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Panel: Finding All Sides of the Truth: Investigating and Handling Employee Discipline (CLE)

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Arbitrators Panel on Discipline and Discharge in Higher Education: Scenario A

Reminder and Summary of Facts:

Professor is a renowned and prolific scholar of social science, critical race theory, religion, and law. Professor is exceptional at bringing in grant funds. Last year, the tenured faculty at University unionized. During that organizing drive, Professor was outspoken and critical of the current University administration. University voluntarily recognized the union to avoid political exposure.

For years, University has received complaints about Professor's behavior. Each year at least a few of his student evaluations contain complaints regarding his attitude toward female students, use the term "boy" when speaking with African American men, or religious proclamations and condemnations. University has usually considered the benefits and prestige of having Professor on its faculty as outweighing the cost of taking any formal actions to investigate or correct his conduct.

Following a complaint by a student who alleges the Professor coerced the student into a sexual relationship, the University immediately issues a letter to Professor placing him on paid suspension pending investigation of "serious student complaints of violation of the University's Title IX policy and threats to student safety."

Faculty Response and Social Media

Rumor of Professor's suspension spreads rapidly. University receives a petition signed by several faculty arguing that Professor has been unjustly suspended without due process and demanding his immediate return to work.

Several Faculty reach out to Professor via Facebook, wishing him the best, offering assistance, and agreeing that he is being treated unfairly.

Encouraged by the statements of his peers, Professor goes on Twitter and tweets the following:

- Unjustly accused and no due process at University #NoJusticeNoPeace
- High-tech lynchings for oppressed peoples at University in 2019 #Slaves
- We voted for a Union and I am paying the price. #UnionRightsAreCivilRights.
- The Lord shall repay all according to what they have done. #VENGENGE

Letter of Censor and Warning

In response to Professor's tweets, University issues a letter reminding him of his obligations to professionalism and censoring him. The letter rebukes his use of "racially charged" language in violation of University anti-discrimination policy and warns that further use of such language can result in discipline up to and including termination. The letter further refers professor to the University's Employee Assistance Program (EAP) Coordinator to schedule a meeting to address his conduct.

Union Grievance #1

University receives a grievance from Union representing the faculty. The Union's grievance alleges violation of the CBA provisions regarding:

- Retaliation for Union and protected activity
- Just Cause

The Union demands that the University immediately rescind the letter of censor.

1. Should the Arbitrator sustain or deny the grievance?

Union Grievance #2

During the course of the investigation into the allegations of the student, the Professor agrees to meet with the University. Professor asserts the following

- Student always struggled in his courses.
- Sexual relationship with Student was consensual
- Sexual relationship does not obligate Professor to give Student passing grades and a job.
- Student became obsessed with him
- Professor was trying to mentor Student
- Student failed to timely submit assignments

At the conclusion of the University's investigation, the University find that there was no violation of the Title IX policy but that there was a violation of the University's Policy on Sexual, Romantic, Amorous, and/or Dating Relationships Between Faculty and Students. The University suspends the Professor for a semester without pay. The Union files a grievance alleging there is no just cause for the suspension. The Union also argues disparate treatment, pointing to relationships between faculty members and students where the faculty members married the students, and no discipline occurred. The most recent example the Union cites occurred approximately ten years ago.

1. Should the Arbitrator sustain or deny the grievance?

Advocates Panel Hypo Two: Bob Bookish

Bob Bookish is an assistant librarian at State University where he has worked for 8 years. He is an hourly non-exempt employee with an annualized salary of \$40,000. His duties include opening and closing the law school library, managing circulation, research database instruction, and other special projects as assigned by his manager. When he was hired, his schedule was programmed as 8 hours per day Wednesday through Sunday, with Monday and Tuesday off. Bob is represented by the Faculty Federation, Local 2019 and serves as the Local's Vice President.

