DIANNE L. McMULLIN,

Grievant,

v. **Docket No. 01-HE-081**

HIGHER EDUCATION INTERIM GOVERNING BOARD/

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Dianne L. McMullin, employed by West Virginia University (WVU or Respondent) as an Assistant Professor in the College of Engineering and Mineral Resources (CEMR), Department of Industrial and Management Systems Engineering (IMSE), filed a level one grievance on July 24, 2000, after she was denied promotion and tenure. Grievant seeks promotion to Associate Professor and tenure. After the grievance was denied at levels one and two, Grievant elected to bypass level three, and advanced her appeal to level four on March 5, 2001. A brief hearing was conducted in the Grievance Board's Westover office on May 3, 2001, at which time the lower level record was supplemented. Grievant was represented by Patricia H. Stiller, Esq., and Respondent was represented by Assistant Attorney General Samuel R. Spatafore. The matter became mature for decision with the filing of proposed findings of fact and conclusions of law by the parties by June 18, 2001.

The following findings of fact are derived from the record, including the level two transcript and exhibits, and testimony offered at level four.

Findings of Fact

1. Grievant was employed by WVU as a tenure-track, Assistant Professor in the College of Engineering and Mineral Resources/Department of Industrial Management and Systems Engineering in August 1994. 2. Grievant applied for promotion to Assistant Professor and tenure during the 1999-2000 academic year.

3. The promotion/tenure procedure is a multi-step process during which the file prepared by the candidate is reviewed by members of her Department, the Department Chair, the College Promotion and Tenure Committee, the Dean, and the Provost. Additionally, opinions of external

reviewers as to whether the candidate's record would merit promotion and/or tenure on his or her campus are solicited.

4. Four external reviewers evaluated Grievant's promotion and tenure file, which included her curriculum vitae, lists of publications and grants, and other evidence of scholarship activity, past performance evaluations and other information relating to her teaching activity, and documentation of service activities. The comments of the reviewers were as follows:

-One recommended her for promotion and tenure, but noted that improvement was needed in the area of peer-reviewed publications.

-One made no specific recommendation, but noted her limited publication in archival journals, and suggested that she be strongly encouraged to publish more.

-One recommended promotion and tenure, stating she had demonstrated a high degree of excellence in her research and proposal activity.

-One could not support her for promotion and tenure based on her research record.

5. The Departmental Promotion and Tenure Committee recommended that Grievant be promoted and awarded tenure.

6. The Department Chair recommended that Grievant be promoted and awarded tenure. 7. The College Promotion and Tenure Committee recommended promotion and tenure be granted.

8. Allen C. Cogley, Dean of CEMR, determined that while Grievant had made a significant contribution in teaching, and a good and reasonable contribution in service, she had failed to establish a significant contribution in research. While finding her efforts to be “reasonable,” Dean Cogley cited Grievant's lack of peer-review[ed] archival publications, a lack of successful research funding, and a lack of support from external reviewers as the basis for his recommendation that Grievant not be awarded promotion and tenure.

9. Gerald E. Lang, Provost and Vice President for Academic Affairs and Research, acting on behalf of WVU President David Hardesty, concurred with Dean Cogley that Grievant had failed to meet the institutional standards in the area of research, and did not award promotion and tenure.

Discussion

Grievant asserts that the decision not to grant her promotion and tenure was arbitrary and capricious in that it was in derogation of established policies and procedures, required her to perform

in a manner which virtually guaranteed her denial of promotion and tenure, and that her research record had been miscalculated by the Provost. When consideration is given to the fact that she had made five presentations in peer reviewed venues, a publication submitted to a peer reviewed journal, and two peer-reviewed book chapters, the number of graduate students she mentored, and the amount of grant funding she secured, Grievant concludes that she more than met the standards in research to grant her promotion and tenure. Respondent denies that the decision to deny promotion and tenure was arbitrary and capricious, and argues that Grievant simply did not demonstrate significant contributions in research due to the lack of peer-reviewed, archival publications. When considered with the lack of support from the external reviewers, Respondent contends that the decision was amply supported.

