

**In the Matter of Arbitration Between :**

**UNITED FACULTY OF FLORIDA :**

**And**

**UNIVERSITY OF FLORIDA :**

**BOARD OF TRUSTEES :**

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**RE: Dr. Judy Robinson, Grievant**

**Representing UFF**

**Candace Churchill**

**Service Unit Director**

**556 NE 11 St.**

**Gainesville, FL 32601**

**Representing University of Florida**

**Charles M. Deal**

**Associate General Counsel**

**123 Tigert Hall**

**Gainesville, FL 32611-2703**

## **ARBITRATION DECISION AND AWARD**

### **Preliminary Matters**

On January 15, 2010, the undersigned was notified of his selection to serve as arbitrator in these proceedings via email from Robin Bielling, on behalf of University of Florida Associate General Counsel Charles M. Deal. Notice of hearing was issued to the parties on February 23, 2010. Pursuant to this notice, the hearing was conducted on April 26, 2010, at Emerson hall, Room 207, 1938 W. University Avenue, Gainesville, Florida. At that time, both parties were ably represented, and presented evidence through the testimony of four witnesses and thirty-one exhibits. Both parties presented opening statements and filed post hearing briefs.

The University of Florida will be referred to as UF, and the United Faculty of Florida will be referred to as UFF. Exhibits will be referred to as (UF # \_\_), (UFF # \_\_), or (JT # \_\_), as appropriate. References to testimony by a witness will be indicated by (Witness Name).

### **ISSUES**

There was no stipulation as to the issue.

It is determined that the issues to be resolved by the arbitrator are as follows:

Whether the University of Florida violated the collective bargaining agreement when it non-renewed the Grievant.

If the non-renewal was in violation of the collective bargaining agreement, what is the proper remedy.

## RELEVANT CONTRACTUAL PROVISIONS

### **Article 13 Non-Renewal**

#### **13.2 Non-renewal and Termination of Faculty Appointments.**

- (b) Tenure-accruing and Permanent-status-accruing Faculty. The appointment of a tenure-accruing or permanent-status-accruing faculty member shall be renewed annually until the end of the tenure or permanent-status probationary period unless one or more of the following occurs:
- (1) The faculty member's position is abolished, the faculty member's department or equivalent unit is abolished, or the faculty member's department experiences a reallocation of resources or reorganization of program offerings or functions that would justify the non-renewal; or
  - (2) The faculty member, in accordance with the Evaluation and Tenure articles of this Agreement, receives an overall "unsatisfactory" evaluation on the annual performance evaluation.

#### **13.3 Notice of Ending of Employment of Non-Tenured and Non-Permanent Status Faculty Members.**

- (b) Except for faculty members described in subsection (a)(1) above, any non-tenured faculty member who is not being offered a further appointment shall receive written notice that they will not be offered further appointment according to the following terms:
- (1) For faculty members in their first two (2) years of continuous university service, one semester (or its equivalent, 19.5 weeks, for faculty members appointed for more than an academic year) prior to the last day of employment;
  - (2) For faculty members in their third contract year of employment or beyond, twelve months prior to the last day of employment;
- (c) Prior to the transmission of the notice of non-renewal, the President or designee shall confer informally with the faculty member concerning the non-renewal.
- (d) The notice of non-renewal shall include the following:
- (1) A statement that the Trustees are not renewing the employment contract;
  - (2) A reference to the meeting held with the President or designee to advise the faculty member of non-reappointment;
  - (3) The expiration date of the current contract;
  - (4) The last date of employment with the University;

(5) A statement that the faculty member may contest the decision, in accordance with Article 31, Grievance Procedure and Arbitration, because of an alleged violation of a specific term or provision of the Agreement or because of an alleged violation of the faculty member's constitutional rights.

(6) A copy of Article 31, Grievance Procedure and Arbitration.

(e) All such notices and statements shall be sent by certified mail, return receipt requested, or delivered in person to the faculty member with written documentation of receipt obtained.

(f) A faculty member who is entitled to written notice of non-renewal in accordance with the provisions of Section 13.3 and who receives written notice that the faculty member will not be offered further appointment shall receive, upon written request within twenty (20) days following receipt of such notice, a written statement of the basis for the decision not to renew the appointment. The President or designee shall provide such statement within twenty (20) days following receipt of the request. All such notices and statements shall be sent by certified mail, return receipt requested, or delivered in person to the faculty member with written documentation of receipt obtained.

(g) If the Trustees do not comply with providing proper notice, as required in subsections (b)–(e), above, the faculty member's employment shall be continued for no less than one additional year.

(h) Reassignment.

(1) Following the delivery of the notice of non-renewal, the Trustees or designees may, at any time, reassign such faculty member to other university duties after consultation with the faculty member and the departments or other units affected.

(2) Such reassignment does not release the Trustees from their contractual commitment to compensate the faculty member for the period prior to the effective date of non-renewal.

#### **13.4 Grievability.**

(a) A faculty member who receives written notice of non-renewal may, according to Article 31, Grievance Procedure and Arbitration, contest the decision because of an alleged violation of a specific term or provision of the Agreement or because of an alleged violation of the faculty member's constitutional rights.

(b) Such grievances must be filed within sixty (60) days of receipt of the statement of the basis for the decision not to non-renew or receipt of the notice of non-renewal if no statement is requested.

#### **13.5 Re-employment Considerations.**

If the decision not to renew the appointment was based primarily upon adverse financial circumstances, reallocation of resources, reorganization of degree or curriculum offerings or requirements, reorganization of academic or administrative structures, programs, or functions, or

curtailment or abolition of one or more programs or functions, the Trustees shall take the following actions:

(a) Make a reasonable effort to locate appropriate alternative or equivalent employment within the University; and

(b) Offer such faculty member, who is not otherwise employed in an equivalent full-time position, re-employment in the same or similar position at the University for a period of two years following the initial notice of non-renewal, should an opportunity for such re-employment arise.

