IN ARBITRATION

IN RE: ARBITRATION BETWEEN

UNITED FACULTY OF FLORIDA, on behalf of Gary Long,

CASE NO. 03-01

Grievant,

and

FLORIDA BOARD OF EDUCATION on behalf of UNIVERSITY OF FLORIDA,

Employer.

Appearances:

Employer Charles Deal, Esq., on behalf of University of Florida

Union Dr. Robert Weinberger, on behalf of UFF

In Attendance:

Dr. Joseph Tedesco, Chair, Dept. of Civil and Coastal Engineering
Dr. Pradeep Kuman, Grievance Officer, UFF
Dr. Llona Geiger, Grievance Officer, UFF
Dr. Martin Vala, Grievance Officer, UFF

INTRODUCTION

This arbitration arises from a demand under Article 20 of the expired 2001-2003 collective bargaining agreement ("CBA") between United Faculty of Florida (UFF), and the Florida Board of Regents. The grievance was denied at Step 1. An evidentiary hearing

was held on February 26, 2004 in Gainesville, Florida. The parties appeared with their respective representatives. All witnesses were duly sworn. There was no official record of the hearing. Post-hearing briefs were submitted by both parties. The Arbitrator has carefully considered her notes, the sworn testimony of the witnesses, the exhibits tendered at the hearing and her review of the post-hearing briefs in reaching this Award. An absence of discussion in this Opinion and Award as to any matter does not indicate the Arbitrator's failure to review and consider it.

ISSUES

The Union stated the issues in its demand as "Did the University violated the provisions of the UFF Collective Bargaining Agreement ? If so, what is the remedy to be provided by the University. " At hearing, the University objected to this statement as being vague. The Union correctly notes in its brief that the University raised this issue for the first time at arbitration. When the parties have not agreed on a statement of the issues being submitted for decision, an arbitrator has the ability to fashion the issues after full review of the record and the collective bargaining agreement. Elkouri & Elkouri, "How Arbitration Works" (1997 Ed.), pp. 323-324.

The record shows the grievance presented at Step 1 identifies Articles 5.1 and 5.2 of the CBA as being the "articles(s) and section(s) of Agreement allegedly violated." The grievance statement also references Rule 6C1-7.018(1)(a), F.A.C., and Article V.1 of the Constitution for the University of Florida. The latter contain statements regarding academic freedom. Since the University's Step 1 decision discusses these CBA articles, the parties have implicitly agreed they are the provisions at issue in this matter.

Therefore, the issues to be decided are: 1) whether the reprimand issued to Dr. Long violates Articles 5.1 and 5.2 of the CBA? and if so, 2) what is the remedy. Though Dr. Long also seeks to be relieved of the counseling he received on August 27, 2002 in this grievance, Article 16.6 excludes counselings from the definition of disciplinary action and it is inarbitrable (as well as untimely). Any mention or consideration of that counseling, therefore, is by way of background to the present dispute.

RELEVANT CONTRACT PROVISIONS

Article 16 allows the University to take disciplinary action for "just cause." Under Article 16.4, notices of disciplinary action "shall be sent certified mail, return receipt requested or delivered in person to the employee with written documentation of receipt obtained." The grievance and arbitration mechanism which can be used by a bargaining unit member to grieve discipline is found in Article 20. Pursuant to Article 20.4, the University carries the burden of proof in disciplinary grievances.

Because the Union specifically cites Articles 5.1 and 5.2, the relevant portions of these sections will be set out in full.

> 5.1. Policy: It is the policy of the Board and the UFF to maintain and encourage full academic freedom. Academic freedom and responsibility are essential to the full development of a true university and apply to teaching ..... An employee engaged in such activities shall be free to cultivate a spirit of inquiry and scholarly criticism and to examine ideas in an atmosphere of freedom and confidence.
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> 5.2 Teaching and Research. Consistent with the exercise of academic responsibility, employees shall have freedom to preent and discuss their own academic subjects, frankly and forthrightly, without fear of censorship, and to select instructional materials and determine grades in accordance with university and Board policies. Objective and skillful exposition of such subject matter, including the

acknowledgment of a variety of scholarly opinions, is the duty of every such employee. Employees shall also be free to engage in scholarly and creative activity and publish the results in a manner consistent with their professional obligations.

Though not cited by the Union, Article 5 also contains 5.3 entitled, "Academic Responsibility" which reads in relevant part:

> 5.3 Academic Responsibility. Academic freedom is accompanied by the corresponding responsibility to:
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> (A) .....
> (B) Respect students, staff and colleagues as individuals; treat them in a collegial manner and avoid any exploitation of such persons for private advantage;
> (C) .....
> (D) .....
> (E) Contribute to the orderly and effective functioning of the employee's academic unit ..... and/or the university.