The Grievance Board's review of an institution of higher learning promotion decisions is "generally limited to an inquiry into whether the process by which such decisions are made conform to applicable college policy or was otherwise arbitrary and capricious." Harrison v. W. Va. Bd. of Directors/Bluefield State College, 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." Siu v. Johnson, 748 F. 2d 238 (4th Cir. 1984); See also Carpenter v. Bd. of Trustees/W. Va. Univ., Docket No. 93-BOD-220 (Mar. 18, 1994). "Deference is granted to the subjective determination made by the official[s] administering the process." Harrison, supra; Gardener v. Bd. of Trustees/Marshall Univ., Docket No. 93-BOT-391 (Aug. 26, 1994). Thus, a grievant attempting to prove wrongful denial of promotion must demonstrate the action was arbitrary and capricious, clearly wrong, or a violation of college policy. See Kilburn v. Bd. of Directors/W. Va. State College, Docket No. 94-BOD-104 (Dec. 29, 1995)

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that itcannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable.

State ex rel. Eads v. Duncil, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). " While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

Grievant bears the burden of proving by a preponderance of the evidence that WVU erred in the application of policies, that the decision was an abuse of discretion, or arbitrary and capricious. See Baroni v. Bd. of Directors/Fairmont State College, Docket No. 92-BOD-271 (Feb. 11, 1993); Harrison, supra. For the reasons discussed below, the undersigned concludes Grievant has failed to meet that burden.

Promotion and tenure are addressed by Board of Trustees Policy Bulletin 36, WVU Guidelines, and CEMR Guidelines. Relevant portions of those policies follow.

BOT Policy Bulletin 36:

SECTION 6. PROMOTION IN RANK 6.1 Within the following framework, each president or designee 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 some institutions might be: excellence in teaching; publications and research; accessibility to students; adherence to professional standards of conduct; professional and scholarly activities and recognition; effective service to the institution, college, or department; experience in higher education and at the institution; possession of the doctorate, special competence, or the highest earned degree appropriate to the teaching field; 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. (Emphasis added).

6.1.2 There shall be demonstrated evidence that, in the process of making evaluations for promotions

there is participation of persons from several different groups, such as: peers from within and without the particular unit of the institution, supervisory administrative personnel such as the department/division chairperson and the dean, and students.

6.1.3 There shall be no practice of granting promotion routinely or because of length of service, or of denying promotion capriciously.

SECTION 8. TENURE

8.1 Tenure is designed to ensure academic freedom and to provide professional stability for the experienced faculty member. It is a means of protection against the capricious dismissal of an individual who has served faithfully and well in the academic community. Continuous self-evaluation, as well as regular evaluation by peer and administrative personnel, is essential to the viability of the tenure system. Tenure should
never be permitted to mask irresponsibility, mediocrity, or deliberate refusal to meet academic requirements or professional responsibilities. Tenure applies to those facultymembers who qualify for it and is a means of making the teaching and research profession attractive to persons of ability. There shall be demonstrated evidence that tenure is based upon a wide range of criteria such as: excellence in teaching; publications and research; accessibility to students; adherence to professional standards of conduct; professional and scholarly activity and recognition; effective service to the institution, college or department; experience in higher education and at the institution; possession of the doctorate, special competence, or the highest earned degree appropriate to the teaching field; 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 tenure shall rest with the institution.

8.2 In making tenure decisions, careful consideration shall be given to the tenure profile of the institution, projected enrollment patterns, staffing needs of the institution, current and projected mission of each department/division, specific academic competence of the faculty member, and preservation of opportunities for infusion of new talent. The institution, while not maintaining "Tenure Quotas," shall be mindful of the dangers of losing internal flexibility and institutional accountability to the citizens of the State as the result of an overly tenured faculty. Tenure may be granted only to

faculty in positions funded by monies under the Board of Trustees' control.

8.3 Tenure shall not be granted automatically, or for years of service, but shall result from action by the president of the institution or designee following consultation with appropriate academic units.

The “West Virginia University Policies and Procedures For Annual Faculty Evaluation, Promotion and Tenure 1999- 2000" states that “[i]n order to be recommended for tenure a faculty member normally will be expected to demonstrate significant contributions in teaching in the classroom or other settings and in research.

* * *

In order to be recommended for promotion, a tenured or tenure-track faculty member normally will be expected to demonstrate significant contributions in two of the following areas: teaching in the classroom or other settings, research,and service. In the third area of endeavor, the faculty member will be expected to make reasonable contributions.

* * *

The decision to accept a recommendation for or against retention or the awarding of tenure shall rest on both the current and projected program needs and circumstances of the department, college, and the university, and on the strengths and limitations of the faculty member as established in the annual evaluation process.”

CEMR Criteria for Promotion and Tenure (1999-2000) reiterate, and elaborate upon, the three areas of professional expectations for faculty members. Addressing research, the College Criteria state that “[r]efereed publications (print or electronic) of high quality are expected as evidence of scholarly productivity.” But that “[q]uality is considered more important than mere quantity.” Thus, “scholarly merit may be demonstrated by a single work of considerable importance or a series of studies constituting a program of worthwhile research. . . [but], It is expected that faculty will demonstrate leadership in publications (as primary author) or research funding (as principal investigator) for purposes of promotion and tenure.”

