ANNA S. ELFENBEIN, PH.D.

Grievant,

v. Docket No. 00-HE-393

HIGHER EDUCATION INTERIM GOVERNING BOARD/

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Anna S. Elfenbein, employed by West Virginia University as an Associate Professor in the Department of English, filed a level one grievance on June 5, 2000, after she was denied promotion to the rank of Professor. The grievance was denied at levels one and two. Grievant elected to bypass level three, as is permitted by W. Va. Code § 18- 29-4(c), and advanced her appeal to level four on December 14, 2000. A level four hearing was conducted on September 14, 2001, and July 25, 2002. (See footnote 1) Grievant was represented by James Haviland, Esq. of Crandall, Pyles and Haviland, and Respondent was represented by Samuel R. Spatafore, Esq., Assistant Attorney General. The matter became mature for decision on January 7, 2003, at the conclusion of the responsive briefing period.

The following facts are derived from a detailed review of the entire record.

Findings of Fact

1. Grievant was initially employed by West Virginia University in April 1980, as an Assistant Professor in the Department of English.

2. Grievant was promoted to Associate Professor and granted tenure in 1986. 3. Grievant filed a request for promotion to the position of full Professor in December 1999.

4. A faculty member seeking promotion is required to compile a promotion file which includes, among other things, a curriculum vita, with a list of publications, grants, and any other evidence of scholarship; past annual evaluations; a representative sample of student evaluations; and information about the candidate's teaching and service. Only the significant contributions since the last promotion are considered. The materials submitted by the applicant are subject to review by committees and administrators who do not perform a separate investigation.

5. The West Virginia University Policies and Procedures for Annual Faculty Evaluation, Promotion and Tenure (University Guidelines) list teaching, research, and service as the professional expectations for which faculty will be reviewed. Research is defined to include scholarly writing, artistic performance, and creative activities. Quality is considered more important than mere quantity, but faculty members are expected to undertake a continuing program of studies, investigations, or creative works.

6. The University Guidelines provide a multi-level evaluation process for the award of promotion, beginning with the Department/Division committee. The promotion file is then forwarded to the Department Chair. If both recommendations are negative the faculty member may submit a rebuttal and petition the Dean for a review. The Dean forwards the petition to the College/School evaluation committee for a recommendation. The Dean then reviews the promotion file and submits his own recommendation. If both the College/School committee and the Dean file negative recommendations, the faculty member may file a second rebuttal and petition the Provost for a review. The UniversityPromotion and Tenure Advisory Panel reviews the promotion file for the sole purpose of determining that: (1) the review procedures at all levels have been followed; (2) the recommendations are supported by objective evidence in the file to ensure the individual is not treated capriciously or arbitrarily; (3) the recommendations are consistent with university and unit policies and objectives; and, (4) the recommendations are consistent with the department, college, and university criteria for promotion. The final step of the review is the Provost, who has been delegated the decision-making authority of the President for matters of promotion and tenure.

7. Department of English “Guidelines For Faculty Evaluation Concerning Promotion and Tenure” (Department Guidelines) provide that:

to be eligible for consideration for promotion to associate professor or to professor, faculty are expected to demonstrate excellence in research, excellence in teaching, and satisfactory performance in service. . . 'Excellence' in this context means “performance which meets or exceeds that of peers recently achieving similar promotion at West Virginia University and at peer research universities.

For consideration for promotion to professor, the Department expects the candidate to present a book or at least five scholarly articles or essays that have appeared in peer- reviewed journals of

national or international reputation. The book, articles, or essays must have appeared since the last promotion. The candidate must also give evidence of a pattern of outstanding and continuous scholarly activity.

Typically, for the profession of English, a single-authored book written for a scholarly audience is the clearest evidence of sustained and continuous research.

8. In addition to the documentation provided by the faculty member, the promotion file may also include evaluations of the faculty member's research from peers external to the University. Four individuals were selected by Department Chair PatrickConnor from recommendations submitted by Grievant and the Department Committee. These external reviewers, whose identities were not revealed to Grievant, were provided a sample of Grievant's scholarly work, her curriculum vitae, and the University guidelines for promotion, and were asked to provide an objective evaluation of her contributions to the field and her ability as a researcher. Specifically, the reviewers were requested to comment on whether the quality of Grievant's work is comparable to, or better than, that of persons recently promoted at their university or other peer universities. Their responses are summarized as follows:

Evaluator 1 noted the importance of Grievant's early work as part of a movement to recover texts from the 1930's by women, but stated that overall he lacked the qualifications to evaluate Grievant's scholarly work, since his expertise was in other areas.

Evaluator 2 stated that “there is no question that, when compared to others . . . [Grievant] merits promotion to full professor. She more than meets requirements for a strong national presence, valuable presentation of new material to her discipline, and commendable expertise on the subjects in her field.”

Evaluator 3 found that Grievant's best works during the period of review were derivative of earlier interests, that the file contained no additional contributions of significance to the field, and opined that the vita misrepresented the quantity of production, and that she would not be promoted at the reviewer's institution based on research alone.

