JAMES W. HARRISON

v. Docket No. 93-BOD-400

WEST VIRGINIA BOARD OF DIRECTORS/BLUEFIELD STATE COLLEGE

DECISION

The grievant, Donald Harrison, is employed by Bluefield State College (BSC) as an Associate Professor of Biology in its Division of Arts and Sciences. He filed a grievance at Level I June 29, 1993, protesting a denial of his request for promotion to the rank of Professor. His immediate supervisor was without authority to grant relief and the grievance was denied at Level II following a hearing held August 6, 1993. (See footnote 1) Appeal to Level IV was made October 7, 1993 (See footnote 2), and a hearing was held December 8, 1993. The parties declined to submit proposed findings of fact and conclusions of law. (See footnote 3)

There is little if any dispute over the facts of the case. The grievant was initially employed by BSC as an Instructor of Biology in 1979. BSC's policies on promotion in effect at that time provided that one could achieve promotion from Associate Professor to Professor by completing sixty hours beyond a Masters Degree, forty-five of which were in the particular field in which the associate taught.

In 1985, then-BSC President Jerold Dugger concluded that revisions in the College's standards for promotion were needed in order to address a growing need for staff members with doctorate degrees in their respective fields. He was seeking a general upgrade in the standards for all promotions. (See footnote 4) Pursuant to Board of Regents "Policy Bulletin 36" (See footnote 5) which mandates that college presidents "establish, in cooperation with the faculty or duly-elected representatives of the faculty, guidelines and criteria for promotion in rank", President Dugger asked BSC's faculty senate to review the then-current standards and submit to him a list of recommended changes.

The faculty senate subsequently appointed a committee to complete the task. Between December 1985 and January 1987 the committee held several meetings during which the subject was strenuously debated. During that time, President Dugger occasionally met with the members and

advised them generally as to the type of changes he was seeking. The need to increase the number of Professors holding doctorate degrees was stressed. He also suggested, however, that exceptions might be made for faculty employed in the college's Engineering Technology, Nursing and Allied Health programs in that a masters degree had traditionally been considered the "terminal degree" in those fields by various professional organizations and other colleges. (See footnote 6) At some point, he also suggested that some allowance be made for faculty members who had been employed at BSC for twenty years but had not obtained a doctorate degree.

The committee had great difficulty developing new promotion criteria and it was not until January 15, 1987, that it reported to President Dugger that it had completed its task. (See footnote 7) PresidentDugger reviewed the committee's findings and made revisions. By memorandum dated February 18, 1987, to all faculty, he announced the following criteria for promotion from Associate Professor to Professor for the Divisions of Business, Education, Humanities and Social Science, and Natural Science:

> Earned doctoral degree, four years in rank as Associate Professor at BSC, with a total of ten years of teaching experience. Faculty teaching in art or music may substitute for the doctorate, the M.F.A. as a second Masters and twelve years of professional and teaching experience with five years in rank as Associate Professor at BSC.

> Faculty hired by 1970 (and no later than 1970) may substitute for the doctorate 20 years of full-time faculty service with BSC and 35 semester hours of high quality graduate work (beyond that required for the Masters) in a graduate degree program as approved by a graduate school, and major scholarly or professional achievements approved by their peers and the academic administration.

The following criteria was established for promotion from Associate Professor to Professor in the Divisions of Engineering Technology and Health Sciences:

> Masters Degree, professional registration, certification, license, if such is available, with four years in rank as Associate Professor at BSC, additional work experience beyond that required for appointment or promotion to Associate Professor. The work experience shall not be less than the equivalent of one year of full-time professional work with a "mini-thesis" type of summary report and peer evaluation of the quality of the experience and the employee's performance. The preferred route for certain faculty, such as in nursing, for example, may be the doctoral degree, and this is acceptable.

The grievant does not dispute that he became fully aware of these changes shortly after the memorandum was issued. Despitethat he did not have a doctorate degree and had not served twenty years at BSC, he made application on or about April 15, 1993, for promotion from Associate Professor to Professor. By memorandum dated May 17, 1993, Lewis Foster, Chairman of the Division of Arts and Sciences advised newly-appointed BSC President Leonard Nelson that he did not recommend the grievant for the promotion on the basis that he did not meet the criteria for such advancement. (See footnote 8) By letter dated May 24, 1993, President Nelson informed the grievant that his request had been denied for that reason. This grievance ensued.

The grievant advances four arguments for reversal of BSC's rejection of his application. First, he asserts that the criteria issued by President Dugger on February 18, 1987 are void in that he did not obtain "the cooperation of the Faculty Senate" before they were finalized. Second, he maintains the criteria are invalid because they were not voted upon by the Faculty Senate. Third, he avers that he has been the victim of discrimination in that other BSC Associate Professors who did not meet the new requirements were nevertheless promoted to Professor. Finally, he asserts that he should have been allowed to "cross over" to the criteria for the Health Sciences department since a majority of the students in his biology classes are enrolled in that program.

BSC maintains President Dugger complied with all applicable Board of Regents policies in effect at the time before issuing thenew promotion criteria and that no Associate Professors have been granted Professor status that did not meet those criteria. The college further avers that despite that Health Science majors are required to take Biology classes, the subject is properly categorized as natural science curriculum. BSC denies that President Dugger was under any legal obligation to seek the Faculty Senate's approval of the criteria. For the reasons discussed below, the undersigned concludes that the college must prevail.

