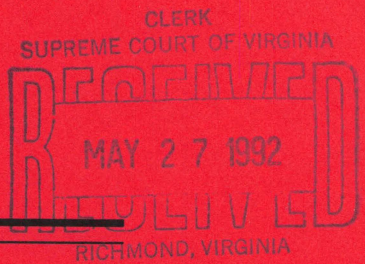


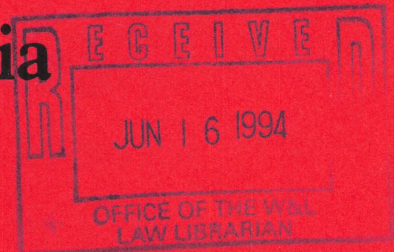
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IN THE
Supreme Court of Virginia

AT RICHMOND

RECORD NO. 911880



WINNIE W. FUN,

Appellant,

v.

VIRGINIA MILITARY INSTITUTE, et al.,

Appellee.

JOINT APPENDIX

Thomas C. Spencer
SPENCER & FILSON, P.C.
31 West Washington Street
Lexington, VA 24450
(703) 463-7138

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Counsel for Appellant

Counsel for Appellee

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VIRGINIA: IN THE CIRCUIT COURT OF ROCKBRIDGE COUNTY

WINNIE W. FUN
Plaintiff,

v.

VIRGINIA MILITARY INSTITUTE

SERVE:

General John Williams Knapp
Office of the Superintendent
Virginia Military Institute
Lexington, Virginia 24450

AND

General John Williams Knapp
Superintendent of Virginia Military Institute
Office of the Superintendent
Virginia Military Institute
Lexington, Virginia 24450

AND

Colonel Thomas W. Davis
Office of the Dean
Virginia Military Institute
Lexington, Virginia 24450

AND

Colonel James E. Gaines, Jr.
Preston Library
Virginia Military Institute
Lexington, Virginia 24450,
Defendants.

MOTION FOR JUDGMENT

COMES NOW THE PLAINTIFF, Winnie W. Fun and hereby respectively moves this Honorable Court for judgment against the Defendants and each of them jointly and severally in the amount of FIVE HUNDRED THOUSAND and NO/100 (\$500,000.00) DOLLARS plus her attorney's fees and costs in this behalf expended and which sum is justly due and owing your Plaintiff by reason of and your Plaintiff would

respectfully represent under your Honor the following facts and circumstances:

(1) The Virginia Military Institute is an Institution created pursuant to the Laws of the State of Virginia and which Institute is a corporation organized pursuant to Section 23-92 et seq. of the Code of Virginia, and which may be a party defendant to this suit pursuant to Section 23-97 of the Code of Virginia.

(2) General John W. Knapp is the Superintendent of Virginia Military Institute, is a citizen of the State of Virginia and is made a party to this suit in his official and individual capacity.

(3) The Defendant, Colonel Thomas W. Davis was at the time complained of herein the Acting Dean of Virginia Military Institute, is a citizen of the State of Virginia and is made a party to this suit in his official and individual capacity.

(4) The Defendant, Colonel James E. Gaines, Jr., is the Head Librarian at the Virginia Military Institute, is a citizen of the State of Virginia and is made a party to this suit in his official and individual capacity.

(5) The Defendants and all of them are residents of Rockbridge County, Virginia.

(6) That your Plaintiff, Winnie W. Fun, was employed by the Virginia Military Institute as a Technical Services Librarian and Assistant Professor of Bibliography effective 1 April 1987, pursuant to the terms of an Employment Contract contained in a letter dated December 12, 1986 from General John W. Knapp, then Dean of the Faculty of Virginia Military Institute. A copy of the

said letter and its enclosures constitute the Contract of Employment by your Plaintiff at the Virginia Military Institute. A copy of the said letter and its enclosures are attached hereto and marked collectively Plaintiff's Exhibit A and incorporated in this Motion for Judgment and prayed to be read as part hereof as if fully set forth in this Motion for Judgment.

(7) Your Plaintiff continued employment pursuant to the terms of this Contract until the fall of 1989. During my employment at Virginia Military Institute the Defendant Colonel James E. Gaines, Jr. was my immediate supervisor.

(8) Throughout my employment at Virginia Military Institute until October 1989, I had received favorable reviews of my performance.

(9) That during the month of October, 1989, the Defendant Colonel James E. Gaines, Jr. summoned me from my employment at the library to his personal residence to reprimand me and accuse me of conducting improper conversation in public about personnel policy without his authorization. He accused me of degrading a library employee in front of other staff members and advised me that if I did not refrain from talking about this employee, I could lose my job at VMI. The allegations were false.

(10) By letter dated October 30, 1989, the Defendant Colonel James E. Gaines, Jr., the Head Librarian at Virginia Military Institute, issued a letter of reprimand to your Plaintiff which letter is attached hereto and prayed to be read as Plaintiff's Exhibit B and which letter is incorporated herein as part of this

Motion for Judgment and prayed to be read as part hereof as if fully set forth herein.

(11) On November 2, 1989, the Defendant James E. Gaines, Jr. summonsed me to his office and advised me that I should start looking for another position and that he was going to start advertising for a replacement for my present position.

(12) On November 30, 1989, the Defendant James E. Gaines, Jr. delivered me a letter of dismissal. A copy of the said letter is attached hereto marked Plaintiff's Exhibit C and prayed to be read as part of this Motion for Judgment and incorporated herein as if fully set forth herein.

(13) Your Plaintiff requested and obtained a conference with the Defendant, then Acting Dean Colonel Thomas W. Davis, and was given a conference with this Defendant in the month of December, 1989. When your Plaintiff reported to this Defendant your Plaintiff requested that this Defendant investigate her "firing." This Defendant advised your Plaintiff "I certainly hope VMI does not treat its people like that and I will look into it." This Defendant did not respond to your Plaintiff until March of 1990.

