DR. MARIA TULIA GOMEZ-AVILA,

Grievant,

v. DOCKET NO. 94-BOT-524

W. VA. BOARD OF TRUSTEES/

MARSHALL UNIVERSITY,

Respondents.

D E C I S I O N

Grievant, Dr. Maria Tulia Gomez-Avila, filed the following grievance on July 2, 1994:

> Grievant has been personally and vindictively attacked by unsubstantiated accusations which are contained in letters issued by the Chairman on Departmental Governance, which letters currently appear in her personnel file. She has further been denied tenure and promotion and notified that her contract for the 1994-95 School Year will be terminal. These actions by the Respondent were arbitrary and capricious. The relief sought by the Grievant is: (1) Removal from her personnel file of all letters relating to denial of her request for promotion and tenure and relating to notice of issuance of her terminal contract; (2) Withdrawal of the notice issued to Grievant by President J. Wade Gilley on April 14, 1994 denying Grievant tenure and promotion and notifying her of issuance of her terminal contract for the 1994-95 School Year; (3) That Grievant be issued a continuing contract for the 1994-95 School Year and that she be granted tenure and promotion.

A Level II hearing was conducted on August 2, 1994, and an adverse decision rendered on August 22, 1994. Grievant appealed to Level IV on August 29, 1994, and following several continuances forgood cause, three days of hearing were conducted at Marshall University on December 5, 1994, January 23, 1995 and January 30, 1995. Post-hearing submissions were filed by the parties on or about February 23, 1995. Grievant filed a Response on March 6, 1995, at which time this case became mature for decision.

Background

Grievant was employed by Marshall University as an Assistant Professor of Spanish and literature

within the College of Liberal Arts, Department of Modern Languages, beginning in the Fall of 1988. LIV Tr., Vol. II, p.16. (See footnote 1) Grievant's immediate supervisor, Dr. Harold Murphy, Chairman of the Department of Modern Languages, performed an evaluation of Grievant each year from 1988 until the present. Grievant received "above average" and "good" evaluations for the years 1988 through 1992. G. Exs. 16-18, 20. During that period, Dr. Murphy reported no negative comments or areas which needed improvement. However, Grievant was concerned about complaints which appeared in her student evaluations, specifically, that the students could not understand her English, and discussed these concerns with Dr. Murphy. LIV Tr., Vol. I, pp. 22, 28.

Dr. Murphy evaluated Grievant on January 13, 1993, as "needs improvement" and reported that many students felt the Grievant did not communicate well, was stubborn, argumentative, sarcastic, and defensive. G. Ex. 6. Grievant and Dr. Murphy discussed the evaluation and Grievant asked Dr. Murphy what she could do toimprove. Dr. Murphy provided Grievant with an "improvement plan" in August, 1993. Most of the items on the plan had already been undertaken by Grievant. G. Ex. 7.

Grievant was eligible to apply for tenure after six years of teaching at Marshall. Dr. Christopher Dolmetsch, Professor of Modern Language and Chair of the Committee on Departmental Governance (hereinafter "Committee"), advised Grievant in writing on October 1, 1993, of the procedures to be followed to pursue promotion and tenure. R. Ex. 13. The Committee is the first step of the promotion and tenure process at Marshall University. Grievant responded by letter to Dr. Dolmetsch on October 18, 1993, advising him that she understood the promotion and tenure process, including the policies and procedures outlined in **The Greenbook**, and the department's own "Promotion and Tenure Guidelines." R. Ex. 14.

The Greenbook is the faculty handbook which identifies the criteria for promotion and tenure, and also contains Policy Bulletin No. 36 which clarifies the criteria for promotion and tenure, as follows:

> Promotion in rank is a reward for achievement. It is based on the professional qualifications of a faculty member, including performance specific to the candidate's contractual responsibilities and duties. Major faculty responsibilities and duties include teaching and advising, scholarly and creative activities, service to the university, and professional service to the community. Individual colleges are responsible for determining the relative importance of the various faculty functions for purposes of personnel decisions. Colleges should provide flexibility in the weighing of such functions in order to accommodate a range of departments, disciplinary specialties and individuals with varying assignments.