Finally, the Union claims that Article 11.5 which prohibits the placement of anonymous material in an evaluation file was violated.

POSITIONS OF THE PARTIES

The University : It is the University's position that Dr. Long engaged in unprofessional behavior worthy of discipline when he disparaged a colleague and the colleague's wife during a class lecture. The comments had no academic purpose and were made as a result of ill-will towards the colleague. Dr. Long had previously been warned about making unprofessional comments in the class and therefore, more severe discipline was warranted.

The Union. It is the Union's position that Dr. Long is being punished for exercising academic freedom. Dr. Long's remarks regarding his colleague were made in the

context of a class session on professional responsibility and ethics. The topics are part of the course and noted on the syllabus. As such, Dr. Long's remarks are privileged and cannot be made the basis of discipline.

FACTUAL BACKGROUND

Grievant, Dr. Gary Long, is an associate professor in UF's Department of Civil and Coastal Engineering. He has taught at the University for nearly 27 years in the area of his expertise, transportation engineering. Dr. Long created and has long taught TTL 4004, an introductory course in the principles of highway engineering and traffic analysis.

Dr. Long took a sabbatical during the 2001-2002 academic year. In June, 2002, he was notified that upon his return in the Fall, he was being assigned to teach EGN 4032 instead of TTL 4004. Dr. Scott Washburn, a relatively new faculty member, had taught TTL 4004 in Dr. Long's absence and the course was being re-assigned to him. The University offered testimony at hearing that it instituted the change due to persistent student criticism of Dr. Long whereas student feedback of Dr. Washburn's TTL 4004 course had been positive.

Dr. Long grieved his Fall course assignment under the expedited Assignment Dispute Resolution Procedure. On August 23, 2002, a neutral empire ruled that the new assignment had been unreasonably imposed by the University. Despite the finding, the University did not reverse Dr. Long's assignment. The new course he was to teach was due to begin three days later. There is no dispute that Dr. Long had never before taught EGN 4032, "Professional Issues in Engineering."

During the introductory class, Dr. Long apparently informed students in EGN 4032

that he was unfamiliar with the subject area, had filed a grievance so he would not have to teach the course, and has been assigned to teach it nevertheless in retribution for his opposition. Students complained to Dr. Joseph Tedesco, Chair of the Department about Dr. Long's expressed attitude to teaching the course. On August 27, 2002, Dr. Tedesco issued Dr. Long a counseling letter that admonished him Long to refrain from making any further statements of this nature and to put forward an "honest effort" to teach the class.

Dr. Long published a five (5) page syllabus on September 4, 2002. It designated required texts including, the Standards of Professional Conduct of the American Society of Civil Engineers. The subject matter included in the course was contract fundamentals, engineering standards, forms of organization, real property, bids, bonds, change orders, unforeseen conditions, payments, business practices and engineering license law, Florida administrative rules relating to the practice of engineering and engineer ethics and conduct. Student course evaluations for EGN 4032 gave Dr. Long an overall 3.51 out of a possible 5 for his teaching of the course. He received the most number of low marks for "Enthusiasm for Subject."

After the semester ended, Dr. Tedesco became aware of an anonymous student article published in a newsletter concerning a "hypothetical" professor teaching EGN 4032. The article alleged, among other things, that the "hypothetical" professor had students in the class create the course syllabus as well as test questions, and that he used the classroom to repeatedly disparaged one of his colleagues (and the colleague's wife).

As a result of this article, Dr. Tedesco interviewed several students in Dr. Long's Fall course. The students agreed to talk on the condition of anonymity and reported,

among other things, that Dr. Long had used Dr. Washburn and his wife as examples in class discussions regarding professional practice and ethics.

Specifically, Dr. Tedesco learned that Dr. Long told his class that Dr. Washburn's use of the designation "P.E." on his university web-site was illegal and unethical as he was not a registered engineer in Florida. To prove this, Dr. Long displayed in class the results of a web search that confirmed Dr. Washburn was not a registered P.E. in the State of Florida but showed that his wife was.

Dr. Long's lecture also discussed the ethical obligation of a professional engineer to report licensure violations. Dr. Tedesco learned that Dr. Long had used Dr. Washburn's wife as an example of someone who had violated the professional obligation to report misuse of the "P.E." designation–by her husband-- to the appropriate authorities. Following his meeting with the students, Dr. Tedesco received unsolicited written statements from them supporting their allegations. Their names were signed on a separate piece of paper.

On February 13, 2003, Dr. Tedesco met with Dr. Long and his union representatives to discuss these allegations. He handed Dr. Tedesco a copy of the newsletter article and the unsigned letter from the students. (At a later date Dr. Tedesco offered to show Dr. Long and the union representatives the signatures of the students). Notes of that meeting indicate that Dr. Tedesco's focus was on Dr. Long's statements to the class regarding Dr. Washburn and his wife (which Dr. Long did not deny making.) Six days following the meeting, Dr. Tedesco issued a reprimand to Dr. Long for "unprofessional statements." The reprimand was placed in Dr. Long's faculty mailbox.