(14) During the latter part of February or early March, 1990 the Defendant, Colonel James E. Gaines, Jr. announced to the entire staff at the library where I was employed that he had obtained the approval of the Defendant, General John W. Knapp, Superintendent of Virginia Military Institute to seek a replacement for my position. I promptly contacted the Defendant, Colonel Thomas W. Davis, then Acting Dean, and conferred with him in March of 1990. Promptly

after this meeting I received a letter dated March 6, 1990 from the Defendant, Colonel Thomas W. Davis, advising that the letter addressed to your Plaintiff from the Defendant Colonel James E. Gaines, Jr. dated 30 November, 1990 was "intended as notification of non-renewal" of my Contract. The said letter erroneously avers that the Administrative Faculty Policy applicable to my employment required only four (4) months notice of a non-renewal of Contract while the said policy in fact requires six (6) months notice.

(15) The notice allegedly given as set forth in the said letter was not a notice of non-renewal and was not given six (6) months prior to the termination of your Plaintiff's then current Contract.

(16) Your Plaintiff's Contract with the Virginia Military Institute expired on June 30, 1990, subject to renewal unless six (6) months notice of non-renewal was given.

(17) By letter dated April 1, 1990, the Defendant Colonel Thomas W. Davis advised your Plaintiff in paragraph 4 of the said letter that your Plaintiff was entitled to six (6) months notice of non-renewal.

(18) That from November 30, 1989 and up until the termination of my employment at Virginia Military Institute, I repeatedly requested from the Defendant Colonel Thomas W. Davis the explanation of my rights under the terms of my Employment Contract and the Virginia Military Institute Administrative Faculty Policy and for an appeal or review of my dismissal pursuant to such policies. I was repeatedly advised that there were no appeals or

review procedures for my case.

(19) The Defendant General John W. Knapp, Superintendent of Virginia Military Institute and the Defendant Colonel Thomas W. Davis ratified and confirmed the acts of the Defendant Colonel James E. Gaines, Jr. herein complained hereof.

(20) The Defendant General John W. Knapp, Colonel Thomas W. Davis and Colonel James E. Gaines, Jr., each acted in their official capacity and as individuals in all of the acts herein complained of.

(21) That your Plaintiff relied upon her Employment Contract and the Administrative Faculty Policies at the Virginia Military Institute in accepting employment pursuant to the terms of your Plaintiff's Contract as hereinbefore set forth and moved her residence to Rockbridge County, Virginia, built a home on real estate purchased in Rockbridge County, Virginia, diligently pursued her duties under her Employment Contract and fulfilled all of the terms of her Employment Contract.

COUNT I

(1) Your Plaintiff hereby re-alleges paragraphs 1 through 21 of this Motion for Judgment.

(2) The Defendant, Virginia Military Institute, breached its Contract with your Plaintiff by terminating your Plaintiff's employment without giving six (6) months notice of non-renewal as required by the terms of the said Contract.

(3) That as a direct result of this breach of Contract your Plaintiff was denied employment at the Virginia Military Institute

for the fiscal year ending June 30, 1991.

(4) That as a direct result of the breach of the said Contract your Plaintiff was compelled to seek employment at another Institution prior to the commencement of the 1990-91 academic year and the offered extension of employment by the Defendant Virginia Military Institute to mitigate its breach of Contract was of no value to your Plaintiff.

(5) Your Plaintiff was required to expend large amounts of time and money in pursuing other employment, relocating her place of residence, placing her real estate upon the market at a time when the real estate market was depressed, loss of fringe benefits, loss of accrued benefits, loss of earnings for the 1990-1991 academic year and in the future and damages to her reputation and profession.

(6) Wherefore your Plaintiff hereby respectively MOVES this Honorable Court for judgment against the Defendant, the Virginia Military Institute in the sum of FIVE HUNDRED THOUSAND and NO/100 (\$500,000.00) DOLLARS, plus her reasonable attorney's fees and costs in this behalf expended.

COUNT II

(1) Your Plaintiff hereby re-alleges paragraphs 1 through 21 of this Motion for Judgment.

(2) The Defendant, Virginia Military Institute, breached its Contract with your Plaintiff by refusing to give your Plaintiff the review and appeal procedures for dismissal, as provided under the terms of your Plaintiff's Contract with the Virginia Military

Institute.

(3) That as a direct result of this breach of Contract your Plaintiff was denied continued employment at the Virginia Military Institute and was unjustly fired without any opportunity to be heard in her defense.

(4) That as a direct result of the breach of the said Contract, as set forth in this Count II, your Plaintiff was compelled to seek employment at another Institution and suffered the damages herein complained of.

(5) That as a direct result of the breach of the said Contract your Plaintiff was required to expend large amounts of time and money in retaining legal advice regarding her rights under the Contract and the prosecution of this cause, relocating her place of residence, placing her real estate upon the market at a time when the real estate market was depressed, loss of fringe benefits, loss of accrued benefits, loss of earnings for the continued employment to which she was entitled at Virginia Military Institute, loss of earnings in the future and damages to her reputation and profession.

(6) Wherefore your Plaintiff hereby respectfully MOVES this Honorable Court for judgment against the Defendant, Virginia Military Institute in the sum of FIVE HUNDRED THOUSAND and NO/100 (\$500,000.00) DOLLARS, together with her reasonable attorney's fees and costs in this behalf expended.

COUNT III

(1) Your Plaintiff hereby re-alleges paragraphs 1 through 21

and the allegations of Counts I and Counts II of this Motion for Judgment.

(2) All of the Defendants are "persons" as defined in Section 42 U.S.C. Section 1983.