. . .

> The grant of tenure requires that a candidate must have demonstrated effective performance and achievement in all of his or her major areas of responsibility. Additionally, the candidate must have demonstrated excellence in either teaching and advising or in scholarly and creative activities.

R. Ex. 24.

The Greenbook provides that the individual departments develop promotion and tenure guidelines which shall be followed in processing a candidate's application. The Department of Modern Languages Promotion and Tenure Guidelines states:

> In accordance with university policy, as stated in the Greenbook, the Committee will evaluate candidates for tenure/promotion according to the quality of their teaching, scholarship, and service.

. . .

> In order to be recommended at the departmental level for tenure/promotion to the rank of assistant professor, an applicant must receive:
>
> (1) a composite score of 3.75 in teaching plus a composite score of 3.75 in either scholarship or service
>
> OR
>
> (2) a minimum score of 3.75 in teaching plus a composite score of 2.75 or better in both scholarship and service.

> In order to be recommended at the departmental level for tenure/promotion to the rank of associate professor, an applicant must receive the same ratings as given above.

R. Ex. 2 (emphasis in original).

Grievant compiled a dossier as part of the promotion and tenure procedure and submitted it to the Committee for review in November, 1993. Joint Exhibit 1.

Professor Dolmetsch, by memorandum dated November 17, 1993, requested of Dr. Murphy any additional information he had regarding all candidates within the Department for promotion and tenure. R. Ex. 8. Dr. Murphy responded on November 19, 1993, with copies of class evaluations for the persons seeking promotion and tenure, and with copies of five letters from disgruntled students that were in Dr. Gomez-Avila's file. These letters were particularly critical of Grievant's teaching ability, as well as Grievant's personality. Grievant also received copies of these documents. R. Ex. 9.

On December 6, 1993, Dr. Dolmetsch advised the other members of the Committee, comprised of all tenured faculty members in the Department, of the schedule and procedure for evaluations and provided them with an evaluation form to be used in reviewing the candidates' dossiers. R. Ex. 10. The members were to use these forms to note the scores they gave the candidates in the areas of teaching, scholarship and service.

The Committee met to discuss the candidates for promotion and tenure. A composite score was derived for each substantive area by averaging the scores they had given each candidate after review of their dossiers. Based upon these scores, and other factors, the decision was made to deny Grievant promotion and tenure. Dr. Dolmetsch then issued a three-page letter on behalf of the Committee on January 10, 1994, denying Grievant promotion and tenure. G. Ex. 10.

This letter began by stating that Grievant's dossier was "greatly inflated", "highly selective", and "neither an accurate nor a reliable representation of her conduct here at Marshall" (emphasis in original). The Committee went on to state that "in all facets of her work Dr. Gomez-Avila has displayed an arrogance and an insensitivity to the extent that they have profoundly affected her relationship with both her students and her colleagues." Finally, the Committee concluded that "the words 'manipulative', 'self-serving', and even 'devious' were not considered too harsh in describing her overall personality and demeanor." The letter then proceeded to discuss the substantive issues

of teaching, scholarship and service. G. Ex. 10.

Dr. Dolmetsch received comments from Dr. Murphy, and Dr. Joan Mead, Acting Dean of the College of Liberal Arts, that this decision was too long, too harsh, and did not focus on the real problem, i.e., Grievant's effectiveness in teaching. LIV Tr., Vol. II, pp. 235, 299; Vol. III, pp. 35, 97.

Based on these comments, Dr. Dolmetsch revised the letter and issued a substitute letter on February 4, 1994, including a signature page for the members of the Committee to acknowledge their assent. This substitute letter contained the same substantive material, but in different order. Some of the comments contained in the first letter were omitted or reworded, however, the tone of the letter remained the same as the original. G. Ex. 11.

Both letters are consistent in that the number of points allocated for each area of substantive concern is the same in both letters:

2.35 out of a possible 5 for "research and scholarship";

3.0 out of a possible 5 for "service"; and

2.4 out of a possible 5 for "teaching".

