

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KAREN N. ROGERS,

Appellant,

v.

TACOMA COMMUNITY COLLEGE,

Respondent.

No. 38041-2-II

UNPUBLISHED OPINION

Quinn-Brintnall, J. — Karen Rogers appeals the Tacoma Community College (TCC) Board of Trustees' (Board) decision terminating her employment as part of a reduction-in-force (RIF). Rogers asserts that the Board violated the seniority provisions of the collective bargaining agreement (CBA) because it retained a less senior tenured instructor in her department when it terminated her position. Rogers also asserts that the Board violated the CBA because evidence from the next academic year showed that TCC hired two part-time instructors to teach the equivalent of a full-time history position. Rogers concedes that evidence from the academic year following her termination was not available at her pre-termination hearing but argues that the superior court abused its discretion when it did not supplement the record with this additional evidence. Because the Board did not violate the CBA when it decided to retain an instructor less senior than Rogers, and the superior court did not abuse its discretion by refusing to supplement

the record on review, we affirm.

FACTS

On April 3, 2007, TCC notified Rogers that it was eliminating her tenured position pursuant to a RIF. The letter informed Rogers that TCC was eliminating her position because the college was facing a projected revenue shortfall of more than \$1,100,000 and the discipline she was teaching was not meeting minimum levels of enrollment to sustain itself. In accordance with Rogers's CBA, she timely requested a hearing before a review committee.

Procedural Facts

The review committee commenced a hearing on June 8, 2007. TCC presented evidence that it was facing a \$1.2 million budget shortfall primarily because of declining enrollments since 2002. Because of the budget shortfall, TCC eliminated multiple classified staff positions; four exempt employee positions; and three faculty positions, including Rogers's.

TCC presented its criteria for reviewing all of the positions and programs across the college and its justification for eliminating Rogers's position. The review committee admitted a TCC exhibit titled, "Criteria for Review of Instructional Positions for 2007-2008 Budget Development Purposes." Administrative Record (AR) at 72. The exhibit identified four full-time faculty members in the history department, Brian Duchin, Yi Li, Bernie Comeau, and Rogers. The exhibit stated that enrollments in U.S. History courses were "consistently strong" (AR at 73), while "Western Civ enrollments have declined, largely because it is not a required graduation course for high schools, and there are abundant other Social Science offerings each quarter that fill distribution requirements and meet specific program needs." AR at 72. The exhibit identified Duchin as the lead full-time faculty member in U.S. History and Culture and stated that Comeau

“was hired specifically to teach across disciplines and covers courses in the US History sequence and Philosophy, as well as teaches Native American courses to serve the [American Ethnic and Gender Studies] Program.” AR at 74. It also stated that TCC occasionally employs adjunct instructors to cover the U.S. History online section.

In recommending that Rogers’s position be eliminated, the criteria for review document stated,

We do not need two [full-time] faculty (Karen Rogers and Yi Li) to cover the World Civ sequence, as we are only filling about seven (or eight) sections per year. It is difficult to schedule classes in Karen Rogers’ academic fields. She was hired specifically to teach European history and Western Civilization, and one area of history outside Europe and the North Americas at a time when the department was growing and expanding. However, the changing of program requirements in the high schools and colleges has influenced what we can schedule. [Rogers’s] academic preparation limits her flexibility. . . . Yi Li, on the other hand, was hired to teach cross disciplinary courses in History of Civilization, Asian History, and Philosophy, which gives us a great deal of scheduling flexibility. He also is the primary advisor for the Pacific Rim Studies Option A transfer degree and teaches [numerous other courses.]

AR at 74-75. The criteria for review document acknowledged that Rogers had been assigned to teach some U.S. history classes at TCC to cover for Duchin’s leaves without pay over the past two years but stated, “US History is not her field and she prefers not to teach it.” AR at 74.

Rogers testified that TCC’s purported justification for her termination was baseless because TCC hired her, and she was fully qualified, to teach history generally and was not limited to teaching a specific discipline within the history department. She also asserted that, although enrollment levels for World Civilization courses have dropped, the U.S. History course enrollments have remained stable, and she has taught U.S. History courses at TCC in the past. Rogers argued that TCC would violate her contract if it terminated her position while retaining

Comeau because she was higher on the seniority list. She then testified about her education, training, and experience in teaching U.S. History, asserting that TCC did not consider her qualifications when it decided to terminate her position instead of offering her more classes in the U.S. History sequence. Last, Rogers argued that TCC's decision to terminate her employment while continuing to employ adjuncts would also violate the contract. She did not dispute that TCC was facing a budget shortfall requiring a RIF.

