THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

SHARON MOLNAR,

Grievant,

v. **Docket No. 05-HE-452D**

Janis I. Reynolds

Chief Administrative Law Judge

WEST VIRGINIA STATE UNIVERSITY,

Respondent.

D E C I S I O N

Sharon Molnar, Grievant, employed by West Virginia State University ("WVSU") as an Assistant Professor of Chemistry, filed a level one grievance on May 4, 2006, after she was denied promotion. Her Statement of Grievance reads:

> Denial of promotion from Assistant to Associate professor [sic], improper handling of Grievant's Promotion and Tenure Portfolio and non-adherence to procedural timelines throughout the Decision process, and fallicious [sic] statements leading to the unjust evaluation of the Grievant. (See footnote 1)

Relief Sought was:

> 20% increase of salary at the assistant professor level in addition to the granting of promotion from assistant to associate professor as of May 16, 2005 (including enumerations therein) and the rectifying of any and all evaluation materials (current and past) to the satisfaction of the grievant. (See footnote 2)

Grievant's claim of default at level three was upheld by the Grievance Board by Order dated October 31, 2006, and a hearing to determine whether the relief requestedwas contrary to law or clearly wrong was conducted in the Grievance Board's Charleston office on February 14, 2007.

Grievant was represented by Christine Barr of the American Federation of Teachers, and WVSU was represented by Elaine Skorich, Assistant Attorney General. The grievance became mature upon receipt of proposed findings of fact and conclusions of law filed by the parties on March 21, 2007.

Synopsis

___Grievant prevailed on a default claim in which she challenged the decision to deny her request for promotion. WVSU argued that to grant the requested relief of promotion would be clearly wrong and contrary to law, because Grievant had failed to meet the standard of excellence required for promotion to Associate Professor. WVSU met its burden of proof by demonstrating by clear and convincing evidence that granting the relief would be clearly wrong or contrary to law. Respondent clearly established Grievant did not meet the requirements for promotion, and this assessment was verified by all the various committees and administrators who reviewed her application.

___The following facts have been derived from a preponderance of the credible evidence admitted into the Level IV record.

Findings of Fact

1. Grievant was first employed by WVSU as a temporary faculty member in 1998. In 1999, she became a tenure-track, Assistant Professor of Chemistry, Department of Natural Sciences and Mathematics. 2. Grievant applied for tenure and promotion to Associate Professor during the 2004-2005 academic year. She was granted tenure, but was found not to have met the requirements for promotion.

3. At WVSU, the criteria for receiving tenure are less than that for promotion to Associate Professor. Test. Dean Harper, Level IV Hearing.

4. To be eligible for promotion to the rank of Associate Professor, a faculty member must have an earned doctorate in her/his teaching field, and five years of full-time teaching experience in higher education, three of which must be "excellent" teaching experience at WVSU and meet the following criteria:

Have demonstrated achievement in at least three of the following areas:

a. professional growth

b. research

c. recognized activity in professional or learned societies

d. service to the college and community

Jt. No. 5 at Level IV at 19.

5. The WVSU Faculty Handbook defines and discusses Professional Growth stating:

Professional Growth: Assessment of professional growth involves a judgment based on concrete experience and evidence. Some indications of professional growth include the following:

* An appropriate degree and/or continuing study

* Participation in conferences

* Presentations on a discipline-related topic

* Other indications of potential for growth, such as development of courses that could lead to further research.

Jt. No. 5 at Level IV at 15.

6. The WVSU Faculty Handbook defines and discusses Research stating:

Research is broadly defined as the organized, deliberate efforts to collect, analyze, and evaluate information. This may be accomplished through a variety of methods including, but not limited to, the historic method, the survey method, the field study, and the experimental method. Research should result in a tangible product such as a peer-reviewed journal article, book, proceedings abstract, presentation at a professional conference, or some other verifiable contribution to the discipline. . . .

Jt. No. 5 at Level IV at 14 -15.

7. The WVSU Faculty Handbook defines and discusses Recognized Activity in Professional or Learned Societies stating:

Recognized Activity in Professional and/or Learned Societies: Most academic disciplines are affiliated with one or more professional societies or organizations on a national, regional, or state level. Activities within these societies that are considered significant included: chairing a panel, acting as a respondent on a panel, working as an officer or board member and/or working as a conference or convention organizer.

Jt. No. 5 at Level IV at 15.

8. The Promotion and Tenure process is lengthy and requires a number of reviews by various peers, committees, and administrators. This review includes an assessment of the applicant's performance, including student evaluations, since the last promotion.