Dr. Long timely grieved the issuance of the written reprimand. The grievance proceeded through the steps and a demand for arbitration was filed on June 6, 2003.

DISCUSSION

I. Procedural Matters

Various procedural issues were raised and will be addressed before the merits.

At hearing, the Union raised the University's violation of Article 16.4. The University objected to this claim being raised for the first time at arbitration. While the Union claims it purposefully drafted the grievance vaguely (to cover every possible violation arising out of the CBA), the very purpose of a step grievance system is to put management on notice of perceived violations of a bargaining agreement that will allow it to make timely corrections. Had the Union noted that Article 16.4 was violated in its Step 1 grievance statement, the University could have corrected the deficiency. It did not do so. Nor has the Union made a showing of how this technical violation has prejudiced its case. Given these circumstances, this objection is deemed waived for not having been timely and specifically raised.

The Union's second procedural objection concerns the University's use of the anonymous student article and the unsigned student statements to bring this disciplinary action. Again, the University responds that the Union's claimed violation of Article 11 was raised for the first time at hearing. (The University also objected based on timeliness and also relevance.)

The University correctly observes that Article 11's prohibition regarding use of anonymous material applies only to evaluations. Article 16 does not address what type

of materials can form the basis for discipline. It only mandates that an employee be given a written statement of the reasons underlying the discipline. Under Article 20.8(d)(3), an employee is entitled to see, *where practicable*, all documents referenced in the Step 1 decision prior to its issuance. Additionally, "all documents referred to in the decision, together with a list of these documents" shall be attached to the decision.

Attached to the Step 1 decision were the anonymous student article and the four students' written but unsigned complaint. Another attachment to the Step 1 decision– a letter dated April 17, 2003 from Dr. Glover to Dr. Vala–offers Dr. Vala the opportunity to see a "list of four students names who were signatories to the complaint. That list is available to you and Dr. Long if you wish to request it from Dr. Tedesco." It is not clear whether Dr. Vala availed himself of this opportunity. Thus, the University did not violate Article 11.

II. Did the University's Reprimand Violate Dr. Long's Academic Freedom

The concept of academic freedom has been held to shield expression in the form of course content, teaching methods, grading and classroom dialogue. "Academic freedom thrives .... on the independent and uninhibited exchange of ideas among teachers and students.... " Board of Regents of University of Michigan v. Ewing, 474 US 214, 226 n. 12 (1985). The breadth of academic freedom at an institution may be expanded by custom and usage, or curtailed to specific rights and privileges. In a unionized academic setting, the bounds of academic freedom are often defined in a collective bargaining agreement. The parties have done so here through Article 5, which is titled "Academic Freedom and Responsibility."

Articles 5.1 and 5.2 set out the rights of bargaining members within the academy. For example, faculty engaged in teaching are free to "cultivate a spirit of inquiry and scholarly criticism and to examine ideas in an atmosphere of freedom and confidence." They may present their academic subjects,, "frankly and forthrightly" without "fear of censorship" and select "instructional materials" as they deem fit "in accordance with university and Board policy."

Similarly, Article 5.3 addresses management's rights and expectations. Among the standards to be observed is the responsibility to "respect students, staff and colleagues as individuals, treat them in a collegial manner and avoid any exploitation of such persons for private advantage." The expectation of collegiality is re-emphasized in Article 5.4. A responsibility arising from the nature of the educational process is to "conduct.. oneself in a collegial manner in all interactions." Thus, Articles 5.3 and 5.4 of the CBA narrow the rights of academic freedom guaranteed in Articles 5.1 and 5.2. [1]

While, "collegial" is not a defined term in the CBA, it is a term of art in higher education. It denotes a faculty member's responsibility to his or her institution, academic unit and colleagues. The concept of collegiality is introduced in the CBA's preamble. With regard to the relationship of colleagues, the preamble recites: "The collegial relationship is most effective when peers work critically together to carry out their duties in the most professional manner possible."

The issue presented in this case is whether Dr. Long's references to Dr. Washburn

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[1] While concepts of academic freedom may overlap with the First Amendment, they are not co-extensive. The Arbitrator has confined her decision and award, therefore, to the term as found in the CBA and as discussed in precedent.

and Dr. Washburn's wife in class lectures fall within the penumbra of the academic freedom guaranteed in Articles 5.1 and 5.2. There is no question that the subject matter on which Dr. Long lectured–ethics and professional responsibility-was part of the course content. There is also no question that the method he used to teach–providing real life examples of how relevant statutes and rules govern the practice of engineering–was an appropriate pedagogical method. Dr. Long had every right to speak "frankly and forthrightly" about ethics and professional responsibility without fear of censorship by the University's academic administration. However, did his use of Dr. Washburn and Dr. Washburn's wife as classroom examples violate Articles 5.3 and 5.4 ?