On June 12, 2007, the review committee approved TCC's decision to terminate Rogers's position with the following findings:

- [1] Karen Rogers is not credentialed to teach United States history as a full-time instructor and would not have been hired for a position in teaching United States history.
- [2] Up to this point the college management has made a good-faith effort to provide Karen Rogers with a full-time load.
- [3] There is no evidence that college management has violated provisions of the negotiated agreement, even though there were important gaps in its justification and documentation of the steps required by the negotiated agreement.

AR at 11.

A dissenting committee member found:

By assigning Karen Rogers to a range of United States history courses in the past, the college demonstrated that it approved her qualifications for teaching those courses, and it appears that in the next year the college may offer enough classes in world civilization and United States history for a full-time position for Karen Rogers.

AR at 11.

Rogers appealed the review committee's decision to the Board, which held a hearing on June 22, 2007. The Board unanimously voted to uphold TCC's RIF decision to terminate Rogers's employment, finding:

- a. The current financial status of the college required the reassignment and eventual RIF proceeding for a number of staff.
- b. The college followed all RIF procedures outlined in the contract. These procedures were followed properly and [Rogers's] position was correctly identified under college procedures as most appropriate for elimination.
- c. [Rogers's] credentials, as the incumbent of the position identified for elimination, were thoroughly reviewed by the college and there was no appropriate alternate position in which to place [her].
- d. The procedures set forth in the faculty negotiated contract were properly followed throughout this process.

AR at 3.

Rogers timely filed for judicial review of the Board's decision on August 3, 2007. On June 16, 2008, Rogers filed a motion to supplement the record on review. The superior court commenced a hearing on June 24, 2008. The superior court partially granted and partially denied Rogers's motion to supplement the record. The superior court allowed Rogers to supplement the record with evidence presented at the Board hearing that it had inadvertently left out of the record for review, but the court did not allow Rogers to supplement the record with evidence that did not exist at the time of the Board hearing. The superior court denied Rogers's petition for review. Rogers timely filed a notice of appeal to this court.

ANALYSIS

Rogers asserts that TCC violated the CBA because (1) TCC retained a less senior tenured instructor when it terminated her tenured position; (2) there was no actual lack of funding or curtailment of work, which is a necessary condition before TCC can dismiss a tenured employee pursuant to a RIF; and (3) after her termination, TCC hired two part-time employees to teach a full-time history position. Rogers concedes that only the first alleged breach of contract was amenable to proof at her pre-termination hearing. But she argues that the superior court, acting

in its appellate authority, should have allowed her to supplement the record with the new evidence. TCC responds that its retention of a less senior tenured instructor did not violate the CBA and that evidence from the next academic school year, which was not available until after the Board's decision, was not relevant to whether the Board violated the CBA. We agree with TCC.

Standard of Review

In reviewing an administrative action, we sit in the same position as the superior court and apply the Washington Administrative Procedure Act (APA), ch. 34.05 RCW, directly to the agency's administrative record. *Granton v. Washington State Lottery Comm'n*, 143 Wn. App. 225, 231, 177 P.3d 745, *review denied*, 164 Wn.2d 1018 (2008). The party asserting the invalidity of an agency action, here Rogers, has the burden of demonstrating such invalidity. RCW 34.05.570(1)(a); *DeLacey v. Clover Park Sch. Dist.*, 117 Wn. App. 291, 295, 69 P.3d 877, *review denied*, 150 Wn.2d 1023 (2003). We grant relief from an agency order in an adjudicative proceeding if we determine that substantial evidence does not support the agency order or the agency's order is arbitrary and capricious. RCW 34.05.570(3)(e), (i).

Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth or correctness of the matter. *Dep't of Ecology v. Douma*, 147 Wn. App. 143, 151, 193 P.3d 1102 (2008). An agency's order is arbitrary or capricious if it is "wilful and unreasonable action, without consideration and regard for facts or circumstances." *Friends of Columbia Gorge, Inc. v. Forest Practices Appeals Bd.*, 129 Wn. App. 35, 57, 118 P.3d 354 (2005) (quoting *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 769, 49 P.3d 867 (2002)). "Where there is 'room for two opinions, action is not arbitrary or capricious when exercised

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honestly and upon due consideration.”” *Friends of Columbia Gorge, Inc.*, 129 Wn. App. at 57-58 (quoting *Isla Verde Int’l Holdings, Inc.*, 146 Wn.2d at 769). We review an agency’s interpretation of contract provisions de novo. *See Butler v. Lamont Sch. Dist. No. 246*, 49 Wn. App. 709, 711, 745 P.2d 1308 (1987) (Where school board acts in a quasi-judicial capacity by determining contract rights, a type of decision historically made by courts, appellate court reviews the board’s decision under de novo standard.) (citing *Yaw v. Walla Walla Sch. Dist. 140*, 106 Wn.2d 408, 722 P.2d 803 (1986)).

