THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

Dr. Elena Ermolaeva,
Grievant,

v. **DOCKET NO. 2009-1560-MU**

Marshall University,
Respondent.

DECISION

Grievant filed this grievance on May 20, 2009, stating, "On or about April 29, 2009, Grievant was denied tenure. Said denial was discriminatory, clearly wrong, arbitrary and capricious, and in violation of law, policy and/or procedure." Her stated relief sought is "to be awarded tenure; to be made whole; and any other relief that the hearing examiner deems appropriate."

A level three hearing was held in the Grievance Board's Charleston office on April 15, 2010. Grievant was represented by counsel, Matthew R. Oliver of Vital and Vital, LC, and Respondent was represented by Senior Assistant Attorney General Jendonnae L. Houdyschell. The matter became mature for decision on May 7, 2010, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Grievant submitted an Exhibit with her Proposed Findings of Fact and Conclusions of Law, which was not made a part of the record at any level of the grievance procedure. Respondent thereafter filed a Motion to Strike the exhibit, as it was not properly before the tribunal. Respondent's Motion is hereby Granted and Grievant's Exhibit "A" has not been considered in the decision of this matter.

Synopsis

Grievant was denied tenure because she did not demonstrate exemplary performance in either scholarly activity or in teaching and advising. Respondent utilized the proper procedure, considering all the evidence Grievant provided in her tenure packet, and each independent step in the review process agreed with the recommendation to deny tenure. Grievant failed to prove the tenure decision was arbitrary or clearly wrong, and her grievance is denied.

Findings of Fact

Based on a preponderance of the evidence, I find the following material facts have been proven:

1. Grievant has been employed by Respondent as an Associate Professor of Sociology since 2005.

2. In November 2008, Grievant submitted a request for tenure to the Chair of the Sociology Department, along with her professional portfolio.

3. Grievant claimed exemplary performance in two areas: teaching and advising, and research/scholarly activity.

4. The tenure review is a multi-step process, and each level makes an independent review of the candidate's tenure portfolio, and then a recommendation to the President of the University, who makes the final determination as to whether tenure will be granted.

5. Grievant's tenure portfolio was first reviewed by a departmental tenure committee, which concluded that Grievant failed to demonstrate exemplary status in either area, and which did not recommend she be granted tenure.

6. The next review was made by the Department Chair, Dr. Anders Linde-Laursen, who felt that Grievant had attained a “professional” level of performance, but did not demonstrate “exemplary” status in any critical area.

7. Next, Grievant’s tenure packet was reviewed by the Promotion and Tenure Committee of the College of Liberal Arts. The College-level committee likewise found Grievant’s performance to be professional, but not exemplary.

8. Dr. David Pittenger, Dean of the College of Liberal Arts, next reviewed Grievant’s portfolio, and opined that Grievant did not demonstrate consistent performance or consistent improvement at or above average levels for the department, and that the student evaluation comments, taken apart from their scores, were “sparse, often unrelated to the quality of instruction” and non-committal.

9. Dean Pittenger also found Grievant’s scholarly activities lacking in a published, peer-reviewed scholarly work. He found her research to be unsatisfactory, because it failed to produce a publishable manuscript.

10. Provost Gayle Ormiston was the next step in the evaluation process, and concurred with the previous reviewers that Grievant’s record was not exemplary.

11. Finally, all of the recommendations were forwarded to University President Stephen J. Kopp, who made an independent review of Grievant’s tenure packet before considering the opinions of the lower levels. Dr. Kopp found that Grievant did not meet the qualifications for tenure, and informed Grievant that her tenure was denied.

12. Grievant’s tenure packet listed no publications in a peer-reviewed, reputable journal or other forum. Grievant did publish an article in the American Sociological

Association Meeting Proceedings, but none of her peers at Marshall considered this to be equivalent to the types of published works needed.

13. Grievant listed a number of scholarly works that were under contract or under review for potential publishing, but at the time she applied, none had been accepted for publishing in final form, and none had been actually published.