After a review of all the materials presented and the assessments of the various Committees, Deans, and Provosts, establish that while Grievant was an excellent teacher, and her service was adequate, her research and publications did not meet the guidelines required by WVU. A review of the record demonstrates that by Grievant's own accounting, she

had five presentations in peer reviewed venues, i.e., conferences, one publication which had not been accepted at the time of her review, and two book chapters. (Grievant's Proposed Finding of Fact No. 17.) (See footnote 1) The conclusion of both Associate Provost C. B. Wilson, who also reviewed Grievant's file, and Provost Lang was that Grievant had failed to demonstrate a significant contribution in the area of research based upon a lack of publications in archival journals, and the brevity of some of her other efforts, including that one of the book chapters was less than three pages in length, and another publication was a twelve line abstract. Provost Lang acknowledged that quality is more important than quantity, but did not find the quality in this instance to outweigh the lack of quantity. As an administrator who is responsible for reviewing faculty for promotion and tenure, his expertise in evaluating and weighting Grievant's record must be given deference.

Grievant raises the question of whether she was given proper consideration of her teaching load and the amount of funding she secured while at WVU. Certainly, the record reflects some disagreement regarding Grievant's teaching load. Although the Provost did not find Grievant's teaching responsibilities during the academic years to be excessive, and concluded that teaching during the summer was not mandatory, testimony of former Professor Terrence Stobbe opined that Grievant was assigned a heavy teaching load, considering the number and diversity of classes taught. Grievant also mentored a number of students in the Masters and Doctoral programs, and assumed administrative duties, first as Assistant Director, and later Director of the Occupational Hygiene and Occupational Safety Graduate Program. Grievant has also secured a number of research and training grants during her employment at WVU. The exact dollar amount obtained varies widely from more than $999,000 by Grievant, to less than $500,000 by Provost Lang. While important, this factor does not appear to have been determinative of Grievant's application.

The Provost's evaluation of Grievant's teaching and funding procurement does not appear to be flawed. Grievant's teaching load and administrative duties may have reduced the amount of time available for her research; unfortunately, Grievant's best interests may not have been well served by her departmental colleagues who made these assignments. While Grievant may not have felt that she had the option to decline teaching or administrative assignments, she was warned on her performance evaluations in 1997 and 1998 that improvement must be shown in the area of research and publication, and there is no evidence that she asked for any assistance to improve in this area.

While the undersigned may have decided this matter differently, given the foregoing evidence,

Grievant has failed to prove that Respondent's determination that she had not made a significant contribution in the area of research, and to deny her request for promotion and tenure was neither contrary to any applicable policy, or arbitrary and capricious.

The above-discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. A grievant attempting to prove wrongful denial of promotion and tenure must prove, by a preponderance of the evidence, that the action was arbitrary and capricious, clearly wrong, or a violation of college policy. See Kilburn v. Bd. of Directors/W. Va. StateCollege, Docket No. 94-BOD-104 (Dec. 29, 1995); Baroni v. Bd. of Directors/Fairmont State College, Docket No. 92-BOD-271 (Feb. 11, 1993).

2. "The Grievance Board's review in cases involving the denial of tenure or promotion in higher education is generally limited to an inquiry into whether the process by which such decisions are made conform to applicable college policy or was otherwise arbitrary and capricious. Deference is granted to the subjective determinations made by the officials administering that process." Miller v. Bd. of Trustees/ W. Va. Univ.. Docket No. 01-BOT-037 (June 30, 2001); Harrison v. W. Va. Bd. of Directors/Bluefield State College, 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." Siu v. Johnson, 748 F. 2d 238 (4th Cir. 1984). Nelson v. Bd. of Trustees/W. Va. Univ., Docket No. 99-BOT-514 (June 19, 2001).

4. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). 5. Grievant has not met her burden of proof and demonstrated WVU's decision to deny her promotion and tenure was arbitrary and capricious, an abuse of discretion, or a violation of Policy Bulletin 36, University, or College guidelines.

Accordingly, this 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 §29A-5-4(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 31, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

The record reflects varying accounts of Grievants research record, and it is undisputed that through no fault of her own Dean Cogley was not provided a complete listing of her accomplishments. However, the error was detected by Grievant, and corrected prior to the final review by Provost Lang.