Between 2014 and 2018, he was managed by Deborah Director. The two had a good working relationship, but Bob was issued two warnings in 2017—one for attendance and misuse of leave, and another due to subpar work performance related to a database cataloging project. Neither warning was grieved. In early 2013, Bob's hours were changed to 8 hours per day Monday through Friday, with Saturday and Sunday off.

Deborah Director retired before the 2018 fall semester. She was replaced by Martha Manager, who has 15 years' experience running law libraries. Ms. Manager has a "hands-on" management style that clashed with Bob's more laid-back view of his role at the library. Bob had several encounters with Martha in that semester, including several instances of verbal counseling for inaccurate work. Late in the semester the two had a verbal altercation where Bob became upset when he thought he heard Martha call him a "lazy freeloader" for not completing a project on-time. Martha denied saying that and Bob was issued a Final Warning for insubordination.

As a result of budget shortfalls and inaction in the state legislature, State University issued a spending freeze and a directive that all departments must cut spending by 10% starting with the spring 2019 semester. Local 2019 had been a fierce opponent of spending cuts and its members, including Bob, have participated in rallies and sit-ins at the state house.

Martha reviewed the library's budget to make the directed cuts, and discovered significant overtime expenditures attributed to Bob. Believing it to be a mistake she contacted the University's payroll department for more information. Payroll confirmed that Bob had been paid \$15,000 in overtime in 2018, and had likewise earned between \$10,000 and \$15,000 in each of the previous 5 years. Believing that there was no possible explanation other than theft, she called Bob and told him he was suspended pending an investigation. When Bob asked why, Martha stated "look at your paystub, I think you know why" and hung up.

Martha contacted Human Resources and requested their assistance in investigating what she believes to be tens of thousands of dollars of theft by Bob. HR begins its investigation immediately.

HR Investigation:

1. HR contacts Bob to come in for an interview. He demands that he will only come in if his chosen union representative is present. When HR reaches out to the union, it learns that the requested representative is on a 2-week trip to Europe. What should they do?

2. What documents and/or other information should HR review before meeting with Bob?
3. What questions should HR ask Bob?
4. Who else should HR interview?

Information Learned:

HR finally meets with Bob a week and a half after he was suspended. HR provides Bob with a spreadsheet showing the aggregate overtime paid from 2011 through 2018. [HANDOUT or SLIDE]

HR asked Bob how he could have been paid all this overtime and Bob stated that it had been approved or he didn't know about it. In response to an HR question about paystubs, Bob produces a stack of unopened paystubs, and claimed that he never opens them. HR also asked if Bob noticed the increased income when he did his taxes, and Bob said he just sends everything to his accountant.

Bob spends the remainder of the meeting denigrating Martha and blaming all his problems on her.

HR tells Bob it will follow up soon once its investigation is complete.

Post Suspension Conduct:

The following day, Bob takes to social media in support of Local 2019's efforts to increase state funding to State University, posting the following to his personal accounts:

- Freeze administrative bloat @StateUniversity, not essential student services. #TrimTheFat #FundHigherEd #StatePoli
- Looking for waste? #cut @MarthaManager a lousy manager who only cares about \$\$ not her employees #UnionStrong #CutThis #FireMartha
- @MarthaManger's financial ineptitude running @StateUniversity @LawLibrary into ground #CutMarthaCutCosts #FireMartha
- I found a target for the @StateUniversity cuts! #FireMartha #CutMarthaCutCosts

Martha
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Bob's I

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and wants Bob terminated
a threat on her life. She drafts

Following a 4 week suspension, HR concludes its investigation regarding the payroll issue and states that Bob had failed to substantiate how or why he had received so much money in overtime payments. HR sends a letter to Bob stating that he has been terminated as a result of the University's investigation. The stated reasons for discharge are "violation of University policies, including the Time Keeping & Attendance Policies." The letter does not mention the Tweets and perceived threats.

