THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ELIZABETH A. KYBER,
Grievant,

v. **Docket No. 2012-1355-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Grievant, Elizabeth Kyber, filed this grievance at level one on June 5, 2012, following the denial of her application for promotion and tenure. Grievant requests the granting of her promotion and tenure application plus back pay, or, in the alternative, Grievant requests that she be reinstated to her former position, back pay, and to be reevaluated for promotion and tenure. This grievance was denied at level one by decision dated August 29, 2012, and authored by Sue Keller, Respondent's Chief Grievance Administrator.

A level two mediation session was conducted on October 31, 2012. The grievance was then placed in abeyance to allow the parties additional time to attempt a settlement. An Order of Unsuccessful Mediation was entered on December 11, 2012. A level three hearing was conducted before the undersigned Administrative Law Judge on May 2, 2013, at the Grievance Board's Westover office location. Grievant appeared in person and by her counsel, Jacques R. Williams, Hamstead, Williams & Shook, PLLC. Respondent appeared by its counsel, Samuel R. Spatafore, Assistant Attorney General. The matter

became mature for consideration upon the receipt of the last of the parties' proposed findings of fact and conclusions of law on July 22, 2013.

Synopsis

Grievant was employed as an Assistant Professor of Landscape Architecture in the Davis College of Agriculture, Forestry and Consumer Sciences at West Virginia University. Grievant was able to demonstrate by a preponderance of the evidence that the Provost's decision to issue her a terminal contract was an arbitrary and capricious act. Grievant met this burden by proving that her teaching performance was placed at a significant disadvantage by the University's failure to provide her with a studio as had been promised at the beginning of her employment. It is undisputed in this case that the studio came four years later than promised in her appointment letter. The undersigned will not second guess the Provost's decision on promotion and tenure; however, it is ordered that Grievant be reinstated to her former position, with an award of back pay, so that she may be reevaluated for promotion and tenure.

The following findings of fact are based upon the record of this grievance.

Findings of Facts

1. Grievant was offered the position of Assistant Professor of Landscape Architecture, Division of Resource Management, Davis College of Agriculture, Forestry and Consumer Sciences at West Virginia University on July 12, 2007.

2. Grievant's appointment letter provided, in pertinent part, the following:

> "a start-up package will be provided that includes a graduate assistantship (PhD level), summer support, office and lab space, a computer, video and digital camera, specialized computer software and a color graphics printer,

mobile welding and woodworking equipment and kiln as agreed upon with Dr. Phipps"

3. Grievant made numerous, repeated requests that the University comply with its obligation to provide her with an appropriate studio. Nevertheless, Grievant did not get her studio until the spring of 2012, five years after she was hired. The record also established that it was also after her file had been closed on January 1, 2012, for the purpose of evaluating her application for promotion and tenure.

4. During the spring 2012 semester, Grievant received notice from the Provost's office that she would neither be promoted nor tenured, and was given instead a terminal contract which expired on May 15, 2013.

5. Grievant's strengths are in her one-on-one teaching where she can demonstrate to students, and assist students in projects, where they weld, construct sets, do large displays and perform other hand-on activities that the studio she obtained in the spring of 2012 permitted.

6. Tim Phipps, Associate Dean of the Davis College of Agriculture, Natural Resources and Design, opined that students would have had a different perspective of Grievant as a teacher had she had studio space because she would have been able to demonstrate her skill in landscape architecture.

7. West Virginia University's Policies for Promotion and Tenure specifies that "teaching includes not only traditional modes of instruction such as the classroom lecture, but also modes such as clinical, laboratory and practicum instructions; thesis and dissertation direction; evaluation and critique of student performance; various forms of continuing education and non-traditional instruction . . ." Grievant's Exhibit No. 4.

8. The record demonstrated that there is an aspect of “square peg/round hole” with landscape architecture in the Davis College. There are no full professors in landscape architecture, and the last faculty member to be tenured in landscape architecture was Professor Charles Yuill, Chair of Landscape Architecture Program, approximately 15 years earlier. Landscape architecture in general, and Grievant’s focus in particular, deal more with aesthetic and artistic projects than is the case with other divisions within the college; hence the need for the promised studio.

9. Grievant had a studio at Iowa State where she also had tenure before coming to West Virginia University; Grievant would not have come to West Virginia University without the promise of a studio.

10. Professor Yuill indicated that the lack of a studio can have a dual impact on teaching performance and research. He stated that those are intertwined. Frequently community design projects and faculty research provide actual instruction to the students who participate in those projects with their teachers.

Discussion

Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of*

Educ., Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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).

"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)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

The Grievant demonstrated by a preponderance of the evidence that West Virginia University acted arbitrarily, capriciously or was clearly wrong when she was deprived of the benefits of a studio which she had been promised when she was hired. In addition, the record demonstrated that it was more likely than not that the lack of studio space to design and develop her sculptures and to develop projects affected her teaching style and strengths as an instructor. The studio workshop was mutually understood to be an important component of Grievant's teaching and research mission at West Virginia University, otherwise it would not have been specified in her contract.

Given that the undersigned is denying the request for promotion and tenure it is not necessary to address Grievant's student evaluations. In any event, the record does tend to show that Respondent's reliance on Student Evaluation of Instruction is misplaced given

the unique facts of the instant matter. Although the undersigned agrees with Respondent that raw Student Evaluation of Instruction numbers may legitimately be included in tenure and promotion decisions pursuant to the University's policies, they are not meant to totally supplant nontraditional instruction. They have little sway in this case since Grievant's strengths lay in nontraditional instruction and the absence of a studio was detrimental to her ratings in teaching and research. Grievant's request for promotion and tenure is denied. Grievant's request to be reinstated, with back pay, is granted.

The following conclusions of law support the decision reached.

Conclusions of Law

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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. 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).

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. 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 Res.*, Docket No. 93-HHR-322 (June 27, 1997).

5. Grievant demonstrated that West Virginia University acted arbitrarily and capriciously when it issued her a terminal contract after she was deprived of the benefits of a studio which had been promised to her when she was hired.

Accordingly, this grievance is **GRANTED IN PART**, **AND DENIED IN PART**. Respondent is **ORDERED** to reinstate Grievant to her former position, with back pay, and to reevaluate Grievant's application for promotion and tenure after she has had sufficient time to perform her teaching and research with the benefit of her studio that should have been provided at the beginning of her employment.

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).

Date: August 6, 2013

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Ronald L. Reece
Administrative Law Judge