DAVID F. GRAF,

Grievant,

v v.

Docket No. 99-BOT-051

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, David F. Graf, employed by the Board of Trustees as an Associate Professor in the School of Medicine at West Virginia University (WVU or Respondent), filed a level one grievance on July 31, 1998, after his request for promotion was denied. (See footnote 1) **Dr. Robert M. D'Allesandri, Vice President of Health Sciences and Dean of the School of Medicine, denied the grievance at level one on August 14, 1998. Following an evidentiary hearing, the grievance was denied at level two by President David C. Hardesty, Jr., on February 1, 1999. Grievant elected to bypass consideration at level three as is permitted by W. Va. Code §18-29-4(c), and appeal was made to level four on February 4, 1999. A hearing was conducted on April 8, 1999, to supplement the lower-level record, and proposed findings of fact and conclusions of law, with responses were filed by the parties. The matter became mature for decision with the submission of an additional exhibit, on June 2, 1999. Grievant was represented by James A. Liotta, Esq., and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General.**

Background and Argument

By memorandum dated September 24, 1996, Grievant advised Dr. RobertJohnstone, Professor and Chair of Anesthesiology, that he was requesting promotion to Professor of Anesthesiology. As part of the review process, a number of individuals outside WVU were solicited to evaluate Grievant's credentials. Two of the outside reviewers recommended promotion, one specifically did not, “due to the lack of organized and thoughtful research activities and grant history”, but did recommend that he be considered for Professor of the

"Educator Track", if one existed. The fourth reviewer noted Grievant's teaching and service activities, and opined that his lack of research might be a consequence of the overwhelming nature of his clinical responsibilities. Without providing a definitive response relating to Grievant's promotion, the reviewer commented that three people with similar credentials had been promoted to the rank of Professor at his institution, all based upon their long-standing solid dedication to research and clinical care, and their impact on the field via the accomplishments of their trainees.

The Department of Anesthesiology Promotion and Tenure Committee reviewed Grievant's petition for promotion in December 1996, and recommended that he be retained at his current rank of Associate Professor. The Department Chair, Dr. Robert E. Johnstone, also recommended retention as Associate Professor. The School of Medicine Committee for Promotion and Tenure, and the Acting Dean of the School of Medicine made the same recommendation, that Grievant be retained as Associate Professor. Acting in the dual roles of Vice President for Health Sciences, and the designated representative of the President, Dr. Robert D'Allesandri, concurred with the unanimous recommendations, and denied the promotion.

Grievant argues that his promotion request was improperly reviewed under the 1995School of Medicine Guidelines, which are invalid because they contradict the Institutional guidelines in effect for the 1996-97 academic year. Specifically, the School Guidelines require that a tenure track faculty member demonstrate excellence in the areas of research and teaching. By comparison, the Institutional Guidelines require that a faculty member demonstrate excellence in two areas of teaching, research, or service. The two areas are to be identified in the individual's letter of appointment, and any changes to the areas of emphasis must be agreed to by the faculty member.

Grievant asserts at the time of his employment in 1979, his areas of emphasis were teaching and service, and that he has never agreed to any changes. Because application of the School Guidelines modified his promotion criteria without his agreement, Grievant argues that his promotion must be reviewed under the Institutional Guidelines. Under the Institutional criteria, Grievant asserts that he has demonstrated excellence in teaching and service, and should be promoted.

Additionally, Grievant argues that his promotion was not completely processed because it was not reviewed by the President. He acknowledges that Dr. D'Allesandri was acting on the President's behalf, but argues that review by both the Provost and the President is required.

Respondent argues that Grievant was properly evaluated using appropriate guidelines. Respondent asserts the decision to deny promotion in this case was unanimous at the departmental and school levels, and was clearly correct based upon conclusions that Grievant failed to achieve excellence in teaching, failed to achieve excellence in research, and failed to attain even satisfactory achievement in research. Based upon those findings Respondent concludes that under any Guidelines Grievant would not have been granted promotion.

Discussion

The review of an institution of higher learning's promotion and tenure decisions is "generally limited to an inquiry into whether the process by which such decisions are made conforms to applicable college policy or was otherwise arbitrary and capricious." Karle v. Bd. of Trustees/Marshall University, Docket No. 98-BOT-258 (Apr. 19, 1999); Harrison v. W. Va. Bd. of Directors, Docket No. 93-BOD-400 (Apr. 11, 1995). "The decisional subjective process by which promotion and tenure are awarded or denied is best left to the professional judgement 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 Circ. 1984). "Deference is granted to the subjective determination made by the official[s] administering the process." Harrison, supra.

Because Grievant alleges that the denial of his promotion was due to the application of improper guidelines, a review of the applicable policies will be helpful.