9. The candidate for promotion and tenure is expected to collect materials for these individuals and committees to review. These materials are to include, 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, service, professional growth and activities. Only the significant contributions from the last promotion are considered. The materialssubmitted by the applicant are evaluated, and the various committees or administrators do not perform a separate investigation.

10. After Grievant submitted her portfolio, the first step in the process was the review and assessment of the Interim Division Chair, Dr. Donald Anderson, who was an Associate Professor. (See footnote 3) He recommended Grievant for tenure, but did not recommend Grievant for promotion. Dr. Anderson indicated several areas of Grievant's contributions were unclear from her portfolio. He found Grievant needed "more time and opportunity to continue implementation of some of her innovative suggestions for teaching excellence and to evaluate the effectiveness of these tools." Additionally, he noted Grievant rarely became involved in the activities within the Chemistry Department, the status of her research was unclear, she did not complete several assignments, she had not noted any independent research projects, and the number of presentations by her research student was unknown. Grt. No. 3 at Level IV.

11. Dr. Kathryn Harper, Dean of the Department of Natural Sciences and Mathematics and a Full Professor, was the next step in Grievant's promotion and tenure process. She recommended Grievant for tenure, but did not recommend Grievant for promotion. Dean Harper found Grievant's teaching performance showed "definite improvement," and her classroom observations were "very good," but Grievant continued to have trouble returning students' course work in a timely and helpful manner, and her student evaluations in the higher level courses were not as good as the lower levelcourses. In summary, Dean Harper found Grievant's portfolio did not "demonstrate overall teaching excellence." Dean Harper noted Grievant had been "slow to develop in the area of Scholarly Activities," and she had no publications, only local grant financial support, weak student-directed research, only two required presentations, both at the local level, and no presentation at professional

chemistry conferences. Dean Harper described Grievant's professional development as "weak," noting she had attended only one out-of- state conference in 2002, and this conference was not related to her teaching area, and she had not developed any new chemistry courses. Dean Harper noted Grievant's service to the university and community were valued, but her service to her Department was lacking, as complaints about submitting reports and needed information were frequently late. Dr. Harper also noted Grievant had difficulty accepting criticism. Jt. No. 7 at Level IV.

12. The next step in the promotion and tenure process was WVSU's Promotion and Tenure Committee. This Committee recommended Grievant for tenure, but did not recommend her for promotion. The Committee found Grievant had "demonstrated exceptional teaching in general education Chemistry courses, and had begun to build a solid record of grant support for [her] research." Grievant was encouraged to pursue her research goals to publication and to become more significantly involved in professional organizations. (Grievant only belongs to one professional organizations and is not actively involved in it.) The Promotion and Tenure Committee informed Grievant, "[w]hile your achievements merit the granting of tenure, they do not rise to the level required for the promotion you seek." Jt. No. 2 at Level IV. 13. President Hazo Carter, noting the comments of the Promotion and Tenure Committee, granted Grievant tenure, but did not grant Grievant promotion. Jt. Nos. 3 & 4 at Level IV.

14. Grievant's annual evaluations demonstrated a consistent pattern of limited activity in the areas of research, professional growth, and recognized activities in professional and learned societies. Grievant was informed on a yearly basis by her Chair, Dean, and the Retention Committee that these areas needed to be developed. Her most recent evaluations (March 6, 2003, February 11, 2004, and March 16, 2005) noted she had no activities in the area of recognized activity in professional or learned societies that would be accepted as significant. (See Finding of Fact 7.) Grievant has also been repeatedly told that while her teaching was good and improving, it did not yet meet the level of excellence in all areas, and although her service to the community and university was very good, she still needed to "pull her weight" within the Chemistry Department. Dean Harper repeatedly informed Grievant in her Department reviews that Grievant was hired to do research, both her own and with students, she had not done this, and this was a deficiency that needed to be corrected. Test. Harper, Level IV Hearing; Jt. No. 7.

15. While the annual retention reviews do not assess a faculty member in the same depth, in

the same way, or for the same reasons as the evaluation for promotion and tenure, the purpose is to assess how the faculty member is performing his or her duties at his or her current rank and to identify areas of strength, weakness, and make suggestions for improvement.

