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PEARL B. COHEN

v.

Docket No. BOR1-86-247-2

WEST VIRGINIA UNIVERSITY

D E C I S I O N

Grievant, Pearl B. Cohen, is employed by the Board of Regents as an assistant professor at the West Virginia University School of Social Work. Dr. Cohen initiated grievance proceedings in August, 1986 following a denial of her request for promotion and tenure. William E. Vehse, Associate Vice President, acting on behalf of Dr. Frank A. Franz, Provost and Vice President for Academic Affairs and Research, denied the grievance and an appeal to level four was filed on August 11, 1986. Hearings scheduled for September 11 and December 1 were continued upon motions by counsel; level four proceedings were conducted on January 21 and 22, 1987. Both parties waived their right to a decision within thirty (30) days to allow a briefing period following receipt of a transcript of the proceedings.

The grievant accepted part-time employment at the School of Social Work in the fall of 1979 and assumed a full-time position in January, 1980. In the fall of 1985 she submitted application for tenure and promotion to the rank of associate professor.

Evaluation and recommendation for promotion and/or tenure at West Virginia University is conducted on three levels: department or division, college or school and by a vice-president, with a final decision made by the President of the University. The 1985/86 Promotion and Tenure Guidelines provides that the primary evidence to be weighed in the evaluation should be contained in the faculty member's personnel file. The file is to contain:

1. An up-to-date curriculum vitae and bibliography containing the following information: critical dates relative to education, employment, change in status, promotion, leave of absence, etc., a list of publication with complete citations, grants and contracts, and/or other evidence of scholarship and a list of public service activities.
2. For each semester or term, since appointment or last promotion, a record of classes taught and enrollments in each, graduate students supervised, clinical assignments, significant committee assignments, and other aspects of the faculty member's plan of work.
3. All other information that bears on the quality of the faculty member's performance in all areas pertinent to his or her evaluation. These areas will

include, but need not be limited to teaching, professional presentations, research in progress and the preparation of unpublished materials, other creative scholarship, service to the University (i.e., by significant committee work) and public service.

4. A copy of past annual evaluations and any written responses.

5. A chronology of entries to assure that the file will remain intact.

6. Other information and records as the chairperson or dean may wish to include. Faculty members may include written response to such material if the member chooses to prepare it.¹

After reviewing this personnel file compiled by the grievant and the chairman, or dean, the Personnel and Finance Committee members unanimously issued a level one recommendation that both tenure and promotion be awarded. In a two page letter to the grievant the committee addressed her performance in relation to the criteria for promotion and tenure. They noted that she had demonstrated a high quality of teaching, that her research and publication activities included the completion of her dissertation and earned doctoral degree, presentation of papers at national conferences, submission of several articles to scholarly publications (a number of which were rejected; however, two had been published in refereed journals) and that while service to the community and the University had not been extensive

¹The faculty member is responsible for completing Items 1, 2, and 3. The chair shares responsibility for Item 2 and has responsibility for Items 4, 5 and 6.

her annual evaluations did not indicate the level of participation to be unacceptable.

In response to the committee's recommendation the grievant submitted a five page rebuttal which, as per her request, was attached to their letter for consideration at the following levels. In this document the grievant questioned some of the findings made by the committee and provided data which she deemed relevant and which was overlooked by the committee.

At the second level of evaluation Dr. Nancy Lohmann, Dean of the School of Social Work, noted the grievant's strong performance in teaching but seemed to take exception to her explanation of low student ratings for one class and encouraged her to develop more effective methods for teaching classes consisting primarily of undergraduate students. The Dean stressed the importance of demonstrated excellence in the areas of research and other scholarly activity for the granting of tenure and/or promotion above the rank of assistant professor. As the "demonstrated evidence of excellence" may be determined from peer judgment, the Dean indicated concern that while two articles had been published, six had been rejected. Of four proposals to obtain funding one was granted, two were rejected and one was not submitted; however, four out of five proposals for pre-

sentations at national or regional conferences were accepted and she had co-authored two monographs. Finally, the Dean determined that the grievant had not engaged in service activities within the community or the profession to the extent required by the School of Social Work criteria for promotion to associate professor. Dean Lohmann concluded that the grievant had shown sufficient evidence of excellence in instruction and efforts to achieve excellence in other scholarly activities to justify an award of tenure, but that her research and service activities were not at the level expected of an associate professor and that she would not recommend promotion. Dean Lohmann indicated that her decision to recommend tenure was based in part on the programatic needs of the school as well as the faculty evaluation process.