University Systems of West Virginia Board of Trustees Procedural Rule, Title 128, Series 36, Section 6, "Promotion in Rank", states in pertinent part:

6.1 Within the following framework, each president shall establish, in cooperation with the faculty or duly-elected representatives of the faculty, guidelines and criteria for promotion in rank:

6.1.1 There shall be demonstrated evidence that promotion is based upon a wide range of criteria, established by the institution in conformance with this document and appropriate to

the mission of the institution. Examples appropriate to someinstitutions might be: Excellence in teaching; accessibility to students; professional and scholarly activities and recognition; significant service to the institution community; experience in higher education and at the institution; possession of the doctorate, special competence, or the highest earned degree appropriate to the teaching field; publications and research; potential for continued professional growth; and service to the people of the State of West Virginia. Ultimate authority regarding the application of guidelines and criteria relating to promotion shall rest with the institution.

WVU's Policies and Procedures for Faculty Evaluations for the 1996-97 academic year addresses the criteria for tenure or promotion in general terms, noting that college or departmental criteria may elaborate on the expectations, taking into account the distinctive character of the faculty member's discipline. The Policy specifically states, "[i]n order to be recommended for tenure or promotion in rank, a faculty member will be expected to demonstrate excellence in two of the following areas: research, teaching in the classroom or other settings, and service." Excellence is defined as "performance which meets or exceeds that of peers recently achieving similar promotion and/or tenure who are respected for their contributions in research, instruction and service at West Virginia University and peer research universities."

The faculty member is expected to perform at the satisfactory level in the third area of endeavor. Satisfactory is defined as "performance which is comparable to that of a typical faculty member in a similar department similar in kind and quality at a peer research university." The Policy continues to state that the two areas of excellence in which a faculty member is expected to perform will be identified in the initial letter of appointment, and may be modified on an individual basis, by mutual agreement of the faculty memberand administration.

The School of Medicine Guidelines for Faculty Evaluation for Promotion and Tenure (Approved September 26, 1995), addresses the criteria for promotion of faculty in the tenure track as follows:

The faculty member who accepts an appointment to/or seeks promotion within this track (tenure with a research emphasis) must have a major commitment to traditional academic

research and teaching as well as an interest in service. In evaluating quantitative research output, especially below the rank of professor, the School of Medicine's Promotion and Tenure Committee will take into account the increased service responsibilities of some clinical science faculty. This in no way negates the requirement for productive research and scholarship.

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1. The primary consideration for promotion to professor is national recognition of the candidate in any one of the three areas of teaching, research and service. Examples of activities that provide evidence of such national recognition include but are not limited to serving on editorial boards, grant study sections, specialty boards, national advisory committees; election to office in national or international professional academic organizations; invitations to present seminars at other institutions.

2. There must be sustained evidence of excellence in the two areas of research and teaching with a satisfactory performance in service.

The Guidelines for Appointment and Promotion of faculty with a Clinical Emphasis - Non-Tenure Track, provides:
Clinicians who select the clinical emphasis, non-tenure track must be heavily committed by choice to clinical service as well as teaching. Faculty in the clinical emphasis track are not subject to the seven year probationary period of the tenuretrack; promotion to senior ranks is not a requirement for institutional commitment and career stability. Individuals in the clinical emphasis track will have voting rights in their respective departments and in the School and will be eligible for appointment to any administrative office in the School, including Department Chair and Dean. They will have all rights and privileges of academic freedom and responsibility.

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The candidate [for professor] should have a long-standing record of accomplishment in teaching and service, with sustained scholarly achievement. . .; there also should be substantial evidence of state, regional, and/or national recognition in one of the three areas. Specific examples of recognition include serving on editorial boards, grant study sections, or specialty boards; by serving on state, regional or national advisory committees; by being an officer instate, regional, or national professional organization; or by serving as consultant to state, local, or national agencies.

As a preliminary matter, it is determined that Grievant's request for promotion was fully processed. The 1996-97 University Policies and Procedures for Faculty Evaluations provides that review is to be made at: (1) the department/division level; (2) college/school level; (3) provost and vice-presidential level; and, (4) presidential level. Grievant's promotion request was not reviewed by WVU President Hardesty, who appointed Dr. D'Allesandri as his designee for these decisions. While the use of a designee modified the review process to three steps, instead of four, in this instance, Grievant offered no authority that an institution president may not make such appointments under this Policy. Therefore, it cannot be determined that the review was procedurally defective.

Grievant's claim that his areas of emphasis have been changed without his consent is not supported by the evidence. Because Grievant is a long term employee, his originalletter of appointment, dated June 22, 1979, was drafted long before the 1996-97 Institutional Guidelines were implemented, and did not identify the two areas of excellence in which Grievant was expected to perform. Grievant asserts that the letter of hire, his initial notice of appointment, and his specific work assignments, when construed together, identify teaching and service as the two areas in which he was expected to achieve excellence in order to be considered for promotion.