(1) All persons on the recall list shall regularly be sent the position vacancy announcements. For this purpose, it shall be the faculty member's responsibility to keep the Trustees advised of the faculty member's current address.

(2) Should a vacancy occur at another university within the State, the faculty member may apply for the position.

(3) Any offer of re-employment pursuant to this section must be accepted within fifteen (15) days after the date of the offer, such acceptance to take effect not later than the beginning of the semester immediately following the date the offer was made. In the event such offer of re-employment is not accepted, the employee shall receive no further consideration pursuant to this Article.

## **Article 18 Faculty Member Performance Evaluations and Evaluation File**

### **18.1 Policy.**

Performance evaluations are intended to communicate to a faculty member a qualitative assessment of that faculty member's performance of assigned duties by providing written constructive feedback that will assist in improving the faculty member's performance and expertise.

(a) Annual Evaluations. Each faculty member's performance shall be evaluated at least once annually, with the exception of those faculty members who have resigned, who are on visiting appointments, or who have either received notice of non-renewal or are not entitled to receive notice of non-renewal under the Non-Renewal article. Faculty shall be evaluated according to the most recently approved standards and procedures, provided that those standards and procedures were in place prior to the beginning of the evaluation period.

(b) Personnel decisions shall be based on written annual evaluations, provided that, where appropriate, such decisions need not be based solely on written faculty performance evaluations.

### **18.2 Sources of Evaluation.**

(b) The person(s) responsible for completing the faculty member's annual evaluation shall also consider, where appropriate and available, information from the following sources: immediate supervisor, peers, students, faculty member/self, other university officials who have responsibility for supervision of the faculty member, and individuals to whom the faculty member may be responsible in the course of a service assignment, including public school

officials when a faculty member has a service assignment to the public schools. Any materials to be used in the evaluation process submitted by persons other than the faculty member shall be shown to the faculty member, who may attach a written response.

(c) University Required Student Evaluations. The tabulated results and written comments of student evaluations of classroom instruction shall be provided to the faculty member no later than thirty (30) days following the end of classes in the semester in which the evaluation occurred, or as soon thereafter as is feasible.

### **18.5 University Criteria for Annual Performance Evaluations.**

The annual performance evaluations shall be based upon assigned duties, and shall carefully consider the nature of the assignments and quality of the performance in terms, where applicable, of:

(a) Teaching effectiveness, including effectiveness in presenting knowledge, information, and ideas by means or methods such as lecture, discussion, assignment and recitation, demonstration, laboratory exercise, practical experience, student evaluations, assessment of and engagement with student work, and direct consultation with students.

(1) The evaluation shall include consideration of effectiveness in presenting knowledge and skills, and effectiveness in stimulating students' critical thinking and/or creative abilities, the development or revision of curriculum and course structure, and adherence to accepted standards of professional behavior in meeting responsibilities to students.

(2) The evaluation shall include consideration of other assigned university teaching duties, such as advising, counseling, supervision of interns, or duties of the position held by the faculty member.

(3) The evaluator shall take into account any relevant materials submitted by the faculty member such as class notes, syllabi, student exams and assignments, a faculty member's teaching portfolio, results of peer evaluations of teaching, and any other materials relevant to the faculty member's instructional assignment.

(4) The chair shall consider all information available in forming an assessment of teaching effectiveness.

(b) Contribution to the discovery of new knowledge, development of new educational techniques, and other forms of research/scholarship/creative activity.

(1) Evidence of research/scholarship/ creative activity, either print or electronic, shall include, but not be limited to, published books; chapters in books; articles and papers in professional journals; musical compositions, paintings, sculpture; works of performing art; papers presented at meetings of professional societies; reviews, and research and creative activity that has not yet resulted in publication, display, or performance.

(2) The evaluation shall include consideration of the quality and quantity of the faculty member's research/scholarship and other creative programs and contributions

during the evaluation period, and recognition by the academic or professional community of what has been accomplished.

- (c) Service within the university and public service that extends professional or discipline related contributions to the community; the State, including public schools; and the national and international community. Such service includes contributions to scholarly and professional conferences and organizations and unpaid positions on governmental boards, agencies, and commissions that are beneficial to such groups and individuals.
- (d) Participation in the governance processes of the institution through significant service on committees, councils, and senates, and the faculty member's contributions to the governance of the institution through participation in regular departmental or college meetings.
- (e) Service as the UFF/UF President, service on the UFF bargaining team, or service as an official UFF grievance representative shall be considered significant service for the purposes of this subsection.
- (f) Other assigned university duties, such as advising, counseling, supervision of interns, and academic administration, or as described in a Position Description, if any, of the position held by the faculty member.

#### **18.7 Annual Evaluation Process.**

The annual evaluation assesses an employee's performance of assigned duties consistent with the criteria specified in Section 18.5 and in departmental by-laws.