(3) In the process by which your Plaintiff was discharged from the Virginia Military Institute, all of the Defendants acted under color of State Law.

(4) In the process by which your Plaintiff was discharged from Virginia Military Institute, all of the Defendants acted both in their official and individual capacities.

(5) Your Plaintiff has a property interest in her continued employment at Virginia Military Institute and in her individual and professional reputation which property interest warrants constitutional protection.

(6) Your Plaintiff suffered the loss of the property interest set forth in the foregoing paragraph, suffered severe emotional harm and was compelled to expend large sums of money in attempting to protect these interests. Your Plaintiff further suffered the loss of earnings, earning capacity for the present and in the future and continuing damages to her professional reputation.

(7) The Defendants and each of them conspired to deprive your Plaintiff of the property interest hereinbefore set forth.

(8) All of the Defendants deprived your Plaintiff of her constitutional right to procedural due process by failing to allow your Plaintiff to have, prior to her discharge, a meaningful opportunity to be heard in her own behalf before being deprived of

her constitutionally protected interest.

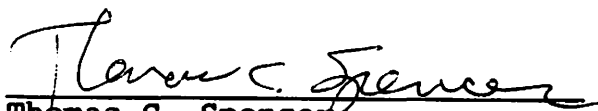
(9) Your Plaintiff was discharged from her employment at Virginia Military Institute without cause.

(10) Wherefore your Plaintiff was required to expend large amounts of time and money and was compelled to retain Counsel to protect her interest in her constitutionally protected rights and was required to pursue other employment, relocate her place of residence, sell her real estate upon the market at a time when the real estate market is depressed, loss of fringe benefits, loss of accrued benefits, loss of earnings presently and earning capacity in the future and damages to her reputation and profession. Your Plaintiff hereby respectfully MOVES this Honorable Court for judgment against the Defendants and each of them jointly and severally in the sum of FIVE HUNDRED THOUSAND and NO/100 (\$500,000.00) DOLLARS, plus her reasonable attorney's fees and costs in this behalf expended.

Respectfully submitted,



Winnie W. Fun, Plaintiff



Thomas C. Spencer,
Counsel for the Plaintiff, Winnie W. Fun
SPENCER & FILSON, P.C.
31 West Washington Street
Lexington, Virginia 24450

VIRGINIA MILITARY INSTITUTE

DEAN OF THE FACULTY
LEXINGTON, VIRGINIA

12 December 1986

Mrs. Winnie Wei Fun
1210 Holy Cross Drive
Monroeville, Pennsylvania 15146

Dear Mrs. Fun:

Your record and qualifications have been reviewed, and I am pleased to offer you an appointment as Technical Services Librarian and Assistant Professor of Bibliography effective 1 April 1987. In this position you will report directly to the Head Librarian who will inform you in detail of your duties.

Your annual salary will be \$34,000 to be paid in twelve monthly installments. All initial appointments are made for one year.

You will be commissioned a Major in the Virginia Militia, receiving your commission in the Adjutant General's Corps. You should purchase the required uniforms and insignia as soon as possible. Colonel Gaines can advise you on the purchase and wearing of uniforms.

Under separate cover, I am sending you a copy of the Handbook for the Faculty and Staff. I call your specific attention to Chapter VIII, Responsibilities of Faculty Members, pp. 41-55, and Chapter XIV, Virginia Militia and Corps of Cadets, pp. 64-76.

You will have faculty status, but you will not be eligible for tenure (permanent status) as you will not be teaching at least half-time. You can expect assignment to several Institute committees. We would expect that as time progresses you would participate in professional activities and join appropriate local organizations.

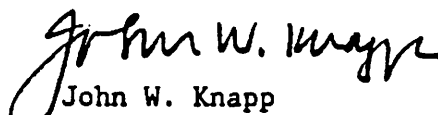
You are eligible for housing on the Post, but we cannot promise housing to a new staff or faculty member. I am certain that Colonel Gaines will assist you in your search for suitable housing.

We look forward to having you at VMI. In order that we may have a file record of your acceptance, please return to me the attached copy of this letter with your signature. Please complete two copies of the attached Commonwealth of Virginia Application for Employment form. The third copy is for your files.

Mrs. Winnie Wei Fun
12 December 1986
Page 2

Very best wishes.

Sincerely,


John W. Knapp
Brigadier General
Dean of the Faculty

Enclosures

cc: Superintendent
Colonel Gaines
Colonel Slater
Mrs. Burch

of visitors, and the board shall forthwith communicate to the governor a full statement of the reasons for making the removal."

10. Procedures for Imposition of Sanctions Other than Dismissal

- (A) If the administration believes that the conduct of a faculty member, although not constituting adequate cause for dismissal, is sufficiently grave to justify imposition of a severe sanction, such as suspension from service for a stated period, the administration may institute a proceeding to impose such a severe sanction; the procedures outlined in Paragraph 8 will govern such a proceeding.
- (B) If the administration believes that the conduct of a faculty member justified imposition of a minor sanction, such as a reprimand, it will notify the faculty member of the basis of the proposed sanction and provide the faculty member with an opportunity to persuade the administration that the proposed sanction should not be imposed. A faculty member who believes that a major sanction has been incorrectly imposed under this paragraph, or that a minor sanction has been unjustly imposed, may petition the faculty grievance committee for such action as may be appropriate.

11. Terminal Salary or Notice

If the appointment is terminated, the Board of Visitors in determining what, if any, payments will be made beyond the effective

date of dismissal, may take into account the length and quality of service of the faculty member.

12. Academic Freedom and Protection Against Discrimination

(A) All members of the faculty, whether tenured or not, are entitled to academic freedom. In this context the administration acknowledges the 1940 Statement of Principles on Academic Freedom and Tenure, formulated by the Association of American Colleges and the American Association of University Professors.