At the third level of evaluation the University Promotion and Tenure Advisory Panel members notified Provost Franz that they had reviewed the materials regarding the grievant's evaluation and found that "...all published procedures and criteria were followed in making the recommendation that she be granted tenure and retained at the rank of Associate Professor."

At the level four grievance hearing Provost Franz testified that his review of the grievant's file and the Dean's split recommendation had caused him some concern.² His own determination was that the grievant's record in research was mediocre and he could find no redeeming features in the areas of teaching or service to offset the weakness. (T.p. 21) He discussed the grievant's case with Dean Lohmann who reaffirmed her decision that she could not recommend promotion. When Provost Franz indicated that he could not recommend tenure without promotion Dean Lohmann responded that under such conditions she could not recommend tenure. The Provost stated that his conversation with the Dean primarily concerned her recommendation and evaluation of the grievant's research. While the Dean may have offered comments regarding the grievant's teaching and service records there was no discussion beyond what was contained in

²The grievant suggests that the Provost's concern regarding the split decision may have arisen due to the fact that he had been at West Virginia University only a brief period of time and had not become familiar with a recognized practice of awarding tenure without promotion at the School of Social Work. While this apparently had occurred at the School it does not serve to validate a practice which was contradictory to the Faculty Handbook guidelines relied upon by the Provost in making his recommendation.

her personnel file. (T.p.28)³ Based on his review of the file and the conversation with Dean Lohmann, Provost Franz recommended that the grievant be offered neither promotion nor tenure. That recommendation was accepted by President Neil Bucklew, who notified the grievant of his decision by letter dated May 14, 1986.

Dr. Cohen alleges that improper procedures were utilized in the processing of her request for tenure and promotion which resulted in a denial of due process. Specifically, she argues that Provost Franz improperly reviewed her request for tenure when both the Committee and Dean Lohmann had recommended that it be granted. Grievant argues that a substantive review of that issue would have been warranted only if the Committee and the Dean had reached opposing decisions or if both had reached negative decisions.

³Testimony of both Provost Franz and Dean Lohmann indicates that their conversation was limited to the grievant's record as established by the personnel file and to the Dean's recommendation. There is no indication that any original or prejudicial information regarding the grievant was discussed.

The grievant argues that a second violation of her due process rights occurred when Provost Franz engaged in an ex parte conversation with Dean Lohmann concerning her application for promotion and tenure. Grievant asserts that the Provost was limited to review of her personnel file in reaching his decision and conferring with the Dean in her absence deprived her of the opportunity to submit any additional information or correct any misinformation provided by Dean Lohmann. The grievant cites the 1985/86 Promotion and Tenure Guidelines which provides any faculty member who receives one negative recommendation at the college/school level the opportunity to include rebuttal for review at the next level, and argues that such a right is meaningless when the Dean engages in ex parte conversations with the individual who renders the recommendation on the vice-presidential level.

In addition to a violation of her due process rights the grievant argues that the denial of tenure was arbitrary and capricious as the given reasons were insufficient to justify the decision. The grievant argues that the members of the School of Social Work Personnel and Finance Committee were well qualified to evaluate her while Provost Franz was not. The

Provost's lack of qualifications to evaluate her is evidenced, in her opinion, by his never having previously evaluated a faculty member of the School of Social Work, therefore, he was unfamiliar with the discipline and the school, his failure to consider some information, his reliance on misinformation, his failure to compare her with other members of the faculty, his lack of a standard by which to measure her publication/rejection rate and his reliance upon information provided by Dean Lohmann.

Grievant's final argument is that the University has acted in violation of Board of Regents Policy Bulletin No. 36 which requires that probationary employees with two or more years of service be given notification of non-retention at least one year prior to the expiration of an appointment. Notification of the grievant's non-retention was dated May 14, 1986 and it was postmarked May 15, 1986. The post office left a notice of certified mail on May 16, 1986 and it was actually received by her on May 17, 1986, less than one year prior to her appointment for the 1986-87 academic term. Policy Bulletin No. 36 provides that failure to timely notify an employee of non-retention requires an appointment for an additional year.⁴

⁴Following the level four hearing grievant's attorney submitted a memorandum of law in which she stated that because the entitlement to promotion was less clear than the entitlement to tenure, the grievant was willing to waive any claim to promotion at this time.

The respondent argues that the final decision regarding tenure and promotion rests with the President of the institution, that the institutional criteria used in assessing a faculty member for tenure and/or promotion are excellence in teaching, research and service and that the grievant had not met that criteria. The respondent acknowledges that the decision to grant or deny tenure is a subjective one but denies that the decision was arbitrary and capricious as it was based on substantial and credible evidence.