- (a) The annual evaluation shall be conducted in the Spring semester, and shall include evaluation of assigned duties for the Fall and Spring semesters of the current academic year and the preceding Summer terms, if the faculty member had an appointment in a summer term. However, in accordance with subsection 18.6(c) above, the department may allow for an evaluation period for research/scholarship/creative activity of up to three (3) years.
- (b) The chair shall provide to his/her department faculty the form or format for submission of a faculty member's annual report no later than January 15. The student evaluations of classroom instruction for the preceding Fall semester shall also be provided to the faculty member no later than January 15, or as soon thereafter as is feasible.
- (c) Each faculty member shall submit to the chair the faculty member's annual report no later than March 15.
- (d) Faculty committees or other individuals submitting evaluative data that may be relevant to the annual evaluation, such as merit pay recommendations, shall report to the chair no later than April 15.
- (e) The chair shall complete the annual evaluation taking into account the faculty member's annual report and other sources of evaluative information referenced in Sections 18.2, 18.3, and 18.7(c) and (d) above, and both the University's criteria and the department's discipline-specific clarifications referenced in Sections 18.5 and 18.6, above. The chair's evaluation shall identify any major performance deficiencies and, if any such deficiency has been identified, shall provide

the faculty member with written constructive feedback designed to assist the faculty member in improving his/her performance.

(f) No later than May 1, the chair shall provide to the faculty member the proposed written annual evaluation, may include the faculty member's annual assignment for the next academic year, and shall attach to the annual evaluation a copy of the faculty member's annual report and the annual assignment for the year being evaluated.

(1) The faculty member shall be offered the opportunity to discuss the evaluation with the evaluator prior to its being finalized and placed in the faculty member's evaluation file.

(2) The evaluation shall be signed and dated by the person performing the evaluation and by the faculty member being evaluated, who may attach a concise comment to the evaluation. A copy of the evaluation shall be provided to the faculty member.

### **18.11 Evaluation File.**

(a) Policy. There shall be one (1) official evaluation file, containing a dated copy of all documents used in the assignment and evaluation process, other than evaluation for tenure or promotion, except for course materials, publications, public speeches/presentations, or papers presented at conferences. When evaluations and other personnel decisions are made, other than for tenure or promotion, the only documents that shall be considered are those contained in the official evaluation file, as well as the faculty member's course materials, publications, public speeches/presentations, or papers presented at conferences that are referenced in the official evaluation file.

(1) The department chair shall be the custodian of the evaluation file, and a notice specifying the location of faculty evaluation files shall be posted in each department/unit.

(2) Documents shall be placed in the evaluation file within a reasonable time after receipt. The faculty member shall be promptly notified when the document is placed in the faculty member's evaluation file.

(3) No adverse employment action shall be taken against the faculty member based upon material in the faculty member's evaluation file that has not been provided to the faculty member or to which the faculty member has not had an opportunity to attach a response.

(d) Anonymous Material. There shall be no anonymous material in the evaluation file except for numerical summaries of student evaluations that are part of a regular evaluation procedure of classroom instruction and/or written comments from students obtained as part of that regular evaluation procedure. If written comments from students in a course are included in the evaluation file, all of the comments obtained in the same course must be included

(e) Peer Committee Evaluations. The chair and other faculty of a department may develop a procedure for peers to evaluate the performance of faculty members, consistent with other provisions of this Agreement. This procedure shall be approved by the chair and other faculty and included in the department bylaws. The procedure shall identify how departmental faculty

will be involved in the process, how the faculty member will receive feedback on the peer evaluation, and whether the evaluation will be included in the faculty member's official evaluation file.

(f) **Removal of Contents.** Materials shown to be contrary to fact shall be removed from the file. This section shall not authorize the removal of materials from the evaluation file when there is a dispute concerning a matter of judgment or opinion rather than fact. Materials may also be removed pursuant to the resolution of a grievance.

(g) **Use of Evaluative Material.**

(1) Information reflecting the evaluation of a faculty member's performance shall be available for inspection only by the faculty member, the faculty member's representative, university officials who use the information in carrying out their responsibilities, peer committees responsible for evaluating the faculty member's performance, and arbitrators or others engaged by the parties to resolve disputes, or others by court order. Such limited access status shall not, however, apply to summary data, by course, for the common "core" items contained in student course evaluations that have been selected as such by the Trustees and made available by the Trustees to the public on a regular basis.

(2) in the event a grievance is filed, the trustees, the UFF grievance representatives, the arbitrator, and the grievant shall have the right to use, in the grievance proceedings, copies of materials from the grievant's evaluation file.

## **Article 19 Tenure and Permanent Status**

### **19.4 Extension of the Probationary Period for Tenure or Permanent Status.**

(c) The maximum extension of the probationary period that a faculty member can obtain under Section 19.4(a) is a total of two years.

(d) In addition, at any time before the President's final decision on the tenure nomination, a faculty member may request a one-year extension of the probationary period in extraordinary circumstances where the extension is necessary to allow the candidate to demonstrate professional excellence and capacity for future academic productivity.

### **19.7 Progress Toward Tenure.**

(b) **Midterm Review Assessing Progress Toward Tenure.** Except for faculty at the P. K. Yonge Developmental Research School, a special midterm review shall be conducted for any faculty members in the tenure probationary period during March or April of the third year of the tenure probationary period. The purpose of this appraisal shall be to assess the faculty member's progress toward meeting the criteria for tenure and to provide thoughtful and constructive assessments, suggestions, and guidance to assist the faculty member in fulfilling the University's tenure criteria, as clarified in the department's bylaws.

## **Article 31 Grievance Procedures and Arbitration**

### **31.1 Policy.**

The purpose of this Article is to provide for a prompt, reasonable, and efficient procedure for the investigation and resolution of grievances.

(c) No Reprisal. Neither the Trustees nor the UFF shall discriminate, harass, or retaliate in any way against any grievant, witness, UFF designee, or other participant in the grievance procedure as the result of an assertion of a violation of this Agreement.

(d) Authority of the Arbitrator.

(1) The arbitrator shall neither add to, subtract from, modify, nor alter the terms or provisions of this Agreement.