(B) All members of the faculty, whether tenured or not, are entitled to protection against illegal or unconstitutional discrimination by the institution, or discrimination on a basis not demonstrably related to the faculty member's professional performance, including but not limited to race, sex, religion, national origin, age, physical handicap, or marital status.

13. Complaints of Violation of Academic Freedom or of Discrimination in Nonreappointment

If a faculty member on probationary or other nontenured appointment alleges that a decision against reappointment was based significantly on considerations violative of (1) academic freedom or (2) governing policies on making appointments without prejudice with respect to race, sex, religion, national origin, age, physical handicap or marital status, the allegation will be

given preliminary consideration by an ad hoc committee appointed for this case only by the Superintendent and instructed by him, which will seek to settle the matter by informal methods. The allegation will be accompanied by a statement that the faculty member agrees to the presentation, for the consideration of the faculty committees, of such reasons and evidence as the institution may allege in support of its decision. If the difficulty is unresolved at this stage, and if the committee finds evidence that the allegations have merit, it may recommend that the matter be heard in the manner set forth in Paragraphs 7 and 8, except that the faculty member making the complaint is responsible for stating the grounds upon which the allegations are based, and the burden of proof will rest upon the faculty member. If the faculty member succeeds in establishing a prima facie case, it is incumbent upon those who made the decision against reappointment to come forward with evidence in support of their decision. Statistical evidence of improper discrimination may be used in establishing a prima facie case.

14. Administrative Personnel

The foregoing regulations apply to administrative personnel who hold academic rank, but only in their capacity as faculty members. An administrator who alleges that a consideration violative of academic freedom, or of governing policies against improper discrimination as stated in Paragraph 12, significantly contributed to a decision to terminate or not renew his or her

appointment to an administrative post, is entitled to the procedures set forth in Paragraph 13.

15. Political Activities of Faculty Members

Faculty members, as citizens, are free to engage in political activities. Where necessary, leaves of absence without pay may be given for the duration of an election campaign or a term of office, on timely application, and for a reasonable period of time. The terms of such leave of absence will be set forth in writing, and the leave will not affect unfavorably the tenure status of a faculty member, except that time spent on such leave will not count as probationary service unless otherwise agreed to in advance.

Appendix C
FACULTY GRIEVANCE PROCEDURES

I. Objective

To afford an immediate and fair method for the resolution of disputes which may arise between faculty members, including department heads, or between the faculty and the administrative staff of the Virginia Military Institute. The Board of Visitors has stipulated, however, that these procedures are not to be construed as applicable to the settlement of personal differences outside the parameters of the profession, as an employee of the VMI and of the Commonwealth of Virginia.

II. Policies

A grievance shall be a complaint raised by a faculty member regarding the application, meaning or interpretation of personnel policies and procedures affecting his status. All complaints shall be given attention and remedies sought, in recognition of the generally accepted principles that any matter affecting the morale of a faculty member should be of equal concern to the entire VMI faculty administration. Grievances may be raised between two or more faculty members, belonging to the same or to different academic departments, between a faculty member and his department head, and between a faculty member and a member of the administrative staff.

The following shall not be grievable except where the faculty

member can show that established policies or procedures were not followed or applied fairly; i.e.,

- (1) negotiation of salaries or faculty benefits
- (2) work activity accepted by the faculty member as a condition of employment
- (3) the contents of established policies of the Institute
- (4) reduction in faculty positions due to demonstrable bona fide financial exigencies
- (5) failure to receive a merit increase or to receive a promotion
- (6) non-reappointment and tenure consideration, which are subject to appeal according to procedures specified in Appendix B

The classification of a complaint as 'non-grievable' shall not be construed to restrict any faculty member's right to seek or the administration's obligation to provide customary administrative review of complaints outside the scope of the grievance procedure.

In further recognition of the principle of academic freedom that appears in the Handbook for Faculty and Staff, it shall be the right of every faculty member filing a grievance to have a representative of his choice and to present witnesses and evidence in support of his case throughout all proceedings, with complete freedom from reprisal. The grievant must bear any cost in employing representation or in preparing or presenting his case. It is to be understood, however, that provisions set forth in this document do not confer the right upon

anyone concerned to make slanderous or libelous statements in the presentation of testimony, either oral or written.

III. Procedures

(1) Step One: Informal Reconciliation

A faculty member shall first attempt to have a satisfactory resolution of his complaint through the informal channels at his disposal. In most cases the grievant will first discuss his complaint with his department head. At the request of either, the Dean of the Faculty may be asked to participate in these informal discussions. If, however, the grievance raised is against the faculty member's own department head, or if the grievant is himself a department head, then the Dean of the Faculty may be called in immediately as an informal mediator. In all cases of interdepartmental grievances, the Dean of the Faculty should be informed by the grievant, through his department head if appropriate, and the Dean should be present at any informal reconciliation meeting. In interdepartmental grievance cases, the grievant should, even at the informal step, submit his complaint in writing.

(2) Step Two: Formal Grievance Hearing

If attempts to resolve his grievance dispute through the informal channels outlined above do not succeed to the faculty member's satisfaction, the grievant may petition the Dean of the Faculty, stating his grievance in writing, within seven (7) days after the last informal

meeting for the convening of the Grievance Hearing Panel. The grievant must suggest an appropriate remedy in his petition.