Post-Discharge

The Union grieves Bob's termination as without just cause. The grievance is denied at each step and is moved to arbitration.

The Union files an information request seeking the following:

1. Any and all documents the University relied up on in its termination of Mr. Bookish;
2. A list of reasons the University discharged Mr. Bookish;
3. Any evidence of past discipline for overtime work;
4. Any witness statements or notes from the University's investigation

You are State University's Director of Labor Relations.

How do you respond to the information request?

How do you prepare your case for arbitration?

Arbitrators Panel: Scenario B

Reminder and Summary of Facts:

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Between 2014 and 2018, he was managed by Deborah Director. The two had a good working relationship. Deborah Director retired before the 2018 fall semester. She was replaced by Martha Manager, who has 15 years' experience running law libraries. Ms. Manager has a "hands-on" management style that clashed with Bob's more laid-back view of his role at the library. Bob had several encounters with Martha in that semester, including several instances of verbal counseling for inaccurate work. Late in the semester the two had a verbal altercation as a result of which Bob was issued a Final Warning for insubordination.

As a result of budget shortfalls and inaction in the state legislature, State University issued a spending freeze and a directive that all departments must cut spending by 10% starting with the spring 2019 semester. Local 2019 had been a fierce opponent of spending cuts and its members, including Bob, have participated in rallies and sit-ins at the state house.

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Following a 4 week suspension, HR concludes its investigation regarding the payroll issue and states that Bob had failed to substantiate how or why he had received so much money in overtime payments. HR sends a letter to Bob stating that he has been terminated as a result of the University's investigation. The stated reasons for discharge are "violation of University policies, including the Time Keeping & Attendance Policies." The letter does not mention the Tweets and perceived threats (in which Bob suggested cutting Martha's position to save money).

The Union grieves Bob's termination as without just cause. The grievance is denied at each step and is moved to arbitration.

1. Should the Arbitrator sustain or deny the Union's grievance?

Arbitrators Panel: Scenario C

The following facts are not in dispute:

A state university (“University”) recently enacted a policy concerning the use of social media that outlines a number of reasons when professors or any other employee can be terminated for the improper use of social media.

The University policy provides that an employee can be dismissed for the improper use of social media postings when it incites violence, reveals confidential student information, or for the “improper use” of social media. It defines “the improper use” of social media as follows: “any communication made in furtherance of the employee’s official duties that is contrary to the best interest of the University, and any communication that “impairs discipline by superiors or harmony among co-workers, has detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker’s official duties, interferes with the regular operation of the university, or otherwise adversely affects the university’s ability to efficiently provide service.”

John Smith, a part-time professor of political science, caused a major controversy when, using his own computer, he posted, on his personal Twitter account, remarks about his disapproval of Trump’s decision to recognize Jerusalem as Israel’s capital. In his posting, Smith also stated that he supported a Palestinian State and called for a “free Palestine from the river to the sea.” This is a phrase often used by terrorist groups that are intent on the destruction of Israel. He posted pictures depicting a violent interaction between an Israeli soldier and Palestinian girl during a protest. The posting went viral with calls for his dismissal accusing him of Anti-Semitism. There were protests at the University both in support of his remarks and against his postings. The University also received letters from donors threatening to withdraw certain donations if the University did not discipline Smith.

In response, the University sent Smith a letter notifying him that his posting violated its social media policy for his improper use of his Twitter account because it adversely interfered with the regular operations of the University. Smith refused to remove the posting, asserting his First Amendment rights of free speech. The University terminates Smith. The Union filed a grievance alleging that: his statements are protected under First Amendment; it restrict his academic freedom; the policy is overly broad; and that the University failed to articulate a legitimate interest to restrict his speech.

Should the Arbitrator sustain or deny the grievance?