(2) Arbitration shall be confined solely to the application and/or interpretation of this Agreement and the precise issue(s) submitted for arbitration.

(3) The arbitrator shall refrain from issuing any statements of opinion or conclusions not essential to the determination of the issues submitted. Where an administrator has made a reasonable judgment involving the exercise of permissible discretion, such as subjective evaluative decisions regarding tenure or promotion, the arbitrator shall not substitute the arbitrator's judgment for that of the administrator. Nor shall the arbitrator review such decision except for the purpose of determining whether the decision has violated this Agreement.

(4) If the arbitrator determines that the Agreement has been violated, the arbitrator shall direct the Trustees to take appropriate remedial action.

(5) An arbitrator may award back salary and related retirement contributions where the arbitrator determines that the faculty member is not receiving the appropriate salary from the Trustees. The arbitrator may not award other monetary damages or penalties.

(6) An arbitrator's decision awarding employment beyond the tenure probationary period shall not entitle the faculty member to tenure. In tenure cases in which a substantive violation of this Agreement has been found, the remedy shall be for the grievant to be granted an additional year employment and reconsidered for tenure without prejudice at the earliest opportunity.

(7) If notice that further employment will not be offered is not given on time, the arbitrator may direct the university to renew the appointment only upon a finding that no other remedy is adequate, and that the notice was given so late that (a) the employee was deprived of reasonable opportunity to seek comparable employment, or (b) the employee actually rejected an offer of comparable employment which the employee otherwise would have accepted.

## SUMMARY OF POSITIONS OF PARTIES

### **UFF Position**

It is the position of UFF that UF violated numerous provisions of the collective bargaining agreement (CBA) between the parties when it determined to non-renew the grievant, Dr. Judy Robinson.

UFF maintains that the reason Dr. Robinson was non-renewed was due to unsatisfactory performance as evidenced by her 2008-2009 evaluation. UFF argues that Dr. Robinson did not receive a valid or fair annual evaluation for 2008-2009. Specifically, UFF argues the evidence establishes that UF violated the CBA in regard to the 2008-2009 evaluation as follows:

- there was more than one evaluation file;
- material used in Dr. Robinson's evaluation was not contained in her file;
- material in Dr. Robinson's file was undated;
- material in Dr. Robinson's file was not factual;
- material in Dr. Robinson's file was not shown to her;
- a meeting with Dr. Robinson was not offered or held prior to her first 2008-2009 evaluation;
- material in Dr. Robinson's file and alluded to in the chair's evaluation letter was anonymous;
- material used in her evaluation was not in her file;
- material used in her evaluation was more than one year old.

Assuming for the sake of argument that Dr. Robinson was non-renewed due to reallocation of resources, UFF asserts that UF violated the CBA by not making a reasonable effort to locate appropriate alternative or equivalent employment within the University, and not offering her re-employment in the same or similar position at the University for a period of two years following the initial notice of non-renewal, should an opportunity for such re-employment arise.

As a result of these alleged violations, it is the UFF's position that the non-renewal should be rescinded, that Dr. Robinson should be reinstated to her position at UF with her previous rank of Assistant professor, and that a proper 2008-2009 evaluation and special mid-term review for tenure be conducted, and that Dr. Robinson's "tenure clock" be stopped for the year 2009-2010 due to the events surrounding these proceedings.

## **UF Position**

It is the position of UF that the contract non-renewal of Dr. Robinson was proper. UF refers to the CBA which permits faculty non-renewals based upon performance deficiencies as evidenced through an unsatisfactory evaluation, based upon a reallocation of resources, and/or based upon programmatic changes. UF maintains the evidence established that all three permissible reasons for non-renewal were operative in this case.

UF argues that the evidence establishes numerous performance deficiencies justifying Dr. Robinson's unsatisfactory performance evaluation and non-renewal on that basis. In addition, the evidence established the necessity for reduction in force resulting in the elimination of her position. Finally, UF made a programmatic change, in that the duties performed by Dr. Robinson as Executive Director of FSPA would, in the future, be performed by a graduate assistant rather than by a faculty member.

UF argues that the non-renewal due to unsatisfactory performance was actually the more favorable of the two options available to UF, in that it provided Dr. Robinson with six months more employment than would have been provided had she been laid off. Finally, UF argues that, even if it had been shown that there was a violation of contract with respect to the non-renewal, the grievant failed to show that she was thereby disadvantaged.

Therefore, UF requests that the grievance be denied in its entirety.

## FINDINGS OF FACT

Based upon a review of the evidence presented at hearing, including testimony and exhibits, it is determined that the following findings of fact are relevant to the resolution of the issue presented by this grievance:

1. The Collective Bargaining Agreement (CBA) was in full force and effect at all times pertinent to this issue.
2. The Grievant, Dr. Judy Robinson, was employed by the UF College of Journalism (College) in August, 2006, and remains employed in that capacity, as a non-tenured, tenure-track faculty member.
3. Her evaluations during this period involved the areas of teaching, research and service.
4. The service area of her assignment primarily involved her role as Executive Director of the Florida Scholastic Press Association (FSPA), an organization that supports high school journalism in Florida high schools.
5. The Grievant spent approximately 25% of her time performing duties associated with FSPA.
6. During the relevant period, UF has faced a reduction of financial resources. In particular, the College of Journalism experienced a \$1.5 million budget reduction. (Wright)
7. The College was required to reduce staff and faculty. Included in these budget reductions was the decision to eliminate Grievant's position as FSPA Director, and fill that role instead with an adjunct. (Wright; Adesogan; UFF # 7)
8. As a non-tenured faculty member, Grievant was subject to layoff. Lay off would have provided Grievant with six months notice before loss of her position. (Wright, Adesogan)
9. The decision not to renew Grievant's appointment as Assistant Professor with the College, , as stated in Dr. Linda Hon's letters to Grievant dated August 3, 2009, and February 11, 2010, was based upon Grievant's 2008-2009 annual performance evaluation for which she received an overall unsatisfactory evaluation. (JT # 9; JT # 13)
10. The decision to non-renew Grievant based upon unsatisfactory performance resulted in twelve months notice before the loss of her position.
11. No midterm review of Grievant's performance was conducted. (Robinson; JT # 11)
12. Grievant's initial 2009-2009 Evaluation on June 15, 2009, (JT # 6) indicated in pertinent part with regard to her satisfactory rating in Teaching as follows:
  - Grievant's Fall teaching evaluation scores were good, and showed "a commendable improvement from your first two years."
  - Grievant's initiative in getting involved in doctoral advising was described as "laudable, especially given the increased emphasis on doctoral education at UF."

