admitted. Official recognition was taken of Exhibit 5.

Respondent re-called Dr. Hawkins and called Claudia Salvano, director of Human Resource Development/Employee

Relations at SCC. Respondent's eight exhibits offered into evidence were all admitted. The parties initially indicated their intent to order a transcript of the final hearing, but by letter from Petitioner received on October 22, 2007, the undersigned was advised that no transcript would be ordered. The parties asked leave to submit proposed recommended orders on or before November 5, 2007. Each party timely submitted a Proposed Recommended Order, and each was duly-considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is currently a doctoral level graduate student. At all times relevant hereto, she held a continuing contract as a professor at SCC in the Networking and Electronics Program (the "Networking Program").

2. Respondent is a community college within the state community college system. It is governed by its Board of Trustees. Dr. Ann McGee is president of SCC; vice president of Educational Services is Dr. Carol Hawkins. Angela Kersenbrock is the dean of Career Programs, including the Networking Program. Department chair in that program is Leon Portelli.

3. Beginning in calendar year 2003, SCC began to experience decreased student enrollment, especially in the area of the Networking Program. SCC instituted a program review under Dean Kersenbrock's tutelage. A program review provides

for the collection of relevant data to ascertain the continued viability of programs within the college. The program review of the Networking Program found low and declining enrollment and retention, a perceived job market decrease, difficulty in recruiting industry partners, and limited internships for students. Based on those findings, a series of recommendations were made to improve the Networking Program. Included in the recommendations were the following: increase class size, reduce faculty (Reduction in Force (RIF)), cross-teaching in other areas, cut back on adjuncts, reduce contract length, consolidate courses and sections, and work closely with industry partners to locate jobs for graduates of the program.

4. Many of the recommendations were implemented even before finalization of the program review. However, in February 2007, Dean Kersenbrock decided the measures being taken were not alleviating the problem. She then submitted her formal recommendations to the Board of Trustees.

5. A formal presentation was made to the Board of Trustees on April 17, 2007. After much discussion and debate, the Board of Trustees approved the recommendation from Dean Kersenbrock's review committee to implement a RIF in the Networking Department. At that time, there were five faculty members in the department, including Petitioner. The other faculty members were: John DelGado, Ben Taylor, Bill Irwin, and Gary Belcher.

The proposed RIF intended to reduce the faculty from five to two. Irwin and Belcher were immediately selected for termination due to the fact that they could teach fewer topics within the department than could the other three staff.

6. After they were terminated, SCC had to select one of the three remaining staff (DelGado, Taylor, and Petitioner) to be the final cut for the RIF. Each of the three had identified strengths and weaknesses; so, the selection was a difficult one to make. In order to make the decision, the following factors were considered: (1) the essentiality of the position, (2) work performance, (3) attendance record, and (4) supervisory recommendations. If all those factors are equal between the faculty members being considered, then length of service to the college would be the determining factor.¹

7. SCC evaluated DelGado, Taylor, and Petitioner and found them, on aggregate, to be equal as far as the four factors were concerned. Each faculty member had strengths and weaknesses within the four categories, but were essentially "tied" when it came down to making a decision.²

8. Petitioner correctly pointed out that of the three faculty members, she was the only one who had experience making presentations at national level conferences. This fact weighed in her favor, but it was not enough to outweigh the strengths of the other faculty members. Likewise, Petitioner has the ability

to teach a number of different classes, a positive in her favor. But, again, her abilities did not make her more essential than the other two.

9. Some questions were raised about Petitioner's work performance, attendance record, and poor supervisory recommendations. However, none of those questions indicated that Petitioner was inferior to her fellow professors.

10. Neither of the parties offered into evidence a true comparison of the three faculty members. There was some indication that each had strengths and weaknesses, but each person's individual assets or liabilities weren't described with any particularity. Thus, a substantive de novo review of that part of Respondent's decision making process is not possible. When all was said and done, Petitioner's length of service at SCC was shorter than the other two, and, thus, she was selected for the final RIF cut.

11. Pursuant to SCC policies and procedures, an employee affected by a RIF must be given at least two weeks notice prior to the reduction taking effect. Petitioner was advised twice concerning her termination: once in a letter from the director of Human Resources Development--letter dated April 26, 2007--and once in a letter from SCC's president, E. Ann McGee--letter dated May 17, 2007. The latter correspondence provided Petitioner her appeal rights.