IV. Grievance Hearing Panel (GHP)

A. Membership

- (1) The GHP shall be composed of five (5) full-time tenured faculty, excluding department heads and any faculty member who also holds an administrative position.
- (2) Members shall be drawn from an elected pool of twelve (12) full-time tenured faculty. Each division (Arts, Sciences, and Engineering) shall elect four (4) representatives to the pool.
- (3) Election procedure
 - (a) An election officer shall be responsible for conducting elections to the pool in the three divisions. For the initial election, this function shall be exercised by the Dean. In subsequent elections, the pool already empanelled shall meet to elect an administrative chairman.
 - (b) The administrative chairman's sole function shall be to conduct the election procedure for future members of the pool.
 - (c) He shall send via campus mail a list of names of the

eligible faculty in each division to that division's members. Each member shall vote for four (4) representatives. The four receiving the highest number of votes shall be elected to the pool. In case of a tie, a run-off election shall be held.

(4) Terms of service in the pool

- (a) A member elected to the pool shall serve for two years. He may be reelected to another two-year term but may not serve more than two such terms consecutively. He shall become eligible for election again after an interval of two years, when he may serve another two consecutive two-year terms before becoming ineligible. A term of service shall begin with the first general faculty meeting of the new academic year.
- (b) A special election may be called by the pool chairman at any time in order to fill an unexpired term of service. Such an election shall be administered in the same way outlined in paragraph 3 above.

- (5) The names of pool members will be published at the beginning of each academic year.

B. Procedure for Convening

When the Dean of the Faculty has received a petition to convene the QHP, he shall, within five (5) working days, submit the list of twelve members in the pool to each side in the dispute. Each party will have three working days within which to select two (2) QHP

members from the list. If both parties select the same member (or members), then the grievant shall select another member (or members). The four members thus chosen shall meet to choose a fifth, who shall be a member of the pool. The five GHP members shall then select a chairman to preside at its hearings.

C. Disqualification of Members for Cause

- (1) A faculty member elected to the pool may disqualify himself from sitting on the GHP convened to hear a case because of possible conflict of interest, personal bias, or any other reason deemed sufficient by all parties concerned.
- (2) In any event, no faculty member from the pool may serve on the GHP convened at the request of a member of his department, nor may any one serve who belongs to the same department as any party involved in the case.
- (3) Notice of disqualification for cause shall be reported to the Dean, and if a person refuses to disqualify himself and it is apparent that good cause exists, the Dean may disqualify that member of the committee, and the party who chose the person initially will select a replacement from the list.

D. Authorities and Responsibilities of the GHP

- (1) The GHP shall have the responsibility to interpret the application of appropriate policies and procedures in each grievance case. It does not have the prerogative to formulate or to change policies or procedures.

- (2) The GHP has the function of determining whether the complainant has a legitimate grievance, and if so, of recommending an appropriate remedy to the Superintendent.
- (3) The GHP shall set the time for the hearing, which shall be held as soon as practicable, but not more than ten (10) full working days after the panel has been constituted. Written notice of the hearing shall be sent by the panel through the Dean to all parties concerned, and panel members shall have copies of the written grievance in their possession at least five (5) days in advance of the start of the hearing.
- (4) The GHP shall have sole authority to conduct its proceedings, but the following procedures shall be observed:
 - (a) The panel chairman shall establish panel procedures. He shall determine the rules of order for a particular hearing.
 - (b) All parties involved must be present at all sessions and all panel members must also be present.
 - (c) The panel shall determine the propriety of attendance at the hearing of persons not having a direct interest in the hearing.
 - (d) A complete tape/transcript of all proceedings shall be kept and copies made available at cost to all parties upon request. A typewritten transcript will be provided at cost to the party requesting the transcript.

- (e) The panel may at the beginning of the hearing ask for statements clarifying the issues involved.
- (f) Exhibits, when offered by either side in a dispute, may be received in evidence by the panel, and when so received, shall be marked and made part of the records.
- (g) Both parties, or their representatives, shall then present their claims, evidence and witnesses who shall submit to questions or other examination. The panel may, at its discretion, vary this procedure but shall afford full and equal opportunity to all parties and witnesses for presentation of any relevant material.
- (h) The parties may offer evidence and shall produce such additional evidence as the panel may deem necessary to an understanding and determination of the dispute. The panel shall be the judge of relevancy and materiality of the evidence offered. All evidence shall be taken in the presence of the panel and of the parties.
- (i) The panel chairman shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the chairman shall declare the hearing closed.
- (j) The hearings may be reopened by the panel on its own motion or upon application of a party for good cause shown at any time before its recommendation is made to the Superintendent.

(5) A majority vote by panel members shall be sufficient in all its determinations.

(6) Report of Findings

(a) The GHP's report shall be filed in writing with the Superintendent by the panel chairman not later than fifteen (15) full working days after completion of the final hearing. A copy of the GHP's report shall be made available to all parties in the case.

(b) The GHP's report shall include separate paragraphs discussing the following items: the issue, the evidence, arguments, findings and recommendations. Other appropriate items may be included in the report.

V. Disposition by the Superintendent

Upon receiving the report from the GHP, the Superintendent shall have fifteen (15) working days in which to make a final disposition of the case. His decision shall be made in writing to all parties in the grievance via the chairman of the GHP and the Dean of the Faculty. A copy of his decision shall also be sent to the Board of Visitors.

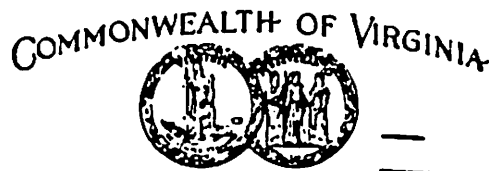
VI. Concluding Notes

The parties to the grievance, by mutual agreement, and the GHP chairman, may extend any or all of the time periods established in this procedure. Failure by the faculty member to process a grievance

within the time limits, or agreed-upon extension, shall constitute termination of the grievance.

Nothing in this procedure shall contravene Executive Order Number One Issued by the Governor on Equal Employment Opportunity.

Reference to the word 'his' means his or her as applicable.