The Grievance Board's review in cases involving denial of tenure or promotion in higher education is generally limited to an inquiry into whether the process by which such decisions are made conformed to applicable college policy or was otherwise arbitrary and capricious. Deference is granted to the subjective determinations made by the officials administering that process. Gardner v. Bd. of Trustees, Docket No. 93-BOT-391 (Aug. 26, 1994); Carpenter v. Bd. of Trustees,Docket No. 93-BOD-220 (Mar. 18, 1994). It is the grievant's burden to prove the allegations in his or her complaint by a preponderance of the evidence. Baroni v. Bd. of Directors, Docket No. 92-BOD-271

(Feb. 11, 1993). For the reasons discussed below, the undersigned concludes that the grievant herein has failed to meet that burden.

It is not necessary to set forth or analyze in any detail the evidence presented by the grievant. That evidence is wholly insufficient to substantiate any of his claims and to a great extent, supports the college's position.

The undersigned finds that the grievant is barred by W.Va. Code §18-29-4(a)(1) from protesting the process by which thecriteria was developed and implemented. That process was completed in 1987 and the grievant was fully aware of the ramifications of the criteria for his opportunities for promotion at that time but yet chose not to protest its adoption until over seven years later. Code §18-29-4(a)(1) requires that a grievance be filed "within fifteen days following the occurrence of the event upon which the grievance is based." Clearly, the event upon which this portion of the grievance is based is President Dugger's issuance of the new criteria in February 1987.

Moreover, regardless of the timeliness of this complaint, the record clearly reflects that President Dugger sought and obtained the faculty senate's full participation in the process by which the standards were ultimately developed. BOR "Policy Bulletin 36" required nothing more.

There is also no policy or regulation of record which mandates that a college president receive the approval of the faculty senate before implementing new promotion standards. Further, the undersigned is unaware of any statute, case law or legal theory which would support such a conclusion.

The evidence on the issue of discrimination merely confirms that since February 27, 1987, there have been no promotions from Associate Professor to Professor in the Divisions of Business, Education, Humanities and Social Science and Natural Sciences in which the applicants did not meet the promotion criteria established for those divisions. (See footnote 9) Further, the grievant concedesand the record establishes that any such promotions granted in other fields were in accordance with the criteria established for those fields.

Finally, the grievant's assertion that he should have been allowed to "cross over" to the criteria for those fields is specious. The grievant does not seriously contend that Biology is not a natural science and the record reflects in clear and convincing fashion that it is properly characterized as such. Simply because students in the Allied Health curriculum are required to take the grievant's Biology classes does not render him a "misclassified" member of the Allied Health faculty.

In summary, a preponderance of the evidence, including the grievant's own testimony, supports that a doctorate has always been considered the terminal degree in the field of natural sciences at BSC and that there was nothing arbitrary or capricious about the colleges's decision to require that degree for promotion to Professor in that field. Further, the record fully supports that BSC followed all applicable BOR regulations in developing and implementing the new promotion criteria and otherwise acted properly in denying the grievant's application for promotion.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Mercer 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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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: April 11, 1995

Footnote: 1The transcript of this proceeding and documentary exhibits entered are part of the record herein.

Footnote: 2W.Va. Code §18-29-4(c) permits an employee to bypass Level III.

Footnote: 3At the conclusion of the hearing, which was held on BSC's campus, the parties advised that a transcript would be prepared and forwarded to the undersigned and counsel. Counsel was given thirty days from the date of receipt of the transcript to submit proposals. Despite that the undersigned made several verbal and written inquiries, the transcript was not received in the GrievanceBoard's office until March, 14, 1995. Since counsel made their legal positions clear during the course of the hearing, it is assumed that they deemed proposals unnecessary.

Footnote: 4At Level IV, BSC presented considerable evidence to establish that President Dugger's determination that promotion standards in effect at the time were too low was not an arbitrary decision. The evidence clearly demonstrates that President Dugger was concerned that BSC had the lowest percentage of persons holding doctorate degrees of any college in West Virginia; that accreditation associations had consistently recommended that the percentage be increased; and that the reputation of BSC in the academic community would be enhanced by an increase in those numbers. There

was no evidence presented in rebuttal. Accordingly, it is concluded that President Dugger was not acting arbitrarily or capriciously in seeking the upgrade. The grievant, however, does not assert that he was.

Footnote: 5At that time the West Virginia Board of Regents had oversight authority over the state's universities and publicly-funded colleges. In 1989, changes in W.Va. Code §18B-1-1 placed the colleges under the auspices of the Board of Directors of The State College System.

Footnote: 6The record reflects that presently there is no college or university in the country which awards a doctorate in Engineering Technology and that many colleges are generally unable to attract persons holding doctorates in Allied Health and Nursing.

Footnote: 7The report was prefaced with remarks by committee chairman Norman Mirsky to the effect that the committee was unable to agree on a list of recommendations and that the report was merely asummary of those proposals made by President Dugger which the members could agree on.

Footnote: 8BSC's policy on promotions also provided that the applicant must receive the recommendation of the Chair of his division and that of the Dean of Academic Affairs. At the time, Dr. Foster was serving in both positions.

Footnote: 9The grievant presented the testimony of six witnesses including several BSC Professors in an effort to show that theProfessors had been afforded some special treatment in the promotion process. It quickly became apparent that this belief was based on rumor and innuendo and that the grievant had not bothered to verify the circumstances under which they had achieved promotion before leveling the charge of discrimination.