12. Petitioner was provided her severance package in accordance with SCC policies.

13. President McGee's letter to Petitioner stated in part, "You have the right to appeal the Board's decision pursuant to Chapter 120, Florida Statutes." However, the letter did not address Petitioner's right to appeal directly to the Board.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2007).

15. SCC's RIF - Policy 2.040 states, in pertinent part:

1. Due to financial exigency or for more efficient operation of the College, the President is authorized to develop a plan to reduce the workforce in certain areas, programs, or functions of the College.

2. Under such conditions, the plan will be developed in accordance with established procedures and approved by the Board prior to implementation.

3. The President shall cause a procedure to be developed to implement this policy.

16. SCC's RIF - Procedure 2.0400 provides:

Purpose:

To set out a procedure for the reduction of personnel when required because of financial exigency or for more efficient operation of the College.

Procedure:

1. Employee(s) affected by a reduction in force will be determined by the needs of the College. In the determination of which employee(s) will be affected, due consideration will be give to such factors as (1) the essentiality of the position, (2) work performance, (3) attendance record, and (4) supervisory recommendations. If all factors are equal, length of service to the College will be the determining factor.

2. The affected employee will be given at least two (2) weeks notice prior to the reduction. The employee will receive severance which equals 10% percent of the affected employee's annual base salary plus three (3) months of health and dental coverage for the employee. Affected employees shall have the right to participate in the College Group Health Insurance Program under the provision of COBRA for a total of 18 months from the date of termination.

17. It appears from the evidence presented that SCC followed its policies and procedures in conducting the RIF and the subsequent termination of Petitioner's continuing contract.

18. Florida Administrative Code Rule 6A-14.0411(5) states:

(a) The college may dismiss an employee under continuing contract or return the employee to an annual contract upon recommendation by the president and approval by the board. The president shall notify the employee in writing of the recommendation, and upon approval by the board, shall afford the employee the right to a hearing in accordance with the policies and procedures of the college. As an alternative to the hearing rights provided by college policies and procedures, the employee may elect to request an

administrative hearing in accordance with the guidelines of Chapter 120, Florida Statutes, by filing a petition with the board within twenty-one (21) days of receipt of the recommendation of the president.

(b) Upon consolidation, reduction, or elimination of a community college program or restriction of the required duties of a position by the board. The board may determine on the basis of the criteria set forth in subsections (1) and (2), which employees should be retained. . . .
[Emphasis added]

19. Minimum requirements and other considerations the Board may look at when an employee challenges his/her termination directly to the Board include: three years of satisfactory service in the same college; educational qualifications, efficiency, compatibility, character, and capacity to meet the educational needs of the community; and the length of time the duties and responsibilities of this position are expected to be needed. See Fla. Admin. Code R. 6A-14.0411(1) and (2).

20. The Respondent established by competent substantial evidence that a basis existed for the RIF. The declining enrollment, duplicity of classes, and smaller class sizes justified the Board's decision to institute a RIF within the Networking Program.

21. Conversely, Petitioner did not prove that the recommendation to terminate her rather than two similarly

situated employees was arbitrary or capricious in nature. The facts establish that Petitioner was equal to (i.e., neither superior nor inferior to) the other professors who were considered in the RIF process.

22. However, Respondent's failure to provide Petitioner the opportunity to appeal directly to the Board is contrary to the plain language of Florida Administrative Code Rule 6A-14.0411. That rule gives the employee, not the college, the right to choose a Chapter 120, Florida Statutes, proceeding instead of a direct appeal. If the employee opts to appeal to the Board, then the criteria in Florida Administrative Code Rule 6A-14.0411(1) and (2) become relevant.

23. While an appeal to the Board by this Petitioner will likely prove fruitless based on the evidence provided at final hearing in this matter, Respondent erred by not providing Petitioner the opportunity.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Petitioner be given an opportunity to select a direct appeal to the Board of Seminole Community College. As far as the instant case is concerned, Petitioner failed to meet her burden of proof and the termination of her contract would be upheld.

DONE AND ENTERED this 16th day of November, 2007, in
Tallahassee, Leon County, Florida.

S

R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of November, 2007.

ENDNOTES

^{1/} There was no testimony as to whether the four factors were weighed individually in order, or whether they were taken as a whole. By inference, the latter seems to be the case and appears to be a reasonable approach.

^{2/} The precise strengths and weaknesses of each professor were not discussed. However, sufficient testimony was presented to determine that all three were good professors and that each probably had some room for improvement. Petitioner did have her own impressions as to her qualities, but none of the cited qualities seemed to make her status more superior than her contemporaries.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.