16. Grievant did not have a pleasant professional relationship with the former Chair of her Department, Dr. Hal Pennick. As revealed by his evaluations, he found herto be "the weakest link" in the Department and unable to accept constructive criticism. (See footnote 4) Grievant found Dr. Pennick to be rather sexist, non-responsive to her research needs, and unhelpful in obtaining needed laboratory space. These problems were brought to Dean Harper notice, a meeting was held, and Dr. Pennick apologized. (See footnote 5) Dr. Pennick is no longer employed by WVSU and did not write the Chair's assessment for Grievant's promotion and tenure review. (Although Grievant now states she disagrees with her yearly evaluations, since none of these were grieved at the time they occurred, they cannot be grieved at this late date. (See footnote 6))

Discussion

Within five days of the receipt of a written notice of the default, the employer may request a hearing before a Level IV hearing examiner for the purpose of showing the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of that presumption. If the examiner finds the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole. W. Va. Code § 29-6A-3. The Grievance Board has determined the respondent must prove by clear and convincing evidence that to grant the remedy requested would be contrary to law or clearly wrong. This standard requires a respondent to produce "evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt." Headley v. Div. of Highways, Docket No. 04-DOH-397D (Aug. 22, 2005). The employer may also rebut the presumption by presenting clear and convincing evidence that the basic facts underlying the asserted presumption are not true. Bailey v. Dep't of Health and Human Res. and Div. of Personnel, Docket No. 03- HHR-167D (June 30, 2004).

Accordingly, WVSU is required to prove that granting Grievant promotion to Associate Professor would be clearly wrong and contrary to law. As frequently stated by the Grievance Board, the

determination on this type of issue, promotion, is by nature somewhat subjective, and, "it 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). "Deference is granted to the subjective determination made by the official[s] administering the process." Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93- BOD-400 (Apr. 11, 1995); Gardener v. Bd. of Trustees/Marshall Univ., Docket No. 93-BOT-391 (Aug. 26, 1994). This 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 supra; Nelson v. Bd. of Trustees/W. Va. Univ., Docket No. 99-BOT-514 (June 22, 2001). "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 Res., 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. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982)." Trimboli, supra.

This issue, promotion as a default remedy, has recently been addressed by the Grievance Board in the case of Chandra v. Marshall University, Docket No. 06-HE-208D (May 10, 2007). See also Ingle v. W. Va. State Univ., Docket No. 05-HE-228D (Feb, 22, 2006), aff'd Kanawha County Cir. Court (Oct. 23, 2006), ref'd W. Va. Supreme Court of Appeals No. 070545 (May 10, 2007). In this very similar case, the grievant's claim of default was upheld, and the grievant was presumed to have prevailed on the merits. The Grievance Board determined, after a review of all the evidence, that the

respondent, byclear and convincing evidence, had demonstrated it would be clearly wrong and/or contrary to law for the grievant to receive a promotion to Full Professor. In Chandra, the administrative law judge found the respondent had established the grievant had not met the required standards of excellence to obtain promotion, and had successfully rebutted the presumption.

After a review of all the materials presented, the undersigned Administrative Law Judge finds WVSU has met its burden of proof by clear and convincing evidence. Respondent demonstrated Grievant did not meet the established criteria for promotion to Associate Professor, as Grievant did not achieve excellence in the required areas. Additionally, it is clear Grievant was consistently placed on notice of this fact. To promote Grievant to a position that others must earn through merit, by completing all the requirements, would be clearly wrong.

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

Conclusions of Law

1. "Upon finding a default occurred, it is presumed the grievant prevailed on the merits of the grievance, and the respondent must prove by clear and convincing evidence that to grant the remedy requested would be contrary to law or clearly wrong. This standard requires a respondent to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt." Headley v. Div. of Highways, Docket No. 04-DOH-397D (Aug. 22, 2005).

2. The employer may also rebut the presumption by presenting clear and convincing evidence that the basic facts underlying the asserted presumption are not true. Bailey v. Dep't of Health and Human Res. and Div. of Personnel, Docket No. 03-HHR-167D (June 30, 2004).

3. WVSU has met its burden of proving that granting Grievant's promotion would be clearly wrong and/or contrary to law.

Accordingly, the grievance is **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. Any such appeal must be filed within thirty (30) 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, 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.

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Janis I. Reynolds

Chief Administrative Law Judge

Date: June 25, 2007

Footnote: 1

Grievant indicated she meant fallacious, but as this issue was not addressed as a separate matter, it will be addressed in the general discussion and Findings of Fact.

Footnote: 2

At the Level IV hearing, Grievant changed her relief sought to a ten percent increase (the increase mandated by the promotion), and did not pursue the subject of removal of evaluations, as this issue had not been raised at the time the evaluations were rendered.

Footnote: 3

The parties agreed that his submission was late, but as it was clear from the evidence that this lateness did not prevent the various parties from conducting a careful consideration of Grievant's portfolio, this issue will not be addressed further.

Footnote: 4

See Grievant's lengthy responses to her annual evaluations and promotion and tenure reviews.

Footnote: 5

Dean Harper has had a personal relationship with Dr. Pennick for a number of years, and they are currently engaged.

Footnote: 6

It appears Grievant disagreed with all the evaluations as they were consistent, but her focus at Level IV was the actions and statements of Dr. Pennick.