THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

GEORGE WATSON,

Grievant,

v. DOCKET NO. 06-HE-231

M. Paul Marteney, ALJ

MARSHALL UNIVERSITY,

Employer.

DECISION

Procedural History

Grievant George Watson, employed by Marshall University, filed this grievance on May 3, 2006. The Statement of Grievance alleges, “Grievant has been denied promotion to Associate Professor even though he has necessary qualifications [to] hold the position.” As relief, Grievant seeks “[P]romotion to Associate Professor.” After being denied at the lower levels, Grievant appealed to level four on July 10, 2006.

After scheduling a level four hearing, the parties agreed to submit the matter for decision based on the record developed below. Grievant represented himself, and Respondent was represented by Elaine L. Skorich, Assistant Attorney General. The matter became mature for decision on October 13, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant was denied promotion based on a lack of documentation in his portfolio to support his claim for community service, although he was rated effective in other required areas. Grievant failed to prove that he had demonstrated the required performance in this necessary area, or that the denial of his promotion based on lack of community service was wrong. Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed by Marshall University (MU) as an Assistant Profession of Elementary Education. At the time this grievance was filed, Grievant was in his fourth year of a tenure-track appointment.

2. Grievant applied for promotion to Associate Professor by preparing a portfolio of his work, to be reviewed and rated by the tenure and promotion committee and others.

3. The portfolio is the sole basis on which an employee applying for promotion and tenure is rated, and its contents are entirely the responsibility of the employee. 4. The portfolio *must* demonstrate effective or excellent performance in four critical areas: teaching and advising; scholarly and creative work; university service; and service to the community.

5. The promotion and tenure committee rated Grievant's portfolio as demonstrating Grievant's effective service in the areas of teaching and advising, and scholarly and creative activities. Grievant's demonstrated University service was rated as excellent.

6. Grievant was rated as “not effective” in the area of service to the community. To be rated as effective, a candidate for promotion must provide evidence of at least three years of ongoing community service on an annual basis. The committee reported:

> The committee rated Dr. Watson's contributions as **not effective** in this category. Dr. Watson's portfolio indicates that he has served as the Technology Demonstration Site Coordinator-Eisenhower National Clearinghouse for Mathematics and Science Education and been a Board member for Eisenhower Regional Consortium for Mathematics and Science Education since 2001. The committee recommends that Dr. Watson provide the required documentation or evidence to support his participation.

7. On the basis of the “not effective” rating, the committee recommended that Grievant's request for promotion be denied.

8. Dr. Rosalyn Templeton, Dean of the College of Education and Human Services, received the committee's recommendation, made her own review of the portfolio, and concurred with the committee. Based on these recommendations, Provost Sarah H. Denman informed Grievant his request for promotion was denied.

9. Dr. Sandra Bailey was chair of the Tenure and Promotion Committee. She believed the claims of community service made in Grievant's portfolio would have supported an “effective” rating,

but Grievant failed to include in his portfolio evidence to support the claims. DeanTempleton was also of the opinion that the items Grievant claimed as service were not the issue, rather the lack of supporting documentation was the detriment.

10. Grievant's Portfolio listed the following under the heading “Service to Community:”

Publications Director, Bethesda United Methodist Church

(2001, 2002, 2003, 2004, 2005, 2006) Note: I have included sample publications that I create 4 times a year.

Demonstration Site Coordinator, Eisenhower National Clearinghouse for Mathematics and Science Education (2001, 2002, 2003, 2004, 2005)

Board Member, Eisenhower National Clearinghouse for Mathematics and Science Education (2001, 2002, 2003, 2004, 2005)

Reviewer, Enhancing Education Through Technology Grant Program

(EdTech) (2003, 2004, 2005)

11.

“Service to the community” is defined in the MU Faculty Handbook (Greenbook) as:

. . . service on a compensated or pro bono basis to governments, to educational, business or civic organizations, or to the public. (Such service could include applied research, consultation, technical assistance, special forms of instruction, clinical work, and performance). Involvement as an official representative of Marshall University, or units thereof, in activities of governments and of educational, business or civic organizations.

12. The Greenbook further states: “For purposes of promotion, as well as other personnel decisions, all relevant faculty activities should be subject to objective qualitative evaluations. . . . For public service qualitative assessment should be solicited from those associated with the service activity or affected by the service outside the university.”

13. Every year, employees who are required to prepare a portfolio are sent a letter that details the rating factors that will be considered when their requests for promotion a reviewed, the required ratings necessary for promotion, and the standards used by the committee in making the ratings. 14. As evidence of his community service, Grievant's portfolio included two copies of a

church newsletter, one from 2003 and one from 2005. Grievant's name appeared nowhere in the newsletters. He also provided one letter from 2005 that addresses him as a “site coordinator.” There was no evidence of Grievant's serving on the Board of the Eisenhower National Clearinghouse for Mathematics and Science Education. There was no evidence supporting Grievant's claim that he served as a reviewer of the Enhancing Education Through Technology Grant Program.

Discussion

The Grievance Board's review of tenure and promotion decisions is narrow, and 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). "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). "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). Thus, a grievant attempting to prove wrongful denial of promotion must demonstrate by a preponderance of the evidence that the denial 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); *McMullin v Higher Educ. Policy Comm'n/W. Va. Univ.*, Docket No. 01-HE-081 (July 31, 2001). Grievant listed in his portfolio several items related to community service which, if he had provided documentation to substantiate his claims, likely would have given the evaluation committee reason to rate him as effective in the area. However, the documentation he did supply was insufficient to make a determination. The committee reached a consensus that the portfolio was lacking in this area, and Dean Templeton made an independent review that reached the same conclusion. Provost Denman was also in agreement.

Grievant was in his fourth year of service at MU when he submitted his portfolio, and he had prepared and submitted his portfolio before. He was familiar with the Greenbook, and with the standards and criteria the promotion committee would be using. He had no excuse for failing to

document his claims in a way that anyone reviewing his portfolio would see what he wanted them to see. Although he provided at hearing different explanations and interpretations of the material he submitted, which explanations may (or may not have) swayed the committee in its review, he knew the sole basis of the decision would be the portfolio's contents.

Grievant met the requirements for promotion in three of the four areas being reviewed. There is no question as to whether his service to the university and his teaching and scholarship are valued. Nevertheless, the promotion criteria are clear and unambiguous, and he even if he has not failed to meet them, he has failed to document in his portfolio that he met them. He has not shown the decision to deny his promotion was violative of policy, clearly wrong, or arbitrary.

The following conclusions of law support this discussion:

Conclusions of Law

1. The Grievance Board's review of tenure and promotion decisions is narrow, and is "generally limited to an inquiry into whether the process by which such decisions are made conformto 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). "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).

2. "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).

3. A grievant attempting to prove wrongful denial of promotion must demonstrate by a preponderance of the evidence that the denial 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); *McMullin v Higher Educ. Policy Comm'n/W. Va. Univ.*, Docket No. 01-HE-081 (July 31, 2001).

4. Grievant has failed to meet his burden of proving he should have been promoted to Associate Professor.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). 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, theappealing 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.

January 31, 2007

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M. Paul Marteney

Chief Administrative Law Judge