

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1095**

Robert Tennyson,
Relator,

vs.

University of Minnesota,
Respondent.

**Filed June 10, 2008
Affirmed
Collins, Judge***

University of Minnesota

Marshall H. Tanick, Charles A. Horowitz, Mansfield Tanick & Cohen, P.A., 1700 US Bank Plaza South, 220 South Sixth Street, Minneapolis, MN 55402 (for relator)

Mark B. Rotenberg, General Counsel, University of Minnesota, Brent P. Benrud, Associate General Counsel, 360 McNamara Alumni Center, 200 Oak Street Southeast, Minneapolis, MN 55455 (for respondent)

Considered and decided by Wright, Presiding Judge; Willis, Judge; and Collins,
Judge.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

COLLINS, Judge

Relator Robert Tennyson is a tenured professor at the University of Minnesota (the university). By petition for writ of certiorari, Tennyson challenges an adverse decision by the university's Senate Judicial Committee (SJC), imposing a one-year disciplinary suspension without pay and benefits, which the university President Robert Bruininks upheld. Tennyson contends that (1) the decision to suspend him was arbitrary, capricious, unreasonable, and unsupported by evidence in the record; (2) the decision was the result of procedural irregularity because the university impermissibly shifted the burden of proof to him; and (3) the sanction of loss of "salary or benefits" as stated is vague and confusing, and therefore unenforceable. Because the university followed its procedures and its decision has support in the record, we affirm.

FACTS

Professor Tennyson began his tenure at the university in 1974 and has been a member of the faculty of the College of Education and Human Development, Department of Educational Psychology (the department) since 1986. During the fall 2003 semester, Tennyson taught two courses, including an on-line course titled "EPSY 8114: Cognition in Learning Seminar," in which six students were enrolled.

That semester, the department was participating in a new on-line student-course-evaluation system. Faculty members were notified that they could use the conventional paper-and-pencil evaluations or, alternatively, could choose to use the on-line system. Faculty members in the department are required to administer student course evaluations

for their classes during the last three weeks of the semester; such evaluations are considered as one of the factors in determining a faculty member's eligibility for merit-based salary increases.

Tennyson responded by e-mail that he preferred to use the on-line-evaluation system for both courses that he was teaching that semester. He submitted his request a few days after the official deadline to do so because he was out of town when the department sent notice of the on-line option. Tennyson never received confirmation of the means by which his courses would be evaluated and was not notified that his election of on-line evaluation of EPSY 8114 had apparently been rejected. The university has no explanation for why the other of Tennyson's courses was accepted for the on-line evaluation system and EPSY 8114 was not.

In early January 2004, five paper student evaluations for EPSY 8114 were found in an inbox on a department secretary's desk in the department office. The secretary did not see who had left the evaluations, but she did see Tennyson in the department office that day. Frances Lawrenz, the department chairperson at the time, was contacted regarding the forms. After reviewing the evaluations, Lawrenz became suspicious because they all gave Tennyson abnormally high ratings. She was also concerned because the forms had been turned in after the semester had ended and because the previous semester Tennyson had requested to have a secretary make changes to evaluation forms that he thought were erroneous. In that instance, Lawrenz believed that Tennyson was trying to alter the evaluations to produce higher outcomes, and she

documented the incident in Tennyson's record in case something similar occurred in the future.

Upon investigation, students enrolled in EPSY 8114 confirmed that they had not submitted course evaluations. Lawrenz referred the matter to the Dean of the College of Education, Steven Yussen, who then met with Tennyson. Tennyson acknowledged that he had been in the department office to attend a scheduled meeting with a department administrator the morning that the secretary discovered the evaluations. Tennyson denied any knowledge of the EPSY 8114 evaluations or their source. Yussen ultimately did not find Tennyson's denials credible; he believed that Tennyson had fabricated, or caused someone else to fabricate, the evaluations.

Yussen then presented his case against Tennyson to the assembled tenured faculty of the department. Tennyson was present and responded to Yussen's charges. Following the hearing, the faculty voted 22 to 5 that Tennyson had engaged in misconduct that warranted discipline, and 14 to 12 in favor of a one-year suspension, with one member abstaining from the latter vote. Tennyson appealed the faculty's determination to the university's SJC.

An SJC panel conducted three days of hearings in May 2006. At issue was whether, based upon the allegations that he fabricated the student evaluations, Tennyson violated tenure code section 10.21(b) by engaging in "unprofessional conduct which severely impairs his fitness in a professional capacity" or tenure code section 10.21(e) by committing "other grave misconduct manifestly inconsistent with continued faculty appointment." *See* Univ. Minn. Tenure Code § 10.21(b), (e) (describing termination or

suspension of faculty appointment). The committee further considered whether a one-year suspension without salary was an appropriate penalty for the alleged misconduct.