14. The student evaluation forms at Marshall consisted of 22 positively worded questions, to which students were asked to respond on a 5-point scale from “strongly agree” to “strongly disagree.” Of the evaluations for her semesters at Marshall, Grievant’s scores compared to the sociology department as a whole, for the “Strongly agree” and “Agree” responses combined, were:

Semester	Grievant	Department
Fall 2005	85%	89%
Spring 2006	94%	92%
Fall 2006	80%	92%
Spring 2007	85%	92%
Fall 2007	91%	92%
Spring 2008	96%	89%

15. Grievant’s Portfolio, also contained her academic credentials, course syllabi, student comments from course evaluations, descriptions of her classes, peer evaluations, articles presented, and evidence of her service projects.

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."[1] "Deference is granted to the subjective determination made by the official[s] administering the process."[2] Since denial of tenure is not a disciplinary action, Grievant bears the burden of proving, by a preponderance of the evidence, that Respondent's tenure decision was arbitrary or that the process failed to follow established procedure.[3]

Professorial candidates for tenure are required to submit a portfolio supporting their application, and must demonstrate "exemplary" performance in either teaching and advising or scholarly activity. Grievant claimed that exemplary performance in both of these areas was supported by her portfolio.

Grievant cites flaws in the tenure review process that she believes caused the unfavorable outcome. Specifically, she cites the statistical review of her student teaching evaluations made by Frederick Roth, a member of the departmental Promotion and Tenure Committee. Grievant had provided her own statistical summary, showing her mean score in five out of six semesters to be 85 or higher, the level at which the committee members testified was exemplary. Dr. Roth questioned Grievant's methods, and convinced the other committee members to disregard them. He did not satisfactorily explain how he arrived at the conclusion Grievant's numbers were selective, and his effort appears to be at least as

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[1] *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995).

[2] *Harrison, supra; Gardener v. Bd. of Trustees/Marshall Univ.*, Docket No. 93-BOT-391 (Aug. 26, 1994).

[3] *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

selective. Clearly, each member of the committee should have decided the matter for himself, but "The grievant must prove that [an] error was harmful, in that 'a different result would likely have occurred. . . . [s]imply stated, if the same result was inevitable, regardless of [adherence to proper procedure], Grievant has not suffered harm from the identified procedural error.' *McFadden v. W. Va. Dept. of Health and Human Resources*, Docket No. 94-HHR-428 (Feb. 17, 1995) at 10."[4] In that every step of the process, that is each committee and each official, arrived at the same subjective conclusion and made the same recommendation without Dr. Roth's analysis, Grievant suffered no harm from this departure from normal procedure.

Nevertheless, the first departmental review was just one, independent step in the process, and the recommendations to deny Grievant tenure based on her teaching and her scholarly activities were unanimous. The information provided by Grievant relating to her teaching and advising was equally accessible to all reviewers, and in their professional judgement, Grievant fell short.

Similarly, Grievant claims her scholarly activities were overlooked, but the decision to discount her efforts in this area was likewise unanimous in putting no weight on Grievant's record of publication, which at the time of her application, was nil.

The peer evaluation process at Marshall University appears to have functioned as it should, allowing those whose professional judgement is most likely to be able to make the determination the ability to review Grievant's work under both objective and subjective

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[4] *Karle v. Brd. of Trustees/Marshall University*, Docket No. 98-BOT-258 (Apr. 19, 1999); *Kloc v. Bd. of Trustees*, Docket No. 96-BOT-507 (Aug. 20, 1997). *See Walker v. Dep't of Public Safety*, Docket No. 98-DPS-056 (Sept. 11, 1998).

standards. It should be noted that this was the same process used by Shepherd University, Grievant's prior employer, when it denied her tenure there, and which was upheld by this tribunal when she challenged that decision.[5] Grievant did not meet her burden of proving the outcome was arbitrary or clearly wrong.

The following conclusions of law support this discussion:

Conclusions of Law

1. Since denial of tenure is not a disciplinary action, Grievant bears the burden of proving, by a preponderance of the evidence, that Respondent's tenure decision was arbitrary or that the process failed to follow established procedure. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. This Grievance Board's review of an institution of higher learning promotion and tenure decisions are "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).

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); *See also Carpenter v. Bd.*

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[5]See *Ermolaeva v. Shepherd Univ.*, Docket No. 04-HE-299 (April 15, 2005).

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).

4. Grievant did not demonstrate that the unanimous decision by her peers to deny her tenure at Marshall University was arbitrary and capricious.

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

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

July 8, 2010

M. Paul Marteney
Administrative Law Judge