VIRGINIA MILITARY INSTITUTE

LEXINGTON, VIRGINIA

24450

30 October 1989

STON LIBRARY
03-464-7228

Major Winnie W. Fun
Technical Services Librarian

Dear Winnie:

Last week I heard a story related to your conduct that, if true, concerns me very much. Essentially, the story was that you had told Linda Covington and Patsy Smith that you intended to revise Mrs. Youngblood's job description so that she would no longer have a position in the catalog department and that you expected their support in your intentions.

You and I have spoken on several occasions about your public outbursts and your need to eliminate them. The episode of this past Thursday was one of inappropriate conversation with your staff. I have told you repeatedly over the past months to make no public comment on the subject of Mrs. Youngblood's or anybody's job reassignment -- that involves only you and me at this point -- and I expect you to do that. Further acts of this kind -- unprofessional conduct in front of your staff or reorganization talk that I have not authorized -- will jeopardize your position at VMI.

In your capacity as a supervisor, I hold you personally responsible for the people in Technical Services; I want them to work as well as possible with each other and with a high degree of cooperation on the large tasks that we face. It is very important for you to "bring people together" so that their varied skills will benefit the library as a whole. By your interactions with employees who work under your supervision, you should contribute to good morale, not detract from it. As I have told you previously, you should not criticize other staff members in public, as it is bad for morale and is counterproductive to motivating the staff.

This letter is formal notice that I expect you to improve your interpersonal skills in dealing with your staff. I look forward to working with you to correct this counterproductive behavior and to find solutions that will make Technical Services an efficient, if not more pleasant, place to work.

Sincerely,

A handwritten signature in cursive script that reads "Jim Gaines".

James E. Gaines, Jr.
Head Librarian

27

C-Colonel T. W. Davis
Acting Dean of the Faculty
Mrs. G. B. Burch
Personnel Director

COMMONWEALTH OF VIRGINIA



VIRGINIA MILITARY INSTITUTE

LEXINGTON, VIRGINIA

24450

30 November 1989

ON LIBRARY
464-7228

Major Winnie W. Fun
Route 2, Box 101A
Fairfield, Virginia 24435

Dear Major Fun:

As we discussed in my office on 2 November 1989, you will be leaving VMI's payroll no later than 31 October 1990, and I will base any letters of reference on your performance from now until departure. I regret very much that you were unable to meet the requirements for managing the department and hope that you will be able to find a suitable and pleasant position elsewhere should you decide to continue working. Among others, you have real strengths in planning, which I will no longer have on the staff and will miss.

We will start the recruitment process for a new Head of Technical Services shortly, expecting to interview during the winter and early spring. It is our hope to have someone in the position over the summer if not sooner. Obviously, it would be less awkward for all concerned if you were relocated by that time.

In completing the final months in your job here, I trust that you will give us your best professional efforts. As I explained to you, the regulations for dismissal of an administrative staff member of your seniority require only four months' notice, and a year's notice is generous and was awarded here in an effort to make your relocation easier. I sincerely wish you well in a new job and/or the opportunity to live nearer your children.

Sincerely,

A handwritten signature in dark ink, appearing to read 'J. E. Gaines, Jr.'.

James E. Gaines, Jr.
Colonel, Virginia Militia
Head Librarian

Copy--Col. Davis, Acting Dean
Mrs. Burch, Personnel Director

V I R G I N I A:

IN THE CIRCUIT COURT OF ROCKBRIDGE COUNTY

WINNIE W. FUN,

Plaintiff,

v.

VIRGINIA MILITARY INSTITUTE

and

MAJOR GENERAL JOHN WILLIAMS KNAPP

and

COLONEL THOMAS W. DAVIS

and

COLONEL JAMES E. GAINES, JR.,

Defendants.

DEMURRER

The Defendants, by counsel, respond to the Motion for Judgment by stating that it is insufficient at law and fails to state a cause of action for the following reasons:

1. Counts I and II assert a breach of contract and seek a damage award. Such pecuniary claims are subject to the mandatory and jurisdictional notice requirements set forth in Va. Code §§ 2.1-223.1 and 8.01-192. Plaintiff's cause of action does not accrue until and unless she receives disallowance from the Comptroller. The Complaint is defective on its face for its failure to name the Comptroller as a party and recite compliance with the notice requirements. Accordingly, defendants request that Counts I and II be dismissed as to all parties.

2. In Count III, plaintiff sets forth a claim pursuant to 42 U.S.C. § 1983 and alleges that defendants deprived her of due process rights under the Constitution of the United States. Contrary to plaintiff's averments, however, VMI is not a "person" under 42 U.S.C. § 1983, nor are the three individuals to the extent they are sued in their official capacities. See Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989).

Defendants request that Count III be struck as to VMI and as to the individually-named defendants to the extent they are sued in their official capacities.

3. Plaintiff also fails to state a cause of action pursuant to 42 U.S.C. § 1983 as to the named defendants in their individual capacities for the following reasons:

(a) Nonrenewal of an appointment contract is to be distinguished from termination or discharge for cause. See the Administrative Faculty Policy ¶ III. D., a document referred to in the Motion for Judgment at ¶¶ 18 and 21. Since plaintiff's contract was for a fixed term of one year, no property interest in continued employment is at stake and the Due Process Clause is not invoked.

(b) The alleged failure of a State official to follow the Commonwealth's personnel policies does not give rise to a § 1983 action. Even if defendants failed to follow their own established procedures, due process is guaranteed by the adequacy of state law remedies. Fields v. Durham, 909 F.2d 94, 98-99 (4th Cir, 1990). Accordingly, defendants request that Count III be struck in its entirety as to all parties.

For the reasons stated, defendants respectfully state that the Motion for Judgment fails to state a cause of action and request that the Court dismiss this action. Defendants reserve the right to seek their attorney fees and costs in defense of an action lacking a basis at law.