During the hearings, the SJC panel heard testimony from Tennyson, Yussen, Lawrenz, and several other witnesses. Tennyson persisted in denying that he had fabricated the evaluations and suggested that someone else, perhaps a disgruntled student, had done it. Lawrenz testified about her suspicions regarding the student evaluations for Tennyson's course from the prior semester, as she had documented in Tennyson's personnel file. She also testified about past irregularities in some of Tennyson's travel-reimbursement requests that had been audited, but about which Tennyson was unable to provide the panel with specific information.¹ To gain a better understanding about the travel-expense issues, the panel requested permission to view Tennyson's personnel file, and both parties agreed. Tennyson later explained that many of the irregular reimbursement requests were based on misunderstandings, and in the instances when he had been inappropriately doubly reimbursed for his expenses, he had repaid the excess amounts without question.

¹ This testimony was solicited by one of the panel members in response to Tennyson's statement that "in fact, there is no documentation in my personnel file that even suggests one irregularity, let alone a history." Lawrenz responded that she did not believe this was a true statement and that the personnel file contained documentation of irregularities that were not specifically related to Tennyson's teaching record—but that it also contained at least one document specifically related to irregularities with Tennyson's prior teaching evaluations. The panel inquired further into the matter because Lawrenz indicated that the other irregularities may have had to do with falsification of documents or documentation—specifically travel-reimbursement requests.

Following the hearing, the SJC panel concluded that

Dean Yussen has demonstrated by clear and convincing evidence that Professor Tennyson fabricated or caused another to fabricate student evaluations for EPSY 8114 . . . [and] that such conduct is (1) unprofessional conduct which severely impairs Professor Tennyson's fitness in a professional capacity and (2) other grave misconduct manifestly inconsistent with continued faculty appointment.

The SJC panel further concluded that

[T]he conduct in question goes directly to the heart of the teaching relationship, the establishment of trust between the faculty member and students . . . [and] that by violating that trust Professor Tennyson has engaged in serious misconduct and that the penalty proposed by Dean Yussen and supported by a majority of the faculty is appropriate.

University President Robert Bruininks reviewed the SJC report and hearing record, and based on that review, concurred with the SJC's factual findings that Yussen proved his case against Tennyson by clear and convincing evidence and that a one-year suspension without pay and benefits was an appropriate sanction. Bruininks did not find Tennyson's denials or alternative explanations credible, and determined that essentially only Tennyson would benefit from fabricated, highly positive student evaluations for EPSY 8114. This appeal, by writ of certiorari, followed.

DECISION

A breach-of-employment-contract claim based on a disciplinary decision by the University of Minnesota is reviewed only on a writ of certiorari. *Shaw v. Bd. of Regents*, 594 N.W.2d 187, 190-91 (Minn. App. 1999), *review denied* (Minn. July 28, 1999). Our certiorari review of a decision of the university is limited to an inspection of the record

developed by the university in reaching its decision and “is necessarily confined to questions affecting the jurisdiction of the [decision-maker and] the regularity of its proceedings.” *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 921 (Minn. App. 1994) (quotation omitted). Regarding the merits of the dispute, our review is limited to whether the decision “was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it.” *Id.* (quotation omitted). The university is part of the executive branch of state government, and as such, its decisions are given deference by this court under the principle of separation of powers. *See Dokmo v. Indep. Sch. Dist. No. 11*, 459 N.W.2d 671, 674 (Minn. 1990) (applying separation-of-powers principle to school districts).

As an initial matter, Tennyson appears to argue that this court should apply an extraordinary standard of review because, under the tenure code, Yussen was required to prove his case by clear and convincing evidence. Tennyson asserts that the university’s action must be reversed if any rational fact-finder would be compelled to conclude that the proof did not meet the clear and convincing standard. But Tennyson’s argument would have us reweigh the evidence on appeal to determine if it was clear and convincing, which would be contrary to the proper scope of our review as discussed above.

I.

Tennyson contends that the university’s decision was arbitrary, capricious, unreasonable, and unsupported by evidence in the record because he “was convicted based upon nothing more than weak, circumstantial evidence of motive and opportunity,

bolstered with improperly submitted, highly prejudicial evidence of unproven charges related to prior ‘bad acts.’” “A reviewing court may reverse a university’s decision to [discipline] an employee only if it finds a lack of substantial evidence to support that ruling.” *Chronopoulos v. Univ. of Minn.*, 520 N.W.2d 437, 441 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994).

In its findings, the SJC panel acknowledged that “[t]here is no direct evidence that Professor Tennyson fabricated or caused another to fabricate the student evaluations in question.” Instead, the panel based its decision on circumstantial evidence: (1) Tennyson was the only person who would benefit from submitting inflated forged course evaluations; (2) he was present in the department office on the morning the secretary discovered the evaluations; (3) there is documented evidence of past institutional concerns about his student course evaluations; and (4) he lacked credibility as a witness. Having carefully reviewed the record, we conclude that this is substantial evidence and is sufficient to support the university’s decision.

During the hearings, the SJC panel engaged in extensive discussion regarding Tennyson’s motive, questioning whether anyone else would benefit from submitting positive fabricated evaluations for Tennyson’s course. Logic seemed to dictate that no one other than Tennyson would benefit. But Tennyson argues that the university improperly relied on improprieties in the student evaluations from the prior year and irregularities in past travel-reimbursement requests to ascertain his motive.