Evaluator 4 observed that because Grievant had chosen to work in areas that are either difficult or marginalized, she has compiled a very strong publications record, and that she is unquestionably “ready for a full professorship.” 9. Grievant's promotion request was first reviewed by the seven

member Departmental Promotion and Tenure Committee, referred to as the Faculty Evaluation Committee ("FEC"). The FEC found Grievant's record in research and publication did not meet the Departmental guidelines. The Committee review includes the following findings relating to Grievant's work:

-Olive Tilford Dargan's From My Highest Hill -Grievant wrote the Introduction, no evidence that text was edited (no notes or annotations) in this republication. The FEC did not consider Grievant's contribution the equivalent of a scholarly book, but credited this work as an article.

-Engendering the Word: Feminist Essays in Psychosexual Poetics, Grievant was one of three co-editors responsible for pulling the volume together for publication, and contributed an essay on Emily Dickinson. The essay was not credited because it was used to support her last promotion. No credit was given for Grievant's role as editor absent supporting evidence of her contribution. Grievant did not contribute to the forward of the volume as did the remaining two editors.

-Essay on Kate Chopin in The Awakening. A reprint, the work was considered in prior promotion application.

-“Women Writers and Social Issues” appears to be an encyclopedia article, not original contributions to scholarship.

-“Taking On the World: U.S. Women Fulbrighters” is co-edited and coauthored with four others. Not an example of scholarly contribution. - “Miss Dolly's Lie and 'Evvie's' Larger Truth,” and the book reviews are very short pieces which cannot readily be defined as the sort of substantial scholarship required of those applying for promotion to the rank of Professor.

10. The FEC members voted unanimously to recommend that Grievant be retained as an Associate Professor.

11. Grievant's promotion request was next reviewed by Chair Connor who noted Grievant's failure to produce a book, and concurred with the FEC that her research did not support a promotion to the rank of Professor.

12. Grievant filed a twenty-five page rebuttal to the FEC and Chair evaluations, and her promotion was next evaluated by the Eberly College Humanities Faculty Evaluation Committee (the College Committee). This Committee found Grievant's scholarly activity since her last promotion to be satisfactory, but lacking sufficient support for promotion. The College Committee's recommendation to retain Grievant at the rank of Associate Professor was unanimous.

13. Grievant's promotion file was then forwarded to M. Duane Nellis, Dean of the Eberly College of Arts and Sciences. Dean Nellis agreed with the prior evaluations that Grievant had not met with minimum requirements in scholarly activity to support promotion. Dean Nellis additionally noted that Grievant had not published for a period of five years, from 1993-98, and thus had failed to establish a continuing program of studies, investigations, or creative works, and that her annual reviews did not rate her above the satisfactory level in this area for two of the past three years. Dean Nellis recommended that Grievant continue at the rank of Associate Professor. 14. Grievant filed an appeal, with an additional rebuttal, to Gerald E. Lang, Provost and Vice President for Academic Affairs and Research, and C. B. Wilson, Associate Provost for Academic Personnel.

15. Grievant's promotion file was reviewed by the University Promotion and Tenure Advisory Panel, which concluded that “all published procedures and criteria were followed in making the recommendations regarding the requested promotion to the rank of Professor.”

16. Following a thorough review of all prior evaluations and Grievant's rebuttals, Provost Lang determined that there was insufficient evidence of consistent high achievement in research to support promotion. Provost Lang addressed Grievant's works individually, as follows:

a. From My Highest Hill by Olive Tilford Dargan -does not qualify as a scholarly book, essentially a reprint with the exception of the introduction. Grievant given the equivalent of one scholarly article for the introduction.

b. Engendering the Word: Feminist Essays in Psychosexual Poetics. Co-editors: Berg, Elfenbein, Larson and Sparks- Grievant's role does not suggest that it qualifies for evaluative purposes as a scholarly book, but credited as the equivalent of one-third of a peer-reviewed article.

c. “Taking on the World: U.S. Women Fulbrighters.” Does not qualify as a scholarly article.

d. “A Forgotten Revolutionary Voice in Southern Literature.” A chapter in The Female Tradition in Southern Literature. Equivalent of one scholarly article. e. “Miss Dolly's Lie and 'Evvie's' Larger Truth.” Possibly a scholarly work but not sufficiently substantive to meet the departmental criteria.

f. “Unsexing Language: Pronominal Protest in Emily Dickinson's 'Lay this Laurel.'” Qualifies as one scholarly peer-reviewed article.

g. “*Icy Sparks,”* by Gwyn Rubio and “*Inter/View: Talks with America's Writing Women,”* by Mickey Pearlman and Katherine Usher Henderson were reviews and do not meet departmental criteria as

scholarly articles.

h. “American Racial and Sexual Mythology.” A reprint, does not meet departmental criteria as a scholarly article.

i. Women Writers and Social Issues. Found insufficient evidence that the article was actually “In Press,” and would not be considered.

