THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

ASHISH CHANDRA,

Grievant,

v. **Docket No. 06-HE-208D**

Sue Keller

Senior Administrative Law Judge

MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

Ashish Chandra ("Grievant") employed by Marshall University ("Marshall") as an Associate Professor of Management and Marketing, filed a level one grievance on May 4, 2006, after he denied promotion. 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 requested was contrary to law or clearly wrong was conducted in the Grievance Board's Charleston office on February 27, 2007. Grievant was represented by Christine Barr of the American Federation of Teachers, and Marshall was represented by Jendonnae L. Houdyschell, Senior Assistant Attorney General. The grievance became mature upon receipt of proposed findings of fact and conclusions of law filed by the parties on March 28, 2007. The grievance was subsequently reassigned to the undersigned for decision on April 9, 2007.

Synopsis

___Grievant prevailed on a default claim for a grievance in which he challenged the decision to deny his request for promotion. Marshall argues that to grant the requested relief of promotion would be clearly wrong and contrary to law because Grievant hadfailed to meet the standard of excellence in two areas of evaluation. Marshall met its burden of proving by clear and convincing evidence that to grant the relief would be clearly wrong or contrary to law by showing that the various levels of review had found Grievant lacking in a second area of excellence.

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

Findings of Fact

1. Grievant was first employed by Marshall as an Assistant Professor of Health Care Administration in the Lewis School of Business, Division of Management and Marketing, in July 2000. He was promoted to Associate Professor in prior to the 2002- 2003 year, and granted tenure in 2003.

2. Grievant applied for promotion to full Professor during the 2004-2005 academic year.

3. Pursuant to *The Greenbook*, Marshall's faculty handbook, to be eligible for promotion to the rank of Full Professor, a faculty member must meet the following criteria:

-A candidate must have earned the terminal degree in a major appropriate to the teaching field from a regionally accredited university.

-A candidate must have had at least four years of experience in the rank of associate professor at a regionally accredited college or university. (See footnote 1)

-A candidate must have demonstrated professional performance in all of his or her major areas of responsibility, and he or she must have demonstrated exemplary performance in two or more such areas, including either teaching and advising or scholarly and creative activities. 4. Promotion to Full Professor is a lengthy process which requires a number of reviews by various peers, committees, and administrators. This review includes an assessment of the applicant's performance, including the student evaluations, since the last promotion. The rank of Full Professor is the highest teaching level within academia.

5. The candidate for promotion 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 and service. Only the significant contributions from the last promotion are considered. The materials submitted by the applicant are evaluated, and the various committees or administrators do not perform a separate investigation.

6. To be promoted to Full Professor, "[a] candidate must have demonstrated effective performance in all of his or her major areas of responsibility, and he or she must have demonstrated

excellence in two or more such areas, including either teaching and advising or scholarly and creative activities."

7. The specific areas to be evaluated for promotion are teaching and advising, scholarly and creative activities, service to the university, and service to the community.

8. The Lewis College of Business Vision and Mission Statement provides that for purposes of promotion and tenure, the following emphasis be accorded the three areas: teaching and advising (65%); scholarly and creative activities (20%); and service to the university and community (15%).

9. As the first step in the promotion procedure, the Division of Management and Marketing Promotion and Tenure Committee did not recommend Grievant for promotionbased on a finding that he had “achieved the level of excellence in Scholarly and Creative Activities; however, the level of excellence in the second area was not attained.”

10. Division Chair, Dr. Chong W. Kim, did not recommend Grievant for promotion at the second step of the process. Dr. Kim found Grievant's performance in scholarship to be excellent, his teaching good, but his university and college services lacking in terms of its scope and intensity. Dr. Kim noted that to be recommended for promotion, Grievant needs to “demonstrate a consistent and improved student evaluation and/or a significant improvement of the university, college and divisional services.”

11. The College of Business Promotion and Tenure Committee did not recommend promotion with three votes for and three votes against the request. The Committee agreed that while Grievant had “demonstrated exemplary performance in scholarship, the documentation provided was insufficient to support such a rating in teaching or service.”

12. Dean Paul Uselding recommended Grievant for promotion based on his “having achieved the highest rating in one of the two required categories, research, three out of three years; and three out of three years in the case of service.”

13. Grievant's annual evaluations establish that while he was consistently rated “excellent” in Scholarship; he was ranked “Excellent/Good” in Service for the 2001-2002 and 2003-2004 years and “Low Excellent” for the 2002-2003 year. Grievant was rated “Excellent/Good” in Teaching for the 2001-2002, 2003-2004 and 2004-2005 school years, but was only rated “Good” for the 2002-2003 year.

14. The annual 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. Annualreviews do not include as much detailed data, the student evaluations, or a review of the past years of performance. The purpose is to assess how the faculty member is performing his or her duties at his or her current rank.

15. Provost Sarah Denman did not recommend Grievant for promotion, stating that he did “not meet the criteria as set forth in *The Greenbook*.”

16. Marshall President Stephen J. Kopp notified Grievant by certified mail dated April 28, 2006, that he agreed with the recommendations of the Division Committee, the Chair and the Provost that “you do not meet the criteria [for promotion] as set forth in *The Greenbook*.”

Discussion

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

Marshall has established that Grievant has achieved excellence in Scholarship, and has performed well in Teaching and Service, but a review conducted by his peers resulted in the conclusion that he has failed to attain the required level of excellence in two areas. While this determination is by nature somewhat subjective, “it is best left to the professionaljudgement 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, supra; 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 v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93- BOD-400 (Apr. 11, 1995). *See 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 anadministrative 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 (W. Va. 1982)." *Trimboli, supra.*

After a review of all the materials presented, the issue of whether the denial of Grievant's promotion was arbitrary and capricious must be answered in the negative. Grievant has failed to demonstrate Marshall 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. Neither is there any evidence that the review or decision was contrary to any applicable policy.

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 rebut the presumption by presenting clear and convincing evidence that the basic facts underlying the asserted presumption are not true. *Bailey, et al. v. Dep't of Health and Human Res. and Div. of Personnel*, Docket No. 03-HHR-167D (June 30, 2004). 3. Marshall 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**.

This decision is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this decision to the Circuit Court of Kanawha County within thirty days of receipt of the decision. This decision is not automatically stayed pending the outcome of the appeal. *W. Va. Code* § 6C-2-5(c). Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named.

DATE: MAY 10, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Although not specifically cited by Marshall, it appears that Grievant lacked the requisite time in rank as an associate professor to be eligible for promotion.