CBA Seniority Provisions

Rogers asserts that TCC violated the seniority provisions of the CBA when it terminated her position while retaining Comeau, an instructor in her department with less seniority. TCC counters that its decision to lay off Rogers instead of Comeau was justified by the needs of its history department and, thus, it did not violate the CBA.

Section 9.10 of the CBA states:

Seniority is recognized as an important factor to be considered in matters relating to tenured academic employee relations practices.

AR at 176.

Section 9.20(a) states:

Seniority shall be based on the Board (or delegated administrat[or]) approved date of hire as a full-time academic employee with the College or its predecessor school district, excluding temporary academic and specially funded academic appointments.

AR at 176.

The record supports Rogers’s assertion that she was a more senior tenured instructor than Comeau. But section 14.25 sets out TCC’s authority to terminate Rogers’s position:

If a reduction is determined to be necessary within a lay-off unit, the employment needs of the department or program shall be the primary basis for identifying the order of reduction-in-force. First consideration will also be given to seniority as defined in Article 9, provided that such consideration results in the retention of qualified academic employees to replace and perform the necessary duties of the personnel reduced. In determining what duties an academic employee is qualified to perform, the president will consider, but not be limited to, (a) general professional experience, (b) actual work experience in the area under consideration, and (c) educational background.

AR at 193.

This contract provision clearly designates the employment needs of the department or program as the primary basis for determining the order of reduction in force, thus allowing TCC to lay off a more senior employee when justified by the department's or the program's needs. Here, the Board found that "[Rogers's] position was correctly identified under college procedures as most appropriate for elimination." AR at 3. Substantial evidence supports the Board's finding.

The parties do not dispute that TCC was facing a budget shortfall requiring RIFs. And TCC presented evidence that it thoroughly considered the needs of the social sciences program and of the history department when it identified Rogers's position as most appropriate for elimination. In its criteria for review document, TCC presented evidence of declining enrollments in Western Civilization courses, often necessitating the need to cancel classes. Additionally, the criteria for review identified a more senior full-time instructor qualified to teach Western Civilization as well as cross-disciplinary courses. TCC's criteria for review document also asserted that, "Comeau was hired specifically to teach across disciplines and covers courses in the US History sequence and Philosophy, as well as teaches Native American courses," whereas "[Rogers] was hired specifically to teach European history and Western Civilization, and one area of history outside Europe and the North Americas." AR at 74. And

Rogers's and Comeau's respective job descriptions support this assertion.¹ Thus, the record contains evidence that is sufficient to persuade a fair-minded person that discharging Rogers while retaining Comeau would best serve the employment needs of TCC's social sciences program and history department. Although TCC was required to consider Rogers's seniority when making its termination decision, it properly determined that retaining Rogers would not adequately serve the employment needs of the college.

Rogers also appears to argue that the Board's decision to discharge her while retaining Comeau was arbitrary or capricious because it disregarded her qualifications to teach U.S. History, a series in the history department with "consistently strong" enrollments, and that TCC disregarded her past experience teaching U.S. History courses at TCC. The record shows that TCC had assigned Rogers to teach, part-time, a number of U.S. History courses in the past. At the hearing before the review committee, TCC acknowledged that it had assigned Rogers to teach U.S. History courses in the past because of low Western Civilization enrollments, but it noted that her transcript would not meet the minimum requirements for a full-time tenure-track

¹ Rogers's job description states that it is one of her primary responsibilities to "[p]repare and teach courses in European History, Western Civilization and [one] area of history outside of Europe and the North Americas." Clerk's Papers (CP) at 114. Her job description also states that her position requires, as a minimum qualification, a "[m]aster's degree in History with major course work in European History and Western Civilization." CP at 115. In contrast, Comeau's job description states that one of his essential functions is to "[p]repare and teach courses in the American Ethnic and Gender Studies program and within a specific humanities or social sciences discipline." AR at 107. And a minimum qualification for Comeau's position is a "[m]aster's degree in a specific humanities or social sciences discipline, such as Cultural Anthropology, American History, Comparative Religions, or Political Science from an accredited college or university." AR at 107.

faculty position in U.S. History.² Although the Board could have found, as one dissenting review committee member did, that TCC demonstrated it approved Rogers’s qualifications to teach U.S. History by assigning her to teach a range of those courses in the past, “[w]here there is ‘room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration.’” *Friends of Columbia Gorge, Inc.*, 129 Wn. App. at 57-58 (quoting *Isla Verde Int’l Holdings, Inc.*, 146 Wn.2d at 769).