G. Exs. 10, 11.

Dr. J. Wade Gilley, President of Marshall University, informed Grievant on April 14, 1994, that he had upheld the recommendation of non-tenure and denial of promotion. Grievant requested a statement of reasons for her denial of promotion and tenure. President Gilley responded on April 26, 1994, that:

> Promotion and tenure guidelines require that candidates must have demonstrated effective performance in all of his or her areas of major responsibilities. Based upon the recommendation of your Dean, the Department Chair and the Department Review Committee, documentation does not support effectiveness in the area of teaching and advising.

R. Ex. 22. (See footnote 2)

Grievant alleges that the two letters from the Committee denying her tenure, and the ultimate affirmance of that decision by President J. Wade Gilley, serve to show that the decision made by the Committee was based on factors other than teaching, scholarship and service, and the decision was, therefore, arbitrary and capricious.

Discussion

It is clear from the witnesses' testimony, the Greenbook, and the Departmental Promotion and Tenure Guidelines, thateffectiveness in teaching is the first and foremost concern at Marshall University. If an applicant does not meet the minimum standard for teaching, then the other scores become irrelevant. LIV Tr., Vol. III, pp. 23-25, 93.

The Greenbook states that the areas in which faculty are evaluated for teaching and advising include: "command of disciplinary knowledge and methodology; effectiveness of classroom performance; advising load and effectiveness of academic advising; effectiveness in assessing student learning; rapport with students; contributions to curricular development; instructional development of faculty colleagues, etc." R. Ex. 24.

The Greenbook further states that "relevant faculty activities should be subject to objective qualitative evaluations. Whenever possible, evaluations should be based on multiple sources of evidence. Teaching should be subject to evaluations by students and peers." R. Ex. 24. Marshall University-designed student evaluations were performed of Grievant's classes in Fall 1988, Spring 1991, Spring and Fall 1992, and Spring and Fall 1993. (See footnote 3)

Dr. Murphy, Grievant's immediate supervisor, observed only one class of Grievant's over six years, and that was in the Fall of1988, shortly after she arrived at Marshall University. Dr. Murphy gave her an overall favorable review at that time. LIV Tr., p. 22.

Dr. Murphy testified that the minimal requirement for a candidate to be recommended for tenure and promotion becomes "effectiveness in teaching." LII Tr., Vol. II, p. 17. Dr. Murphy gave great weight to student evaluations, particularly questions 4, 7 and 8, which he believes to be the three most important questions. Those questions concern how clearly the instructor communicates instructions, the overall organization of the class, and whether the presentation was clear and appropriate. LII Tr., Vol. II, pp. 12-16; R. Ex. 2. According to the responses to those questions, Dr. Murphy concluded that significant numbers of students believed that Grievant did not answer questions clearly, did not organize the presentations, and did not present the work clearly or in appropriate ways. LII Tr., Vol. II, pp. 13-14.

The only other faculty member to observe Grievant in class was Dr. Maria Carmen Riddel, another Spanish faculty member in the Department of Modern Languages. Dr. Riddel also served as

Grievant's mentor upon arriving at Marshall University, and for three years thereafter. She withdrew her support after that time, because she felt Grievant should be able to stand on her own as a faculty member. LII Tr., Vol. II, p. 117.

Dr. Riddel was a member of the Committee evaluating Grievant's promotion and tenure application. Dr. Riddel observed two of Grievant's classes as part of that evaluation process and foundnothing negative about Grievant's teaching in those class periods. G. Ex. 12; LII Tr., Vol. II, p. 125.

Dr. Riddel testified, though, that her class observations were hardly enough to outweigh some of the other things, specifically, the student evaluations, organization of classes, and the five student letters received complaining about Grievant's teaching ability. LII Tr., Vol. II, p. 129. Dr. Riddel testified that she gave Grievant a score on her teaching that she thought was fair. She took off points for the student evaluations, which she found to be "singularly unimpressive". LII Tr., Vol. II, p. 138.

Dr. Riddel testified that there were several important questions in the student evaluations in which Grievant consistently got low scores. Those questions dealt with knowledge of material, organization, grades, and comparison to other professors. LII Tr., Vol. II, p. 129. Dr. Riddel also took into account the letters from the students which had been supplied to the Committee by Dr. Murphy. LII Tr., Vol. II, p. 140.