Numerous cases have addressed the bounds of academic freedom in a university level classroom. See, e.g. *Edwards v. California University of Pennsylvania*, 156 F.3d 488 (3rd Cir. 1998); *Brady v. Pittsburgh Board of Education*, 910 F.2d 1172 (3rd Cir. 1990); *Piarowski v. Illinois Community College Dist. 515, 759 F.2d 625, 629* (7th Cir.), cert. denied, 474 U.S. 1007, 106 S. Ct. 528, 88 L. Ed. 2d 460 (1985); *Megill v. Board of Regents,* 541 F.2d 1073 (5th Cir. 1976); *Vega v. SUNY Board of Trustees*, 67 F. Supp. 2d 324 (S.D. NY 1999); *Rubin v. Ikenberry*, 933 F. Supp. 1425 (C.D. Ill. 1996) *Scallet v. Rosenblum*, 911 F. Supp. 999 (WD Va. 1996). Whether viewed as academic freedom or exercise of First Amendment rights, faculty have the right to speak in the classroom on matters of public concern that are germane to the topics they teach.

However, it is equally clear that a professor's podium cannot be used as a bully pulpit to advance personal disputes in the presence of a captive student audience. *Keen v. Penson*, 970 F.2d 252, 257 (7th Cir. 1992) Academic freedom does not license

uncontrolled expression which is detrimental to the institution's proper functioning. *Ferguson v. Thomas*, 430 F.2d 852, 858 (5th Cir. 1970).

Dr. Long's use of Dr. Washburn and his wife as examples of unprofessional behavior was not borne of mere coincidence. Dr. Long admitted at hearing and in his March 7, 2003 letter to Dr. Tedesco that he had previously talked to Dr. Washburn about his use of the "P.E." designation when he was first hired. Dr. Long admitted that he "might" have accused Dr. Washburn of "stealing" his course on the first day of class. Dr. Long also testified that Dr. Washburn, a newer faculty member hired because of his CAD experience, had changed the content of TTL 4004, a course he created and taught for many years.

Dr. Long had a right to focus on the importance of the PE designation as part of the content of EGN 4032. But, isolating and pinpointing a departmental colleague to students he will teach as an example of unethical and illegal behavior surely falls within the proscriptions of Articles 5.3 and 5.4 and the spirit of collegiality heralded in the CBA preamble. Such derision, especially in such a small track as Transportation Engineering, was irresponsible. See *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972) [professor could be disciplined for airing complaints about the administration and other teachers to students in a classroom].[2]

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[2] The Court in *Clark* rejected the professor's First Amendment and academic freedom claims, stating " ... we do not conceive academic freedom to be a license for uncontrolled expression at variance with established curricular contents and internally destructive of the proper functioning of the institution. First Amendment rights must be applied in light of the special characteristics of the environment in the particular case. *Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d*

While it is often difficult to distinguish when lack of collegiality or the exercise of academic freedom has been the impetus for discipline, the Arbitrator believes the greater weight of the evidence shows that Dr. Long's statements were not protected by academic freedom under Articles 5.1 and 5.2.

AWARD

Based on the precedent cited and the reasons stated, Dr. Long's grievance is denied. All claims not expressly granted in this arbitration are hereby DENIED. This Award is in full settlement of all claims submitted to this arbitration. In accordance with Article 20.8(8), the fees and expenses of the Arbitrator shall be divided equally between the parties.

DATED _____2004.

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Leslie W. Langbein, Arbitrator

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731 (1969); Healy, supra. The plaintiff here irresponsibly made captious remarks to a captive audience, one, moreover, that was composed of students who were dependent on him for grades and recommendations. See *Ferguson v. Thomas, 430 F.2d 852, 858 (5th Cir. 1970).*

Furthermore, *Pickering* suggests that certain legitimate interests of the State may limit a teacher's right to say what he pleases: for example, (1) the need to maintain discipline or harmony among co-workers; (2) the need for confidentiality; (3) the need to curtail conduct which impedes the teacher's proper and competent performance of his daily duties; and (4) the need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence. Cf. *Cook County Teachers Union, Loc. 1600 v. Byrd, 456 F.2d 882, 889-890 (7th Cir. 1972),* cert. denied *409 U.S. 848, 93 S. Ct. 56, 34 L. Ed. 2d 90; Albaum v. Carey, 310 F. Supp. 594, 596,* (E.D.N.Y.1969)."