Because Grievant was employed prior to Respondent's development of a two track system, his understanding or intention of the two areas in which he would excel at the time of his employment is no longer relevant. Accepting that Grievant's areas of interest are teaching and service, he has chosen to pursue his career in the tenure track. By making this decision, Grievant impliedly accepted the terms of that choice. The areas of excellence were not

changed without his consent.

The next issue to be addressed in this matter is whether the School of Medicine Promotion and Tenure Guidelines conflict with the Institutional Guidelines, rendering them invalid, and requiring that Grievant's request for promotion be evaluated under the Institutional Guidelines. The American Heritage Dictionary, 396 (Third Ed. 1996), defines "conflict" to mean "to be in or come into opposition; differ." In this instance, the School Guidelines utilized exactly the same criteria for review as the Institutional Guidelines. The significant difference between the two is that the School Guidelines determine the two areas in which the faculty member must demonstrate excellence based upon his or her employment in the tenure track or the clinical track.

The School's requirement that tenure track faculty must demonstrate excellence inthe areas of teaching and research does not place the School Guidelines in conflict with the Institutional Guidelines. While the criteria for tenure track faculty may be perceived as more demanding, particularly for individuals such as Grievant who excel in the area of service, the reward of tenure is also greater. There is no question that Grievant is in the tenure track, and therefore must demonstrate excellence in teaching and research. Because Grievant concedes that he did not achieve excellence in the area of research, further review of this grievance is unnecessary.

For future promotion purposes, Grievant must demonstrate excellence in the areas of teaching and research. In the alternative, Grievant may transfer to the clinical track, where less emphasis is placed on research; however, that choice would likely result in the loss of his tenure.

In addition to the foregoing narration it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant was initially employed by Respondent as an Assistant Professor of Anesthesiology, on June 22, 1979. Grievant was promoted to the rank of Associate Professor on July 1, 1983, and was granted tenure on July 1, 1985.

2. On September 24, 1996, Grievant applied for promotion to Professor of Anesthesiology.

3. The Department Promotion and Tenure Committee reviewed Grievant's application, and

recommended that he be retained at his current rank, based upon his "small contribution in the area of research." 4. Department Chair Robert E. Johnstone recommended that Grievant be retained at the rank of Associate Professor, finding that Grievant "has spent minimal time in research during the past few years, and thus he has not obtained a level comparable to other professors."

5. The School of Medicine Committee for Promotion and Tenure concurred that Grievant be continued as Associate Professor, noting there had been no documented activity since 1985, and recommending "that Dr. Graf needs to maintain scholarly activity in order to be promoted to Professor.

6. George A. Hedge, Ph.D., Associate Dean for Research and Graduate Studies, recommended Grievant's continued appointment as Associate Professor, noting, "[u]fortunately, Dr. Graf presents virtually no recent research activity to be evaluated. . . . Our School of Medicine criteria for promotion to Professor require 'sustained evidence of excellence in the two areas of research and teaching' for faculty in the tenure track."

7. Acting as Vice President of Health Sciences and as the designated representative of the President, Dr. D'Allesandri concurred with all prior levels of review, and determined that Grievant would retain the rank of Associate Professor.

8. Because Grievant is employed as a tenure track faculty member, he must demonstrate excellence in the areas of teaching and research to gain promotion.

9. Grievant concedes that he has not attained excellence in the area of research.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

2. The review of an institution of higher learning's promotion and tenure decisions is "generally limited to an inquiry into whether the process by which such decisions are made conforms to applicable college policy or was otherwise arbitrary and capricious." Karle v. Bd. of Trustees/Marshall University, Docket No. 98-BOT-258 (Apr. 19, 1999); Harrison v. W. Va. Bd.

of Directors, Docket No. 93-BOD-400 (Apr. 11, 1995).

3. "The decisional subjective process by which promotion and tenure are awarded or denied is best left to the professional judgement 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 Circ. 1984). "Deference is granted to the subjective determination made by the official[s] administering the process." Harrison, supra.

4. The School of Medicine Promotion and Tenure Guidelines are more specific than, but do not conflict with, the Institutional Guidelines.

5. Grievant has failed to prove that the School Guidelines were invalid, or that he should have been reviewed under the Institutional Guidelines.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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. However, the appealing party is required by W. Va. Code §29-5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: July 8, 1999

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Sue Keller

Senior Administrative Law Judge

Footnote: 1 ***Grievant notified Respondent of his intent to grieve by letter dated May 26,1997; however, both parties agreed to hold this matter is abeyance pending review by the W. Va. Supreme Court of Appeals of a prior grievance regarding promotion. That decision was issued June 24, 1998, and Grievant***

proceeded with the present claim.