However, it is not shown that either the SJC panel or Bruininks factored in such collateral evidence to determine specifically that Tennyson had motive to fabricate the

evaluations. Rather, the SJC panel made clear that this evidence went only to Tennyson's credibility and the veracity of his defense position. Because this was not a formal court proceeding and the rules of evidence did not apply, the SJC panel did not violate any element of Tennyson's due-process rights by considering this evidence as bearing on his credibility as a witness.

Tennyson also contends that his mere presence in the department on the morning that the evaluations were found is not enough to make him the culprit. Because the secretary who found the forms did not testify at the SJC hearing, Tennyson argues that evidence of what she saw and found that morning was improperly admitted hearsay. Tennyson notes that while hearsay is generally admissible in this type of proceeding, in this instance hearsay regarding the secretary's observations is neither sufficiently probative nor credible enough to be admissible.

But there does not appear to be any reason to discredit the secretary's statements, and nothing attributed to her is materially contradicted by other evidence. Tennyson himself acknowledged that he was in the department office the morning the evaluations were discovered on the secretary's desk. Yussen was not required to prove the specific opportunity that Tennyson had to fabricate the student evaluations, and it was not improper for the SJC to take note of Tennyson's presence in the department as part of the evidence supporting its decision.

Tennyson further alleges that the committee improperly relied on the travel-reimbursement evidence to show that he had committed wrongdoing in the past or had a disposition to lie. He argues that such information was not relevant because there is no

relationship between the travel-expense issues that were resolved long ago and alleged fabrication of student evaluations. Tennyson notes that the department had not previously initiated disciplinary action concerning such matters, they were not part of the present formal charges, and therefore should not have been injected into the case.

While it may be somewhat tenuous, sufficient evidence in the record supports the university's argument that the SJC limited its consideration of this evidence as bearing only on Tennyson's credibility. In an August 7, 2006, letter from the SJC panel to Tennyson, the SJC specifically addressed Tennyson's concern that evidence of his travel-reimbursement requests was an unfair surprise and irrelevant to the proceedings. The SJC noted in the letter that it sought access to Tennyson's personnel file only after a witness brought up the irregularities but was unable to provide specific information—and that the file was only accessed with the agreement of both parties.

Obviously, Tennyson knew that the travel-expense-request audits had occurred and that it was likely that the information was in his personnel file. Because he gave the committee permission to view the file, it seems that the committee's consideration of the information contained therein was not an unfair surprise. Additionally, Tennyson had an opportunity to address and explain the material at the hearing, and the record shows that the SJC panel engaged in a lengthy discussion to fully understand the travel-reimbursement issues and did not cavalierly jump to conclusions regarding Tennyson's past wrongdoings or propensity to lie.

II.

Tennyson argues that this court should reverse the university's decision because the university, contrary to the terms of the tenure code, shifted its burden of proof to Tennyson. He bases this argument on Bruininks's conclusion that "I find no credible evidence in this case that anyone else had an interest in fabricating student evaluations in this particular online course." Tennyson asserts that he offered reasonable alternative hypotheses that there was either some sort of mix-up or that a disgruntled student fabricated the forms.

But simply because the university did not find Tennyson's alternative theories credible does not mean that the university improperly shifted the burden of proof to Tennyson. The record shows that the SJC and Bruininks took the burden of proof and the overall fairness of the proceedings very seriously. The SJC repeatedly reiterated during the hearings that the burden of proof was on Yussen. Tennyson was never required to prove his innocence by introducing evidence that someone else, not he, was responsible. Rather, the committee's concern appears to have been that Tennyson's mere assertion and speculation that someone else did it was not credible or sufficiently weighty to rebut Yussen's case in light of other evidence in the record.

III.

Tennyson asserts that Bruininks's order of suspension is vague and confusing because it bars Tennyson from receiving "salary or benefits," in the disjunctive, without specifying which alternative penalty should apply. Tennyson contends that in the event

this court affirms the suspension, we should nonetheless interpret the order to impose only the penalty of loss of benefits, but not loss of salary.

Tennyson's contention that he should be denied only benefits is without merit. As the university cogently argues, the meaning of Bruininks's order is plain—Tennyson shall not receive either salary or benefits during his period of suspension. When this formal proceeding was initiated, the penalty Yussen proposed was “a one-year suspension without pay of Professor Tennyson's faculty appointment at the University of Minnesota.” And in his January 7, 2005, letter to Tennyson, Yussen explained the outcome of the meeting of the tenured faculty in the department, stating that he thought the faculty's 14 to 12 vote in favor of a one-year suspension without pay was “sufficient to proceed with a one-year suspension of [Tennyson's] academic appointment without salary or employer contribution to benefits.” Read in this context, the phrasing by which Bruininks expressed the sanctions is neither vague nor confusing.

Because the university's findings adequately document sufficient evidence supporting Tennyson's unprofessional conduct and his failure to comport his behavior consistent with continued faculty appointment, as well as the reasons why a one-year suspension without pay and benefits was an appropriate remedy, we affirm the university's order of suspension.

Affirmed.