Arbitrators Panel: Scenario D

John Brown, a tenured professor of sociology, has been employed with the State University (“University”) for thirty (30) years. From September – December 2018, three (3) female students individually complained to the administration that Professor Brown “inappropriately rubbed their arms, shoulders, and backs during private one-on-one counseling session”. Student 1 informed the Dean of Student Affairs, Student 2 informed human resources, and Student 3 informed the Title IX Coordinator of these allegations. Student 3 also alleged that Professor Brown stated that her “long legs were sexy”. Neither student informed Professor Brown that his comments and conduct were unwelcomed. These are the first sexual harassment allegations brought against Professor Brown during his academic career. Professor Brown last received sexual harassment training in 1989 immediately after being hired by the University. The University’s sexual harassment policies and reporting procedures are as follows:

The University’s Policy Prohibiting Sexual Harassment: Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when...Such conduct has the purpose or effect of unreasonably interfering with an individual’s work or educational performance, or of creating an intimidating, hostile, or offensive environment for work, learning or living. Complaints should be directed to the Office of Human Resources or Employee Relations. **The University’s Title IX Policy:** Female, male, and gender non-conforming students, faculty, and staff are protected from any sex-based discrimination, harassment or violence regardless of their real or perceived sex, gender identity, gender expression, and pregnancy/parenting status. The Title IX Coordinator is responsible for ensuring effective and timely responses to complaints of sexual violence, misconduct, discrimination or harassment. **The Collective Bargaining Agreement** references and incorporates the University’s sexual harassment and Title IX policies and reporting procedures concerning tenured faculty.

Human resources investigated Students 1, 2, and 3 allegations and determined that Professor Brown was guilty of sexually harassing each student in violation of the University’s sexual harassment policy. Professor Brown was informed of each allegation by human resources at the same time and investigations concerning each allegation were conducted simultaneously.

The University typically employs progressive discipline (e.g., written warning, counseling, and training for the first infraction) depending on the severity of the infraction but seeks to suspend Professor Brown for one month because of multiple violations of the University’s sexual harassment policy. The University maintains that Professor Brown is aware of the University’s sexual harassment policies in that these policies are posted on the University’s website.

The Union filed a grievance alleging the following: (1) Professor Brown is innocent of all allegations; (2) Professor Brown was not provided notice concerning the University’s sexual harassment policies; (3) Professor Brown was neither afforded due process nor a fair investigation in that the Title IX Coordinator, and not human resources, has jurisdiction to investigate these allegations in that the alleged incidents involved students and not employees; and (4) If Professor Brown is found guilty, the appropriate penalty should be a written warning and training in that this would be his first infraction.

The University ultimately suspends Professor Brown for one semester without pay. The Union grieves the discipline.

1. Should the Arbitrator sustain or deny the grievance?

Arbitrators Panel: Scenario E

Higher Ed Community College (“College” or “Employer”) serves 20,000 credit students and its’ enrollment has grown by double digits in each of the last three years. The faculty and staff complain that while the student population has grown by nearly 35%, the employee population has remained the same. The non-teaching staff have been represented by the College Staff Union (“CSU” or “Union”) for over twenty years and the CSU and the College are parties to a collective bargaining agreement (“CBA” or “Contract” or “Agreement”). All discipline is subject to just cause.

During the past three years, the staff has come under increasing pressure to not utilize their generous leave benefits. Each staff member with more than ten years of service is allotted 12 sick days and 20 vacation days each January 1st. While sick leave may be carried over each year (and sick leave accruals are not capped), vacation days must be used in the calendar year they are afforded.

In addition to sick leave, employees are entitled to up to twelve (12) weeks of unpaid leave to care for themselves or a qualifying family member with a serious health condition as per the Family Medical Leave Act (“FMLA”). FMLA is not mentioned in the collective bargaining agreement.

Article IX of the collective bargaining agreement states the following in regard to the use of vacation days:

Normally, individual vacation days will be requested five (5) or more days in advance, but an employee may request such time with less than twenty-four (24) hour notice for each day requested. Such vacation days will be granted whenever College operating needs permit.