Rogers’s Motion to Supplement the Record

Next, Rogers asserts that the superior court abused its discretion when it refused to supplement the record with documents that did not exist at the time of the Board’s decision and that this refusal deprived Rogers of her right to due process. She asserts this later evidence would show that TCC violated the CBA because it did not actually suffer a lack of funding or curtailment of work and because it hired two part-time instructors to teach the equivalent of a full-time history position. But this purported later evidence does not qualify under any of the statutory exceptions for admitting evidence outside the administrative record on judicial review. RCW 34.05.562. Accordingly, we find that the superior court did not abuse its discretion by refusing to supplement the record here.

A court considering a petition for judicial review may not generally admit new evidence or

² At oral argument, TCC asserted that it could not assign Rogers to teach U.S. History on a full-time basis because national accreditation standards require that instructors have earned 18 credit hours in post-graduate course work in the specific discipline that they teach and Rogers had only earned 12 credit hours in post-graduate U.S. History courses. Although compliance with national accreditation standards would justify TCC’s decision to terminate Rogers over a less senior instructor who is qualified to teach U.S. History full-time, in affirming the Board’s decision we do not rely on this fact because there is nothing in the record regarding national accreditation standards or showing that the Board relied on these standards in making its decision to lay off Rogers.

decide disputed factual issues. RCW 34.05.562; *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005) (new evidence admissible on judicial review only in “highly limited circumstances”), *review denied*, 156 Wn.2d 1004 (2006).

RCW 34.05.562 states in part:

(1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

(a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;

(b) Unlawfulness of procedure or of decision-making process; or

(c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

(2) The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:

....

(b) The court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action, and (ii) the interests of justice would be served by remand to the agency.

Under RCW 34.05.562, the reviewing court may consider evidence outside the administrative record *only* if it relates to the validity of the agency action *at the time it was taken*.

Here, evidence from the academic year following Rogers’s termination, which did not exist at the time the Board decided to terminate Rogers’s position, does not relate to the validity of the agency action at the time it was taken. This evidence merely purports to demonstrate no actual curtailment of work within the history department as a whole the following year and does not show any impropriety on the part of the Board at the time it made its decision to terminate Rogers. Moreover, Rogers does not assert that this evidence related to any of the three

exceptions under RCW 34.05.562(1). Thus, even if this newly-discovered evidence related to the validity of the Board's earlier decision to terminate Rogers, the proper remedy would be to remand to the Board to conduct further fact-finding. RCW 34.05.562(2)(b).

Due Process

Next, Rogers argues that the superior court's refusal to supplement the record with evidence from the academic school year following her termination denied her due process by depriving her of an opportunity to prove a breach of contract. We disagree.

We have previously summarized the rule for a denial of property without due process of law claim in the public employment context:

“A person must have a legitimate claim of entitlement to his or her employment to have a property interest in it. The existence of a property interest must be determined with reference to state law. Typically, this interest arises from contractual or statutory limitations on the employer's ability to terminate an employee. . . . When such a property interest exists, the employee is entitled to a hearing or some related form of due process before being deprived of the interest.”

Aitken v. Reed, 89 Wn. App. 474, 484, 949 P.2d 441 (quoting *Winegar v. Des Moines Indep. Sch. Dist.*, 20 F.3d 895, 899 (8th Cir.), *cert. denied*, 513 U.S. 964 (1994)), *review denied*, 136 Wn.2d 1004 (1998).

Here, Rogers entered into a contract with TCC providing that TCC could terminate her employment only upon certain conditions, including a RIF. Thus, Rogers had a protected property interest in her continued employment. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985); *Aitken*, 89 Wn. App. at 484-85.

Having established that Rogers had a property interest in continued employment, the next step in analyzing her due process claim is determining what process was due. *See Loudermill*,

470 U.S. at 541 (“once it is determined that the Due Process Clause applies, ‘the question remains what process is due’”) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)). Determining what process is due requires us to consider three distinct factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Here, Rogers’s pre-termination hearings afforded her notice, opportunity to present evidence, cross-examine witnesses, and petition for judicial review of the Board’s final decision. This satisfies due process. *See Loudermill*, 470 U.S. at 546 (Due process requires only that, before a tenured public employee may be terminated, “[she] is entitled to oral or written notice . . . , an explanation of the employer’s evidence, and an opportunity to present [her] side of the story.”). Rogers’s assertion that a reviewing court should “supplement the record as a matter of course whenever evidence of a breach of contract first comes into existence during the pendency of a judicial review” would create an undue hardship on the government’s interest in managing its affairs and the timely adjudication of employment disputes. Br. of Appellant at 30. Rogers’s due process rights were not offended by the Board’s pre-termination hearing procedures or by the superior court’s refusal to supplement the record on review. Accordingly, we affirm.

Attorney Fees

Last, Rogers asserts, without argument, that she should be entitled to attorney fees under

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RCW 4.84.350. Again, we disagree.

RCW 4.84.350(1) provides:

Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

Because Rogers is not the prevailing party, we deny her request for attorney fees.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, P.J.

HUNT, J.