Discussion

"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." Cohen v. W. Va. Univ., Docket No. BOR1-247-2 (July 7, 1987). See Siu v. Johnson, 748 F. 2d 238 (4th Cir. 1984)(Tenure review is "a subjective, evaluative decisional process by academic professionals." The standard of review is whether the decision is "manifestly arbitrary and capricious.") 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, the review of an institution of higher learning promotion decision is "generallylimited to an inquiry into whether the process by which such decisions are made conforms 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); Nelson v. Bd. of Trustees/W. Va. Univ., Docket No. 99-BOT-514 (June 22, 2001);. Baroni v. Bd. of Directors/Fairmont State College, Docket No. 92-BOD-271 (Feb. 11, 1993).

Grievant argues that the decision to deny promotion was both arbitrary and capricious and in violation of promotional guidelines, in that she was not given proper credit either for the quality and quantity of her work, and she was not held to the same standard as other faculty members. Grievant asserts that given the appropriate credit, her record would more than meet the requirements for promotion. In addition to the credit recognized by Provost Lang, Grievant argues that she is entitled to the following:

a. “Miss Dolly's Lie and 'Evvie's Larger Truth” appeared in a peer-reviewed journal, and should have been considered one article. Grievant disputes determinations that the three page article was too short, noting than another faculty member who had applied for promotion to full Professor had

been credited with an article of the same length.

b. “Taking on the World: U.S. Women Fulbrighters” Grievant asserts that she is entitled to credit for one-third of an article which she co-authored. This article appeared in a peer-reviewed journal, and while it does not consist of traditional literary scholarship, Grievant notes that it is a publication on a topic of related professional interest that advances the aims of the discipline and the objectives of the English department, and may be counted.

c. Women Writers and Social Issues. Grievant argues that the determination this work was not yet “In Press” was erroneous, and the chapter she contributed should becredited as one scholarly article. Grievant notes that works “in press” have regularly been considered for promotion.

d. Grievant opines that her editorial contribution to Engendering the Word is equivalent to one and one-third journal articles. She additionally claims credit for her editorial work on My Highest Hill.

While there is a reasonable difference of opinion as to the works considered for promotion, there was no violation of promotional guidelines regarding the two edited books. “Edited collections of solicited or reprinted scholarly or creative work, with substantial contributions by the editor” may be considered a scholarly article; however, it is the applicant's responsibility to demonstrate the substantial contributions, and in this case, Grievant failed to do so.

The determination that Grievant's essay regarding her experience as a Fulbright scholar would not be counted as a scholarly article was appropriately determined within the discretion of the reviewers. While the article was of related professional interest, the decision not to grant it the weight of a traditional scholarly work did not violate the guidelines.

The decision that the essay in Women Writers and Social Issues would not be considered for promotion was based upon a letter advising Grievant that she would soon receive a “consent-to-publish” letter from the press. While this letter establishes that Grievant's work would be included, it did not include information regarding when the book would be printed. The determination that the work was not “In Pess” was not in violation of the guidelines. However, “Miss Dolly's Lie and 'Evvie's' Larger Truth,” was published in a peer- reviewed journal, and should have been credited as a scholarly article. While it is brief, a mere three pages long, promotion guidelines specifically state that quality is valued over quantity. Further, in response to Grievant's claim that she has published a number of pages comparable to other faculty who were promoted, Respondent declared that page count was not determinative. This appears to be the case involving Grievant's “Introduction” to From

My Highest Hill, since she was given credit for only one article despite the fact that, at forty-six pages, it was much more substantial than other credited publications.

"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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 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 ofeducation. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

Grievant has failed to demonstrate WVU relied on criteria that was not intended to be considered, arrived at a decision in a manner contrary to the evidence, or reached a decision that was so implausible that it could not be ascribed to a difference of opinion. The decision to retain Grievant at the Associate Professor level was not arbitrary and capricious, and the "special competency" of the University and the committees and administrators who made this difficult decision will not be disturbed.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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 (2000); Schiavone v. Higher Ed. Policy Comm'n /Marshall Univ., Docket No. 02-HEPC-026 (Nov. 22, 2002); Baroni v. Bd. of Directors/Fairmont State College, Docket No. 92-BOD-271 (Feb. 11, 1993). See W. Va. Code § 29-6A-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human

Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

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 bythe officials administering that process." 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." Cohen v. W. Va. Univ., Docket No. BOR1-247-2 (July 7, 1987). See Siu v. Johnson, 748 Fed. 2d 238 (4th Cir. 1984). See also Carpenter v. Bd. of Trustees/W. Va. Univ., Docket No. 93-BOD-220 (Mar. 18, 1994).

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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 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. 5. Grievant has not met her burden of proof and demonstrated the decision to retain her at the Associate Professor level was arbitrary and capricious or in violation of the University and Departmental promotional 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: January 31, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

The delay was due in part to the fact that Grievant changed counsel following the first day of hearing.