VIRGINIA MILITARY INSTITUTE
MAJOR GENERAL JOHN W. KNAPP
COLONEL THOMAS W. DAVIS
COLONEL JAMES E. GAINES, JR.

By: Martha M. Parrish
Counsel

MARY SUE TERRY
Attorney General

PAUL J. FORCH
Senior Assistant Attorney General

C. TABOR CRONK
MARTHA M. PARRISH
Assistant Attorneys General

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Demurrer was mailed via First Class mail to Thomas C. Spencer, Counsel for Plaintiff, Spencer & Filson, P.C., 31 West Washington Street, Lexington, Virginia 24450 this 11th day of April, 1991.

Martha M. Parrish
Counsel

6:98-p3/292/331B

Commonwealth of Virginia

JUDGES

RUDOLPH BUMGARDNER, III, Chief Judge
DUNCAN M. BYRD, JR.
GEORGE E. HONTS, III
THOMAS H. WOOD



TWENTY-FIFTH JUDICIAL CIRCUIT
COURTHOUSE SQUARE
LEXINGTON, VIRGINIA 24450
(703) 463-4758

CIRCUIT COURTS OF
COUNTY OF ALLEGHANY
COUNTY OF AUGUSTA
COUNTY OF BATH
COUNTY OF BOTETOURT
COUNTY OF CRAIG
COUNTY OF HIGHLAND
COUNTY OF ROCKBRIDGE
CITY OF BUENA VISTA
CITY OF CLIFTON FORGE
CITY OF STAUNTON
CITY OF WAYNESBORO

July 30, 1991

Martha M. Parrish
Assistant Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

Thomas C. Spencer, Esquire
31 West Washington Street
Lexington, Virginia 24450

In re: Winnie W. Fun v. VMI, et al

Dear Counsel:

Winnie W. Fun (Fun) instituted this action against the Virginia Military Institute (VMI), the Superintendent of VMI (Superintendent), Colonel Thomas W. Davis (Acting Dean) and Colonel James E. Gaines, Jr. (Head Librarian). Fun alleges one-year employment contracts with VMI for her employment as librarian and Assistant Professor of Bibliography beginning in 1987. She further alleges the Head Librarian privately reprimanded her, in 1989, for alleged conduct she denies, and then reprimanded her by letter of reprimand October 30, 1989. On November 2, 1989, Fun was advised orally she would be terminated. On November 30, 1989, Fun was delivered a letter of dismissal. Fun then conferred with the Acting Dean in December, 1989. The Acting Dean did not respond until March, 1990. In late February or early March, the Head Librarian announced the advertisement to fill Fun's position. The Acting Dean's response came after the Head Librarian's announcement and declared the letter of 30 November to be notice of non-renewal of Fun's contract.

Fun alleges in: Count I - a breach of contract by failing to give her six (6) month's notice of non-renewal; Count II - a breach of contract by failing to give Fun information regarding review and appeal of her non-renewal; and Count III - the actions taken or not taken violated Fun's Constitutional protections of due process and each of the individuals named are "persons" as defined in 42 U.S.C. Section 1983.

Ms. Parrish
Mr. Spencer
Page two

The action comes before us upon the demurrer of the defendants to each count. I shall attempt to address the demurrer by count.

(A) The defendants demur to Counts I and II claiming that the Comptroller of Virginia is an essential party to the action under Section 2.1-223.1.

I find no merit in that position. Article 5 of Chapter 14 of Title 2.1 of the 1950 Code of Virginia, as amended (Claims Against the Commonwealth), sets out the procedure for the handling of pecuniary claims against the Commonwealth. Section 223.1, which is the first section of the Article, provides "if... the claimant cannot identify such alleged act or omission with a single ...institution or agency... then the claim shall be presented to the Comptroller."

Fun has clearly identified the state agency involved, VMI. Having done so, she has no obligation to add the Comptroller to this action. Once the agency involved is identified, the Comptroller has no duty but to pay what is properly owed the claimant. If the Comptroller should be added to this action, under the procedure outlined in Article 5, the defendants may do so, but Fun is not required to do so.

Finding the Comptroller is not a necessary party to this action also obviates the notice requirements of Section 192, Article 18, Chapter 3, Article 8.01 of the Code.

(B) The defendants demur to Count III on the basis that none of the defendants individually or officially constitute a "person" as defined in Section 1983 and Fun suffered no deprivation of property, since she had no vested interest beyond her one-year contract then in force.

I find this portion of the demurrer well-founded and accordingly grant the demurrer as to Count III. Fun did, in fact, work out her one-year contract. While the notice to her was inartful and, perhaps, tactless, it was notice that VMI did not intend to continue its employment relationship.

The letter of 30 November, 1989 to Fun begins: "As we discussed in my office on 2 November, 1989, you will be leaving VMI's payroll no later than 31 October, 1990..." In the second paragraph of the letter the Head Librarian also wrote, "It is our hope to have someone in the position over the summer if not sooner. Obviously, it would be less awkward for all concerned if you were relocated by that time."

The notice of non-renewal is plainly set out in the language

Ms. Parrish
Mr. Spencer
Page three

quoted. So, while the Head Librarian speaks of dismissal and makes reference to the fact "dismissal" requires only four months notice, Fun was given "a year's notice" which he described as "generous", but which also extended Fun's opportunity for employment past the expiration of her contract.

I find, therefore, that Fun was not deprived of her due process guarantees under the United States Constitution.

Counsel for the defendants is directed to prepare an order in conformity herewith.

Sincerely yours,



George E. Honts, III, Judge

GEHIII/det

cc: Mr. Bruce Patterson, Clerk
Rockbridge County Circuit Court

V I R G I N I A:

IN THE CIRCUIT COURT OF ROCKBRIDGE COUNTY

WINNIE W. FUN,

Plaintiff,

v.