Ms. Violet has been employed as a lab assistant in the physics department for 20 years. Until three years ago, she utilized very little sick leave each year and used all of her vacation days. Beginning in 2017, Mr. Lab (Ms. Violet’s supervisor) has regularly denied Ms. Violet’s request for vacation days, no matter how far in advance she requests the leave, citing “College operating needs”.

On March 30, 2017, Mr. Lab gave Ms. Violet a verbal reprimand. Mr. Lab stated Ms. Violet abused her sick leave by utilizing 5 sick days after he denied Ms. Violet’s request for vacation days. On April 3, 2017, Mr. Lab gave Ms. Violet a written reprimand for nearly identical conduct (requesting a vacation day and, when denied, calling in sick). On May 3, 2017, the College suspended Ms. Violet for ten (10) days for identical conduct.

The Union filed a grievance after Ms. Violet confidentially shared with Mr. Union Steward that she suffers from a chronic, degenerative health condition that was diagnosed three years ago. Ms. Violet did not want to reveal this condition to anyone at work as she is afraid she will be treated differently or forced to retire.

Should the Arbitrator sustain or deny the grievance?

Arbitrator Panel - Scenario F

Professor Mosi was denied tenure by the University. The parties agreed to the following facts. The parties stipulated to the following facts:

There are three general areas of evaluation for tenure and promotion evaluation: 1) instruction and instructionally related activities; 2) scholarly and creative achievements; and 3) University/community/professional service. The Department of Accountancy Retention, Tenure and Promotion (“RTP”) committee, the Department of Accountancy chair, the College of Business Administration (“CoBA”) RTP committee and the dean of the CoBA recommended that Dr. Mosi not be granted tenure and promotion to associate professor. The University’s decision to deny Dr. Mosi’s tenure and promotion to associate professor was based on Dr. Mosi’s performance in the area of scholarly and creative achievement. The provost is the president’s designee to make tenure and promotion decisions.

The Standard of Review

The arbitrator is prohibited by the language of the Collective Bargaining Agreement from substituting her or his judgment for that of the president of the campus. That means that the arbitrator does not have “...unfettered authority to redecide tenure and promotion decisions based on his or her own evaluation of the candidate’s record...” (*citations omitted*). The ultimate decision for the arbitrator is to determine “...whether the decision made by those charged with making it was not reasoned...” (*citations omitted*).

For an arbitrator to conclude that ‘reasoned judgment’ was not exercised in a particular case would normally require a strong showing, e.g., that the University’s decision was based on criteria different from those set forth in established policies; that criteria were applied in an arbitrary, inconsistent or discriminatory manner; that evidence strongly in the applicant’s favor was ignored; or that the decision-making process was demonstrably defective for some other concrete reason.

Facts

In considering Dr. Mosi’s application for promotion to Associate Professor with tenure, the Department and the College reviews rejected the publication in the journal, *Online Energy Accounting Quarterly (QEAQ)*. the Department Chair told Grievant at one point in the pre-review process that an article in *QEAQ* would be considered toward the three (3) publications in a high quality peer-reviewed scholarly publication. The Department had previously credited an *OEGQ* article in considering an earlier faculty member’s tenure application. Dr. Mosi relied on the Department Chair’s representation as to the RTP process and that of experienced colleagues as advised to do

The provost independently considered the application and decided the journal to be should not be considered toward the three publications in a high quality, peer reviewed scholarly publication and then failed to credit the article toward the publication criteria.. The Provost also considered that the Department RTP Committee and the Department RTP Committee had rejected the *QEAQ* journal as appropriate to meet the quality-test for scholarly work worthy of tenure.

1. Did the University commit a procedural error demonstrating that “reasoned judgment” was not exercised?
2. Was the error prejudicial to the decision with respect to Grievant?
3. If there is a violation, what should the remedy be?