Dr. Terence McQueeny, a member of the Committee, testified that teaching was Grievant's biggest problem. Dr. McQueeny testified that one gets a "feel" for things that are recurrent or pervasive when reviewing student evaluations, and if those problems extend over a number of years, it tends to show a serious problem. LII Tr., Vol. II, p. 202.

Finally, Dr. Joan Mead, then-Acting Dean of the College of Liberal Arts, testified that her major concern in evaluating candidates for promotion and tenure is effectiveness in teaching. LIV Tr., Vol. III, p. 91. Dr. Mead relied on the student evaluations and found many negative statements about Grievant's teaching and low numerical ratings. In fact, Dr. Mead testified that she had "never seen such overwhelmingly low ratings." LIV Tr., Vol. III, pp. 91-92. (See footnote 4)

Importantly, Dr. Mead did not consult with the Committee and performed her own independent evaluation of Grievant's dossier. Dr. Mead testified that she did not know Grievant and approached her review in an objective and fair manner. LIV Tr., Vol. III, pp. 94, 99. Dr. Mead found Grievant's service and scholarship more than satisfactory, but found her effectiveness in teaching to be

inadequate. LIV Tr., Vol. III, pp. 102-103.

Dr. Mead also found questions 4, 7 and 8 on the student evaluations to be the most informative in determining a professor's effectiveness in teaching. Dr. Mead concluded that:

> According to these responses, significant numbers of Dr. Gomez-Avila's students believe that she does not answer questions clearly, that she does not organize the presentation (the work of the class) well, and that she does not present the work clearly or in appropriate ways. These two problems, communicating understandably and presenting material logically, indicate a lack of sensitivity as to how one's students are comprehending the material at hand. Without that sensitivity, without the ability to realize, as the class proceeds, how the students are receiving the material, one does not teach effectively.

R. Exs. 18, 19.

Dr. Mead's testimony was very crucial to the undersigned in making a determination about Grievant's claims that the decision to deny her promotion and tenure was arbitrary and capricious. The undersigned found much hostility, bias and animosity towards Grievant from Dr. Murphy, Dr. Dolmetsch and Dr. Riddel, so much so that it was difficult at first to believe that any evaluation of Grievant by these individuals could be fair and objective. Indeed, when asked by Grievant's counsel to provide specific instances where Grievant was "manipulative", "self-serving" and "devious", as described in the Committee's two letters, the witnesses, Dr. Dolmetsch, Dr. Murphy and Dr. Riddell, merely responded with instances of "personal" conflict with the Grievant. The witnesses pointed to one of the five student letters received which complained that Grievant took credit for work done by students in a service organization as an example of her being "self-serving". However, one letter out of hundreds of student evaluations does not justify the harsh, vindictive comments found in the Committee's letters.

In comparison, Dr. Mead presented herself as an honest, thoughtful and credible witness, who was notably without bias toward the Grievant. The fact that Dr. Mead, in her own independent evaluation of Grievant's dossier, concluded that her effectiveness in teaching was inadequate, based upon the student evaluations is, quite frankly, the only determining factor that serves to support the Committee's recommendation that Grievant should be denied promotion and tenure.

While the undersigned agrees that the two letters from the Committee indicate a strong animosity and bias towards Grievant that interfered with the objective decision-making of the Committee, the

independent evaluation of Grievant's dossier by Dr. Mead, the Acting Dean of the College of Liberal Arts, serves to support the Committee's conclusion that Grievant did not meet the acceptable standards for effectiveness in teaching at Marshall University. (See footnote 5)

Findings of Fact

1. Grievant was employed by Marshall University as an Assistant Professor of Spanish and literature within the College of Liberal Arts, Department of Modern Languages, beginning in the Fall of 1988.

2. Grievant applied for promotion and tenure in or about October, 1993.

3. Respondent processed Grievant's application for promotion and tenure and adhered to all pertinent policies and procedures established by Marshall University.