- Grievant was encouraged to “take a leadership role by chairing master’s committees. Not only is this contribution valuable in its own right, the experience of directing master’s theses will be invaluable as you move later toward establishing a record as an independent supervisor of doctoral students.”
- Regarding other instructional accomplishments, it was stated, “[T]hese accomplishments should prove helpful to you and the College as we move forward with curriculum changes . . . .”

13. In that same evaluation, Grievant’s Research rating was unsatisfactory. It was stated that Grievant’s “progress in this area has not been sufficient to put you on track for tenure.” Suggestions were made to improve her record in this regard. (JT # 6)

14. With regard to Service, the initial 2008-2009 Evaluation rated Grievant as unsatisfactory. It was stated, “[A]lthough there has been significant progress related to the financial management of the organization and the annual conference was a notable success, your relationship with some members of the board continues to be antagonistic. The large number of documented complaints has created a situation that has become untenable. . . . Effective August 16, 2009, your assignment in the College no longer includes any duties related to FSPA.” (JT # 6)

15. Grievant did not have the opportunity to discuss her evaluation prior to the issuance of the final evaluation letter. (Anderson; Adesogan)

16. UFF timely filed a grievance on behalf of Dr. Robinson on August 11, 2009, alleging numerous contractual violations relating to the annual evaluation and non-renewal of Dr. Robinson. (JT # 10)

17. On September 11, 2009, the grievance was denied by Dr. Hon. (JT # 11)

18. It was stipulated at hearing that there was more than one evaluation file kept concerning Grievant.

19. Documents used in the evaluation process were not shown to Grievant prior to the issuance of final evaluation letter. These documents were received October 21, 2009. (Robinson; Leavey; UFF # 1)

20. Material used in the evaluation process dealt with information from a time period preceding the current 2008-2009 contract year.. (Robinson; Leavey; UFF # 4; JT # 6, 12)

21. There was anonymous material contained in the Grievant’s file, and alluded to in the formal evaluation. (Robinson; Leavey; JT # 2; UFF # 1, 4)

22. Associate Provost, Dr. Angel Kwoleck-Folland, acknowledged in her Step 2 Report dated November 18, 2009, that “a procedural error did occur,” due to the fact that documented complaints were not made available to Grievant. Dr. Kwoleck-Folland directed that “the department will reconsider all evaluative materials related to the 2008-2009 annual review,” and stated further that, [I]f this review . . . results in a change in the overall evaluation related to non-renewal, the department will rescind the non-renewal.” (JT # 14; UFF # 1)

23. On January 29, a second evaluation was completed. There was no change in the content or rating of Grievant's performance in Teaching or Research, which were rated Satisfactory and Unsatisfactory respectively. (JT # 12).

24. There were significant changes in the content of the second evaluation concerning Service. A one-half page commentary in the first evaluation was replaced with one seven pages in length. There were new references to conduct alleged to have occurred in 2006 and 2007. There were untimely, undocumented and anonymous allegations and purely subjective statements in the evaluation, including the following:

- “You also lobbed a few figurative grenades in the direction of the board, indicating that it was a difficult group of personalities, all with the Machiavellian designs of controlling scholastic journalism in the state.”
- “In retrospect, I see that communication has been a significant problem for you. Board members began calling me soon after you assumed your duties . . . .”
- “In early 2007, less than six months after you joined the faculty, we began hearing complaints from FSPA members. . . . It was the content of what was said about your management of FSPA that was important, not the identities of the particular FSPA board members (who made the comments).”
- “Board member Jill Maassen thought it odd that you made no attempt to contact the board or its members prior to officially starting work.”
- “. . . within months (of Grievant's employment in 2006) you recommended to your colleagues at a faculty meeting that the organization be cast off and that a new organization – headed by you – be established. Within two months of your employment, you gave us reason to question your commitment.”
- “Problems continued that year (2007), as did phone calls from FSPA board members.”
- “At a board meeting prior to our meeting with Sollazzo and Zabele (on June 17, 2007), we were told you told the board members to ‘go to hell.’ In a follow up email, Sollazzo said, ‘The situation is sad. I believe she is sucking the life out of those around her.’ ”
- “In their darker moments, board members suggested that since Julie Dodd believed herself mistreated in her last years with the FSPA job, your role was to kill off the organization, with her behind-the-scenes participation. Odd and paranoid as this sounds, this was a persistent theory among FSPA members.”

25. On February 11, 2010, a letter was sent to Grievant by Dr. Hon advising that the revised evaluation for 2008-2009 continued to indicate an overall unsatisfactory performance evaluation, and that “the decision to non-renew your contract remains in effect.”