The respondent asserts that the President is not bound by the recommendation of the faculty in making his decision as he is responsible for guiding the entire institution through the individual schools. Additionally, his independent action protects individuals from bias or prejudice of their fellow faculty members.

Respondent argues that the notice of non-retention was timely as it was delivered on May 16, 1986 and from that date to May 15, 1987, the last day of the grievant's 1986-87 appointment, is 365 days or one year. In the alternative, if the notice should be untimely, the institution had substantially complied with the policy and the grievant has failed to show any prejudice or harm resulting from the perceived delay.

Board of Regents Policy Bulletin No. 36 requires that every institution establish guidelines and criteria for promotion in rank appropriate to the mission of the institution. Policy Bulletin No. 36 also provides that tenure be awarded to those faculty members who qualify for it. Promotion shall not be granted routinely or because of length of service, nor may it be denied capriciously. Neither promotion nor tenure is granted automatically or for years of service but must result from action by the President of the institution following consultation with appropriate academic units and upon a showing that the grievant has demonstrated evidence that he has met the applicable criteria. In addition, decisions require consideration of the tenure profile of the institution, projected enrollment patterns, staffing needs of the institution, current and projected mission of each department/division, the specific academic competence of the faculty member and the preservation of opportunities for new talent.

The West Virginia University Faculty Handbook states that while rank and tenure are officially separate, normally tenure will not be awarded to faculty who are not being promoted to or are already at the rank of associate professor or higher.

The 1985/86 Promotion and Tenure Guidelines provides that evaluation is to be by general University criteria with primary

weight given to the faculty member's demonstration of excellence in teaching, in research or equivalent creative scholarship and publication, and in service. The individual's record of research and publication are given strong weight in the consideration for tenure or promotion above the rank of assistant professor. Faculty members with specific work assignments will be appraised primarily on the basis of their performance in these assignments.

In applying the above-cited policies, rules and regulations it appears that Provost Franz, by virtue of his position and authority delegated by the President, is required to evaluate the performance of faculty members in relation to University criteria for promotion and tenure. As he does not possess expertise in all of the various academic areas he has made it a practice to consult the appropriate Dean when the need arises. The grievant characterizes this as an ex parte communication which resulted in a deprivation of due process as she was deprived of an "...opportunity to confront one's accusers, an opportunity to present evidence on one's own behalf, and an adequate record of proceedings which are part of the decision." However, the Provost's testimony indicates that what occurred in the present case was not the solicitation and/or consideration of information extraneous to the grievant's personnel file but

rather was consultation by the Provost with the Dean to clarify her impressions of the grievant's capabilities and the split recommendation for tenure but against promotion. No information was discussed outside the personnel file which the grievant had partially compiled and had exercised the opportunity to address following the level one evaluation. It is clear from the Guidelines and from the testimony offered by Provost Franz that the decision made by the President to grant or deny promotion and tenure applications are based upon the recommendation of the Provost. As such, it is only the Provost who reviews the application and personnel file and makes a recommendation based upon the needs and goals of the institution as a whole. Therefore, in making a recommendation which must promote the mission of the institution yet serve the more specific needs of the division, it is simply a matter of common sense that consultation between administrative personnel take place. Policy Bulletin No. 36 specifically permits such discussions between the President and the appropriate academic units. To the extent that the Provost acts as the President's designated representative in completing the final substantive review of the lower level evaluations his consultation with the Dean was a necessary and permissible step in a decisional process of a subjective nature.

Consideration of both tenure and promotion at the third level was necessary as similar criteria were applied to both and because tenure is not normally awarded to faculty not being promoted to, or already at, the rank of associate professor or higher. To restrain consideration of tenure at level three simply because it had been recommended at levels one and two would be inconsistent with the Guidelines requirement that recommendations from all colleges be reviewed by a vice-president in making his final recommendation to the President.

The President's decision to deny both promotion and tenure was set forth to the grievant by letter dated May 14, 1986 and postmarked May 15, 1986. She collected a notice that certified mail was being held for her on May 16 and received the letter on May 17, 1986. As her term of employment was to end on May 15, 1987 and as the letter was available to her on May 16, 1986 the grievant had received 365 days or one year's notice of the decision in compliance with Board of Regents Policy Bulletin No. 36. She has failed to show any harm from the alleged delay in receipt of the notification.

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

Findings of Fact

1. Grievant began employment on a part-time basis at the West Virginia University School of Social Work in the fall of 1979 and accepted a full-time position effective January, 1980.

2. In September 1985 the grievant requested that she be considered for tenure and promotion to associate professor.

3. Upon consideration of the grievant's personnel file, which included materials submitted by the grievant in support of her application, the level one faculty review committee recommended that she be awarded both tenure and promotion.