4. The members of the Department of Modern Languages Committee on Departmental Governance, the first step in the promotion and tenure process, displayed hostility and bias towards Grievant that interfered with their ability to objectively assessher strengths and weaknesses in the substantive areas of teaching, scholarship and service.

5. The two letters dated January 10, 1994 and February 4, 1994, from the Committee on Departmenal Governance, denying Grievant promotion and tenure, are harsh, vindictive and substantially unrelated to the substantive issues to be addressed in evaluating a candidate's application for promotion and tenure.

6. The COLA Committee, chaired by then-acting Dean of the College of Liberal Arts, Dr. Joan Mead, performed an independent evaluation of Grievant's dossier as part of the promotion and tenure process.

7. Based on that independent evaluation, Dr. Mead concluded that Grievant had not demonstrated an effectiveness in teaching which was required first and foremost by Marshall University.

8. Dr. Mead recommended to Alan Gould, Vice President for Academic Affairs, that Grievant be denied promotion and tenure. R. Exs. 18, 19.

9. Dr. Gould recommended to President J. Wade Gilley that Grievant be denied promotion and tenure. R. Ex. 20.

10. President Gilley informed Grievant on April 14, 1994, of his decision to accept the

recommendation from the Dean, the Department Chair, and the Committee on Departmental Governance to deny her promotion and tenure. R. Ex. 21.

Conclusions of Law

1. Grievant must prove all her allegations constituting the grievance by a preponderance of the evidence. Baroni v. Board ofDirectors/Fairmont State College, Docket No. 92-BOD-271 (Feb. 11, 1993).

2. The decisional subjective process by which promotion and tenure is awarded or denied is best left to the professional judgment of those presumed to possess a special competency in making the evaluation unless shown to be arbitrary and capricious or clearly wrong. Sui v. Johnson, 784 F.2d 238 (4th Cir. 1984); Carpenter v. Board of Trustees/West Virginia University, Docket No. 93-BOD-220 (Mar. 18, 1994).

3. Grievant has not met her burden of proving that the denial of promotion and tenure was arbitrary and capricious or clearly wrong.

4. This Grievance Board is authorized under W. Va. Code § 18-29-6(b) to provide such relief as is deemed fair and equitable. Standifur/Weese v. University of W. Va. Bd. of Trustees, Docket No. 92-BOT-017 (Oct. 30, 1992); Rexroat v. Boone Co. Bd. of Educ., Docket No. 91-02-233 (June 15, 1992).

Accordingly, this grievance is **GRANTED** in part and **DENIED** in part. The denial of promotion and tenure of Grievant is hereby affirmed. Nonetheless, Respondents are hereby **ORDERED** to remove the January 10, 1994 and February 4, 1994 letters from the Department of Modern Languages' Committee on Departmental Governance from Grievant's personnel file and to destroy any copies that may be found to exist within the University system.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: March 14, 1995

Footnote: 1 *References to the Level II and Level IV transcripts will be designated as LII or LIV Tr., Vol. ___, p. ___.*

Footnote: 2 *Grievant has stipulated that the promotion and tenure procedure was adhered to by Marshall University, so it is unnecessary to review every step of the process in this decision. LIV Tr., Vol. II, p. 221.*

Footnote: 3 *Grievant performed her own evaluations in Spring, Summer and Fall 1990 in order to determine how she was doing in her teaching. Much controversy surrounded these "self" evaluations in the Committee's review of Grievant's dossier. However, the Committee conceded that they did not consider Grievant's self-evaluations and relied on the "official" Marshall evaluations in determining Grievant's effectiveness in teaching. It is evident that there were enough "offical" years of evaluation for the Committee to determine trends in Grievant's teaching performance.*

Footnote: 4 *The Chairman of the Department forwards the recommendation of the Committee to the next level, the COLA Committee. Dr. Mead was the Chair of the COLA Committee.*

Footnote: 5 *Because the undersigned finds that Respondent did not act in an arbitrary and capricious manner in concluding that Grievant's teaching abilities were below the standard recognized at Marshall, it is unnecessary to discuss the scores Grievant received in scholarship and service.*