## DISCUSSION AND ANALYSIS

### **Reason for Non-renewal**

UF asserts that its non-renewal of Grievant was based upon unsatisfactory performance, reallocation of resources and programmatic changes. **Article 13(b)** of the CBA provides that “the appointment of a tenure-accruing or permanent-status-accruing faculty member shall be renewed annually until the end of the tenure or permanent-status probationary period unless one or more of the following occurs: . . .” (Emphasis added). Consequently, it would seem that UF had the contractual authority to use all three factors as the basis for non-renewal of a non-tenured faculty member.

Admittedly, the facts support that UF was experiencing some severe fiscal constraints.

However, as indicated in the Findings of Fact above, the sole reason initially cited for the non-renewal was unsatisfactory performance. The first that grievant knew that there was a fiscal rationale for her non-renewal was after she had been notified that her non-renewal was based upon unsatisfactory performance.

Furthermore, **Article 13.5 - Re-employment Considerations**, provides:

If the decision not to renew the appointment was based primarily upon adverse financial circumstances, reallocation of resources, reorganization of degree or curriculum offerings or requirements, reorganization of academic or administrative structures, programs, or functions, or curtailment or abolition of one or more programs or functions, the Trustees shall take the following actions:

- (a) Make a reasonable effort to locate appropriate alternative or equivalent employment within the University; and
- (b) Offer such faculty member, who is not otherwise employed in an equivalent full-time position, re-employment in the same or similar position at the University for a period of two years following the initial notice of non-renewal, should an opportunity for such re-employment arise.
  - (1) All persons on the recall list shall regularly be sent the position vacancy announcements. For this purpose, it shall be the faculty member’s responsibility to keep the Trustees advised of the faculty member’s current address.
  - (2) Should a vacancy occur at another university within the State, the faculty member may apply for the position.
  - (3) Any offer of re-employment pursuant to this section must be accepted within fifteen (15) days after the date of the offer, such acceptance to take effect not later than the beginning of the semester immediately following the date the offer was made. In the event such offer of re-employment is not accepted, the employee shall receive no further consideration pursuant to this Article.

There was no effort on the part of UF to comply with the provisions of this Article. No effort was made to locate appropriate alternative or equivalent employment within the University. No

offer was made regarding re-employment in the same or similar position at the University for a period of two years following the initial notice of non-renewal, should an opportunity for such re-employment arise. And there was no suggestion that the Grievant would be placed on a recall list at the termination of her employment with UF.

UF cannot have it both ways. If the non-renewal is based upon the fiscal factors enumerated in Article 13.5, then the affected individual is entitled to certain rights, including recall, that were not provided to the Grievant.

UF asserts that its choice to non-renew Grievant on the basis of unsatisfactory performance was actually to Grievant's advantage in that Grievant would be provided one year's notice as opposed to the six month notice provided for employees to be laid off. The record is clear on the point of which non-renewal is to Grievant's advantage. In addition to the fact that layoff provides for certain reassignment and/or recall rights, the stigma that attaches to a non-renewal based upon unsatisfactory performance is irrefutable.

UF's protestations notwithstanding, the record supports the conclusion that the primary, if not the sole reason for non-renewal of the Grievant was unsatisfactory performance.

### **Contract Violations**

The process used by UF in determining that Grievant's performance was unsatisfactory violated numerous CBA provisions.

**Article 18.1 - Policy**, provides in pertinent part as follows:

Performance evaluations are intended to communicate to a faculty member a qualitative assessment of that faculty member's performance of assigned duties by providing written constructive feedback that will assist in improving the faculty member's performance and expertise.

A close review of the two evaluations at issue in this matter reveals little, if any, "constructive feedback that will assist in improving the faculty member's performance and expertise." This is especially true in the evaluated area of Service. As was indicated above, and will be referred to later, this section of the second evaluation in particular contained undocumented, untimely, anonymous and, in the opinion of the undersigned, unprofessionally subjective comments that could not be, in any way, construed as constructive.

**Article 18.2 (b)**, provides in pertinent part as follows:

Any materials to be used in the evaluation process submitted by persons other than the faculty member shall be shown to the faculty member, who may attach a written response.

The record is clear that there were numerous materials used in Grievant's evaluation that were not shown to Grievant before the evaluation. In fact, the record indicates that these materials were not provided to Grievant until a demand was made to obtain them, at which time it became

clear that there was more than one evaluation file pertaining to Grievant, in violation of **Article 18.11**, a violation that UF acknowledged at hearing.

**Article 18.7(a)** provides as follows:

(a) The annual evaluation shall be conducted in the Spring semester, and shall include evaluation of assigned duties for the Fall and Spring semesters of the current academic year and the preceding Summer terms, if the faculty member had an appointment in a summer term. However, in accordance with subsection 18.6(c) above, the department may allow for an evaluation period for research/scholarship/creative activity of up to three (3) years.

(Emphasis added). As indicated in the Findings of Fact above, there were numerous examples of the use of untimely materials used in the evaluation process in violation of this section. Of special significance is the use of obviously untimely material in the second evaluation in the area of Service. The use of this material is even more surprising considering that UFF identified the untimely material in a series of emails prior to the second evaluation. (UFF # 4) This violation becomes all the more critical in view of the fact that it is this section of the Evaluation that obviously tips the scale against Grievant.

**Article 18.7(e)** provides in pertinent part as follows:

The chair shall complete the annual evaluation taking into account the faculty member's annual report and other sources of evaluative information referenced in Sections 18.2, 18.3, and 18.7(c) and (d) above, and both the University's criteria and the department's discipline-specific clarifications referenced in Sections 18.5 and 18.6, above. The chair's evaluation shall identify any major performance deficiencies and, if any such deficiency has been identified, shall provide the faculty member with written constructive feedback designed to assist the faculty member in improving his/her performance.