VIRGINIA MILITARY INSTITUTE, et al.,

Defendants.

Case No. L-39-91

MOTION TO AMEND DEMURRER

Defendants, by counsel, move the Court to permit the amendment of their Demurrer, heretofore filed, as follows:

1. Counts I and II of the Motion for Judgment state no cause of action because the said Motion for Judgment and its attachments show on their face that defendants afforded plaintiff the notice of non-renewal required by her contract, and, secondly, that plaintiff was not dismissed during the term of her contract, but, rather, received the benefit of the full term thereof.

In consideration whereof, Defendants respectfully move the Court to dismiss the Motion for Judgment.

VIRGINIA MILITARY INSTITUTE

MAJOR GENERAL JOHN W. KNAPP
COLONEL THOMAS W. DAVIS
COLONEL JAMES G. GAINES, JR.

Martha M. Laroche

Counsel

the 6
9-16-21
JAH

MARY SUE TERRY
Attorney General of Virginia

PAUL J. FORCH
Senior Assistant Attorney General

C. TABOR CRONK
Assistant Attorney General

MARTHA M. PARRISH
Assistant Attorney General

101 North Eighth Street
Richmond, Virginia 23219
(804) 786-3810

CERTIFICATE OF SERVICE

I, the undersigned, certify that a copy of the foregoing Motion was mailed to Thomas C. Spencer, Esquire, counsel for plaintiff, Spencer & Filson, P.C., 31 West Washington Street, Lexington, Virginia 24450, this 6th day of September, 1991.

Martha M Parrish

6:46-p6/341S/MDD

V I R G I N I A:

IN THE CIRCUIT COURT OF ROCKBRIDGE COUNTY

WINNIE W. FUN,

Plaintiff

v.

Case No. L-39-91

VIRGINIA MILITARY INSTITUTE, et al.

Defendants.

ORDER

This cause came to be heard on Defendants' Demurrer, which for the reasons stated in the Court's letter opinion of July 30, 1991 is sustained as to Count III of the Motion of Judgment. Because of findings announced in the said letter opinion, defendants have moved to amend their Demurrer to raise an additional ground for dismissal of Counts I and II of the Motion for Judgment.

Leave to amend Defendants' Demurrer is granted, and the Amended Demurrer is hereby sustained based on the Court's findings of July 30, 1991 that plaintiff received the notice of non-renewal required by her contract and was not dismissed during her contractual term. Accordingly, the Motion for Judgment is hereby DISMISSED WITH PREJUDICE.

Date: 9 / 16 / 91

ENTER:


Judge

I ask for this:

Martha M. Pambh

Counsel for Defendants

Seen and objected to
as dismissing the Motion
for Judgment; *and granting the Demurrer*
and For Sustaining Demurrer as to Count 11.

Thomas C. Spencer

Counsel for Plaintiff

6:46-p5/341S/MDD

VIRGINIA: IN THE CIRCUIT COURT OF ROCKBRIDGE COUNTY

WINNIE W. FUN,
Plaintiff,

v. Case No. L-39-91

VMI, et als,
Defendants.

PLAINTIFF'S EXCEPTIONS TO THE COURT'S ORDER
OF SEPTEMBER 16, 1991

Comes now the Plaintiff, Winnie W. Fun, by counsel and makes these her exceptions to the Court's Order entered on September 16, 1991, herein on the following grounds:

(1) The Court erred in allowing the Defendant to amend its Demurrer after a Demurrer had been filed, argued and ruled upon.

(2) The Court erred in sustaining the Defendant's Demurrer on Counts I, II and III on the grounds that the Plaintiff's Motion for Judgment alleges that the Defendant breached her contract with the Defendant by failing to give her timely notice of non-renewal, and by failing to give the Plaintiff the benefit of reviews guaranteed to her by her contract.

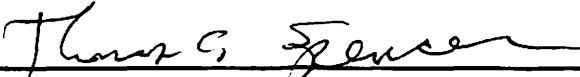
(3) The Court further erred in dismissing the Motion for Judgment with prejudice and in not allowing the Plaintiff an opportunity to amend the Motion for Judgment.

(4) The Court further erred in sustaining the Defendant's Demurrer to Count III of the Motion for Judgment by holding that the Defendants were not persons as alleged in the Third Count of the Motion for Judgment, and further erred in holding that the Plaintiff had no constitutionally protected interest in her continued employment and reputation at Virginia Military Institute.

Respectfully Submitted,

WINNIE W. FUN

By Counsel



Thomas C. Spencer
SPENCER & FILSON, P.C.
31 West Washington Street
Lexington, Virginia 24450


CERTIFICATE OF SERVICE

I hereby acknowledge that on the 19th day of September, 1991, a true copy of the foregoing Plaintiff's Exceptions to the Court's Order of September 16, 1991 was mailed to Martha M. Parrish, Assistant Attorney General, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia 23219.



Thomas C. Spencer

SPENCER & FILSON, P.C.
31 West Washington Street
Lexington, Virginia 24450

FILED
JUDGE COUNTY
CLERK
91 SEP 20 PM 2:45

CLERK

II. ASSIGNMENTS OF ERROR:

The Plaintiff hereby makes the following assignments of error:

(1) The Court erred in allowing the Defendants to amend their Demurrer after the Demurrer had been filed, argued and ruled upon.

(2) The Court erred in sustaining the Defendants' Demurrer to: (A) Counts I, and II

(B) Count III

ASSIGNMENT OF CROSS-ERROR

The trial court erred in overruling defendants' demurrer to Counts I and II of the motion for judgment on the ground that the plaintiff failed to plead compliance with the requirements of Va. Code § 2.1-223.1 as a jurisdictional prerequisite to suit under § 8.01-192.