4. The grievant submitted a response to the recommendation in which she took issue with findings made by the committee which she perceived to be less positive and noted facts which they had overlooked.

5. At the second level of evaluation the Dean of the School of Social Work recommended that the grievant be awarded tenure but that she not be promoted to associate professor.

6. At level three members of the University Promotion and Tenure Advisory Panel notified Provost Frank Franz that they had found that all published procedures and criteria were followed in making the recommendation that the grievant be granted

tenure and retained at the rank of associate professor. However, upon his review of the grievant's file, Provost Franz became concerned as to whether she had met the criteria of excellence required for promotion and tenure. After a discussion with the Dean, who restated her concerns regarding promotion, the Provost recommended the grievant be awarded neither tenure nor promotion.

7. President Neil Bucklew accepted the Provost's recommendation and notified the grievant of her nonretention by letter dated May 14, 1986. The letter was postmarked May 15, the grievant received a notice to pick up a certified letter on May 16 and came into possession of the letter on May 17, 1986.

8. The grievant's employment term for the 1986/87 academic year ended on May 15, 1987.

Conclusions of Law

1. W. Va. Board of Regents Policy Bulletin No. 36 provides that each President, in cooperation with the faculty, shall establish guidelines and criteria for promotion in rank. There must be demonstrated evidence that promotion is based on a wide range of criteria established by the institution appropriate to its mission. Promotion shall not be denied capriciously

nor shall it be awarded routinely or for length of service but shall result from an action by the President of the institution following consultation with the appropriate academic units.

2. W. Va. Board of Regents Policy Bulletin No. 36 provides that the ultimate authority regarding the application of guidelines and criteria relating to tenure shall rest with the institution. There shall be evidence that tenure is based upon a wide range of criteria such as: excellence in teaching; professional and scholarly activity, publications and research; service to the people of the State of West Virginia, etc. Careful consideration is to be given to the tenure profile of the institution, projected enrollment patterns, staffing needs, the current and projected mission of each department/division, the specific academic competence of the faculty member and preservation of opportunities for infusion of new talent. Tenure is not to be granted automatically or for years of service but from an action by the President following consultation with appropriate academic units.

3. The West Virginia University Faculty Handbook provides that rank and tenure are officially separate except that in-

structors continuing in rank may not be awarded tenure. The University does not normally award tenure to faculty members who are not being promoted to, or are already at, the rank of associate professor or higher. The general evaluative criteria outlined in the section "Awarding of Tenure" provides a basis for determining the qualifications of a faculty member for advancement.

4. The 1985/86 Promotion and Tenure Guidelines provides that criteria for retention or advancement will be excellence in the performance of teaching, in research or equivalent creative scholarship and publication and in service. Faculty members with specific work assignments will be appraised primarily on the basis of their performance of these assignments; however, the individual's record of research and publication are normally given strong weight in considering either the award of tenure or promotion above the rank of assistant professor.

5. The grievant was not deprived of any due process rights as a result of a level three review of her tenure application inasmuch as a review and recommendation are required at that level by the 1985/86 Promotion and Tenure Guidelines.

6. The grievant was not deprived of any due process rights as a result of a consultation by the Provost with the Dean

as such administrative interchange is permitted by Board of Regents Policy Bulletin No. 36 and when no opportunity for rebuttal at the second or third level of evaluation has been established by the Promotion and Tenure Guidelines.

7. Testimony offered by Provost Franz describing the information which he considered in his determination that the grievant had not met the criteria for tenure and promotion resulting in his recommendation that neither be granted establishes that the decision was based on substantial evidence and was neither arbitrary, capricious nor without factual basis.

8. The respondent's notice of nonretention was issued in substantial compliance with the requirement set forth in W.Va. Code, 18-26-8c that faculty be notified at least one year prior to the expiration of an appointment.

9. Substantial compliance with technical requirements such as promotion and tenure guidelines has been upheld by the W.Va. Supreme Court of Appeals when the alleged infractions have not prejudiced the interests of the petitioner. Clarke v. W.Va. Board of Regents, 279 S.E. 2d 169 (W. Va. 1981) and State ex rel. Norton v. Stone, 313 S.E. 2d 456 (W. Va. 1984).

10. The subjective decisional process by which promotion and tenure are awarded or denied is best left to the professional

judgment 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, Robert B. Kauffman v. Shepherd College, Docket No. BOR1-86-216-2.

Accordingly, the grievance is DENIED.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County and such appeal must be filed within thirty (30) days of receipt of this decision. (W. Va. Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.

DATED July 7, 1987

Sue Keller

SUE KELLER
Hearing Examiner