As indicated previously, especially in the area of Service, there was little, if any, constructive feedback.

**Article 18.7(f)**, provides in pertinent part as follows:

No later than May 1, the chair shall provide to the faculty member the proposed written annual evaluation, may include the faculty member's annual assignment for the next academic year, and shall attach to the annual evaluation a copy of the faculty member's annual report and the annual assignment for the year being evaluated.

(1) The faculty member shall be offered the opportunity to discuss the evaluation with the evaluator prior to its being finalized and placed in the faculty member's evaluation file.

The record indicates that UF simply did not comply with this section. Grievant was not provided a copy of the proposed written evaluation by May 1, and did not have the opportunity to meet with the evaluator prior to the evaluation being finalized.

**Article 18.11- Evaluation File**, provides in pertinent part:

(a) There shall be one (1) official evaluation file, containing a dated copy of all documents used in the assignment and evaluation process, other than evaluation for tenure or promotion, except for course materials, publications, public speeches/presentations, or papers presented at conferences. When evaluations and other personnel decisions are made, other than for tenure or promotion, the only documents that shall be considered are those contained in the official evaluation file, as well as the faculty member's course materials, publications, public speeches/presentations, or papers presented at conferences that are referenced in the official evaluation file.

(1) The department chair shall be the custodian of the evaluation file, and a notice specifying the location of faculty evaluation files shall be posted in each department/unit.

(2) Documents shall be placed in the evaluation file within a reasonable time after receipt. The faculty member shall be promptly notified when the document is placed in the faculty member's evaluation file.

(3) No adverse employment action shall be taken against the faculty member based upon material in the faculty member's evaluation file that has not been provided to the faculty member or to which the faculty member has not had an opportunity to attach a response.

(Emphasis added). The first evaluation, which provided the basis for the adverse employment action of Grievant's non-renewal, was based upon material that was used in violation of this Article. The Findings of Fact establish that there was more than one file, that Grievant was not notified and in fact was unaware of what was continued in her evaluation file(s), and the adverse action of non-renewal was taken before Grievant had an opportunity to attach a response to the material that she was unaware existed.

**Article 18.11(d) - Anonymous Material**, provides in pertinent part as follows:

There shall be no anonymous material in the evaluation file except for numerical summaries of student evaluations that are part of a regular evaluation procedure of classroom instruction and/or written comments from students obtained as part of that regular evaluation procedure.

(Emphasis added). As indicated above, there was considerable anonymous material in Grievant's evaluation file, and more significantly in the evaluation itself. This was especially true, as indicated above, in the second evaluation of the Service area. In that evaluation, as was noted above, the evaluator's assessment of Grievant's performance in the area of Service expanded from one-half page to seven pages. The expanded version contained numerous references to anonymous material and complaints. Consequently, Grievant had insufficient information to rebut the allegations. To continue a repetitive theme, this section of the second evaluation is critical in view of the fact that, although Grievant's Teaching was evaluated Satisfactory, the overall evaluation was unsatisfactory.

**Article 18.11(f) - Removal of Contents**, provides as follows:

Materials shown to be contrary to fact shall be removed from the file. This section shall not authorize the removal of materials from the evaluation file when there is a dispute concerning a matter of judgment or opinion rather than fact. Materials may also be removed pursuant to the resolution of a grievance.

Grievant provided UF with an exhaustive list of information that she considered to be factually incorrect, and gave an explanation for her position. There is no indication on this record that any information was removed from the file. One can only assume it was UF's position that, with regard to each allegedly incorrect fact, there was a "dispute concerning a matter of judgment or opinion rather than fact," and the fact remained in the file.

**Article 19.7 - Progress Toward Tenure**, provides in pertinent part as follows:

(b) Midterm Review Assessing Progress Toward Tenure.

Except for faculty at the P. K. Yonge Developmental Research School, a special midterm review shall be conducted for any faculty members in the tenure probationary period during March or April of the third year of the tenure probationary period. The purpose of this appraisal shall be to assess the faculty member's progress toward meeting the criteria for tenure and to provide thoughtful and constructive assessments, suggestions, and guidance to assist the faculty member in fulfilling the University's tenure criteria, as clarified in the department's bylaws.

(Emphasis added). As was indicated in the Findings of fact, there is insufficient evidence on this record to establish that a "midterm review" was conducted for Grievant. Grievant was entitled by contract to such a review. The legitimate rationale for such a review is made clear in the contract language – i.e., to provide "guidance to assist the faculty member in fulfilling the University's tenure criteria." Grievant was entitled to this guidance and assistance. It must be assumed that the University believed such a review had value, and that it could be used to positively to assist faculty members. Otherwise, such a review would be a meaningless exercise..

Perhaps, as suggested by UFF, UF had already decided to non-renew Grievant using a fiscal rationale, thus rendering a midterm review meaningless. Whatever the rationale was for not providing the midterm review, Grievant was entitled to one, and it is possible that information derived from such a meeting could have changed the outcome of her evaluation.

**Article 31.1(c) - No Reprisal**, provides in pertinent part as follows:

Neither the Trustees nor the UFF shall discriminate, harass, or retaliate in any way against any grievant, witness, UFF designee, or other participant in the grievance procedure as the result of an assertion of a violation of this Agreement.

UFF argues that UF has retaliated against Grievant for the filing of this grievance. Although there is not sufficient proof on this record to permit such a conclusion, the tone and content of the evaluator's aforementioned second evaluation of Grievant in regard to Service suggests an intent that is not professional in nature.

## Significance of Service Evaluation

Much has been made in this Discussion and Analysis concerning the second evaluation and the comments contained in the evaluation of Grievant's performance related to Service. The reason for this emphasis is directly related to the weight that has obviously been given to this section of the evaluation by UF. As was indicated above, Grievant's teaching performance was rated Satisfactory. Grievant's Unsatisfactory rating regarding Research is adequately supported by the record. Consequently, in order to rate Grievant as "overall unsatisfactory," thus justifying her non-renewal, it is essential to closely scrutinize the final area of evaluation – Service.

In Grievant's first evaluation regarding Service, the following comments were made in their entirety as follows:

You have the standard assignment for service and governance. You have volunteered as a judge for Journalism Education Association, paper reviewer for AEJMC, and article reviewer for *Journal of Virtual worlds*. You have served as the College representative for the Virtual Worlds Environment and given your time generously to the College through your willingness to serve repeatedly as a graduation marshal. You have also served the department on the equipment committee of the departmental curriculum committee.

Your work as Florida Scholastic press Association Executive Director is a significant assignment. You are responsible for, among other things, correspondence, the Web site, and myriad details related to annual board meeting and annual convention. Although there has been significant progress to the financial management of the organization and the annual conference was a notable success, your relationship with some members of the board continues to be antagonistic. The large numbers of documented complaints has created a situation that has become untenable.

Effective August 16, 2009, your assignment in the College no longer includes any duties related to FSPA. For the 2009-2020 academic year, in lieu of the one-course per semester teaching reduction you have received for your FSPA responsibilities, you will be assigned to teach the standard load for a full time faculty member, two courses per semester.

Performance: *Unsatisfactory*

It is clear from this evaluation that the only real issues regarding Service were those related to the relationship between grievant and the board of FSPA. The other aspects of this evaluation were generally positive in nature. It could be argued that, with the removal of the assignment to FSPA, Grievant would have at least an opportunity to achieve a satisfactory rating in this area.

In Grievant's second evaluation, all of the positive comments contained in the Service evaluation have been removed, replaced by the comments alluded to above – comments that are unsupported, anonymous, untimely and/or subjective. (See Finding of Fact # 24). In short, the content of this critical element of Grievant's evaluation is seriously flawed – so flawed as to justify the conclusion that it should be removed from the evaluation.

## **Role of the Arbitrator**

It is understood that the CBA prohibits an arbitrator from substituting his judgment for that of the evaluator. **Article 31.1(d)** provides in pertinent part as follows:

(3) The arbitrator shall refrain from issuing any statements of opinion or conclusions not essential to the determination of the issues submitted. Where an administrator has made a reasonable judgment involving the exercise of permissible discretion, such as subjective evaluative decisions regarding tenure or promotion, the arbitrator shall not substitute the arbitrator's judgment for that of the administrator. Nor shall the arbitrator review such decision except for the purpose of determining whether the decision has violated this Agreement.

(Emphasis added). The facts on this record at least suggest that the evaluator's judgment, especially in regard to the second evaluation related to Service, was not "reasonable." Nevertheless, despite apparent authority to do so, the undersigned will not substitute his judgment for that of the evaluator. There is not enough information on this record to support such a substitution of judgment.

## **CONCLUSION**

There is sufficient evidence on this record to conclude that the evaluator's decision was based upon information that violated the contractual rights of the Grievant.

In addition to the information included in the evaluation files in violation of the CBA, it is concluded that UF also violated the CBA regarding the procedures required for a valid performance evaluation. Specifically, grievant was not afforded a midterm review that could have prepared her for a more positive evaluation, nor was she afforded a meeting with the evaluator prior to the issuance of the final evaluation that would have afforded her the opportunity to challenge or question the tentative conclusions reached by the evaluator. It is unknown whether either of these lost opportunities would have changed the outcome, but there remains the fact that the contract required such opportunities be provided.

The record in this case indicates that the Grievant is a competent teacher, with some serious shortcomings in regards to research – shortcomings that she may or may not be able to overcome. With regard to her Service, this record is inconclusive. The evidence does suggest that, absent her responsibilities regarding FSPA, Grievant has a satisfactory record of service.

## DECISION

For the reasons stated above, it is determined that, with regard to the issue to be resolved, the University substantively violated the following articles of the collective bargaining agreement between the parties:

Article 18.1, 18.2(b), 18.7(a), (e), (f), 18.11(a), (d), and 19.7(b)

The grievance is granted.

## REMEDY

Article 31(d)(4), provides that, if the arbitrator determines that the Agreement has been violated, the arbitrator shall direct the Trustees to take appropriate remedial action.

For the reasons set forth above, the University is directed to take the following actions:

- (1) Reinstatement Grievant to her position at UF with her previous rank of Assistant Professor, and assign her the standard load for a full time faculty member, two courses per semester.
- (2) Rescind Grievant's letter of non-renewal, dated July 11, 2009;
- (3) Rescind Grievant's second evaluation, dated January 29, 2010;
- (4) Provide Grievant with a midterm review consistent with the language and intent of Article 19.7 of the CBA;
- (5) Provide for an annual evaluation consistent with the terms of the CBA;
- (6) Provide that such midterm review and annual evaluation be conducted by an individual other than the individual who conducted the first two evaluations of Grievant;
- (7) Pursuant to Article 31(d)(6), grant Grievant an additional year employment beyond the current year 2009-2010, and provide for reconsideration for tenure without prejudice at the earliest opportunity.

It is to be understood that this remedy does not entitle Grievant to tenure.

*Respectfully submitted this 2<sup>nd</sup> day of June, 2010,*

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*Tom Young, Arbitrator*