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DR. JOYCE WEBB

v.

DOCKET NO. 87-287-2

SHEPHERD COLLEGE

DECISION

Grievant, Dr. Joyce Webb, is employed by Shepherd College and presently holds the position of Assistant Professor of Speech Communications. Dr. Webb filed a level one grievance on October 5, 1987 at which time she alleged violations of Policy Bulletin 36, Sections 6-1; 6-1-3 and 6-2 when she was denied promotion to Associate Professor. Following a level one response dated October 19 an appeal was filed to level two where no action was taken by November 12 when a level four appeal was filed. A motion filed by the respondent to remand the matter to the institution was granted for the purpose of curing its error in failing to address the grievance. The grievance was denied

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following a hearing held on March 24, 1988 and was again appealed to level four on April 18. By agreement of both parties the matter was submitted for consideration based upon the record developed at level two with supplementary testimony offered on May 26 and proposed findings and conclusions submitted by August 9, 1988.

The grievant has been employed as an Assistant Professor of Speech Communications at Shepherd College since July 30, 1979. After having been awarded tenure in 1985 the grievant's applications for a promotion in rank in 1985 and 1986 were denied. The grievant argues that the 1986 denial was improper as she exceeded the criteria for promotion as set forth in the policies of the Board of Regents and Shepherd College. In support of her position the grievant submitted annual evaluations completed by her division chairman for 1980-1986, her two applications for promotion with extensive documentation of her professional qualifications and letters of recommendation written by her immediate supervisor in support of her application for tenure and promotion.

The respondent argues that a faculty member does not have any right to promotion which is a reward to one who has demonstrated excellence in a number of areas. Although Dr. Lee Keebler, Chairman of the division of Language and Literature and the

grievant's immediate supervisor, and both Promotion, Retention and Tenure Committees approved the application for promotion, Academic Dean Howard Carper found the grievant to be lacking excellence in her teaching performance and recommended that the promotion be denied. At the level two hearing Dean Carper explained his recommendation against promotion was based on "...a continuing theme of negative reservations...related to apparent absence of commitment to classroom duties as would be extremely necessary if one were to be rated at the outstanding level for promotion purposes." (T.196) Dean Carper identified the source of these negative reservations as faculty committee reports which he conceded were generally positive in tenor.(T. 197) Dean Carper could not or would not identify the individuals who contributed the negative elements and stated that he had no record of the comments.¹ (T.209) He did specifically state that in the context of reports filed by Dr. Keebler he did not believe the evaluations of the grievant established excellence or outstanding performance in teaching. (T.205-206) The respondent concludes that inasmuch as the ultimate decision of

¹These records may have been available as Dean Carper indicated that they were submitted as a report to the president. (T. 209) As President Butcher was not called as a witness his possession of the information was not verified and any weight he may have accorded it was not established.

the institution's president to deny the promotion was based upon credible information it should be upheld.

West Virginia Board of Regents Policy Bulletin No. 36 provides that promotion shall not be granted automatically or routinely because of length of service but shall be awarded based upon a wide range of criteria appropriate to the mission of the school. In making evaluations for promotion there must be demonstrated evidence of participation by persons from several different groups such as peers from within and without the applicant's unit, supervisory administrators such as the department chairman, the dean and students.

The "Guidelines and Criteria for Promotion in Rank and Tenure at Shepherd College" provide that requests for promotion/tenure are to be evaluated on the basis of four areas of performance: the possession of a terminal degree and/or the doctorate; excellence in teaching as evidenced by regular evaluations; professional growth as evidenced by scholarly research or creative work appropriate to the discipline or field of appointment and evidence of outstanding professional service.

A determination of whether an individual has met the criteria for promotion is to an extent a subjective matter best evaluated by administrators and will not be reviewed unless evidence is

presented indicating the decision to be arbitrary and capricious or in violation of applicable policies, rules or statutes. The grievant has presented her 1986 evaluation in which Dr. Keebler rated her in five categories: terminal degree; teaching; service; professional, scholarly or creative activities and exemplary performance. Her overall rating was nine out of a possible ten points which included the maximum allowable points in the teaching category. She presented a written recommendation from Dr. Keebler to the Promotion, Retention and Tenure Committees which included positive comments relating to the four areas of performance to be considered and a recommendation for promotion. Although not made part of the record, there is no dispute that both the divisional and campus committees recommended the promotion.² Dr. Keebler and members of the committees appeared at the level two and four hearings to express their support for the grievant's promotion.

Of particular curiosity is the fact that based on evaluation of the same four areas of performance (terminal degree, teaching,

²Student evaluations were also included however there seemed to be confusion by the faculty as to interpretation of the ratings and none of the evaluators, including Dean Carper, appears to have accorded more than minimal weight to them.

professional growth and professional service) the grievant had been awarded tenure in 1985 yet Dr. Carper found her performance over essentially the same period of time to be of insufficient quality for promotion.

Evidence does support the idea that the promotion may have been denied for other than the stated reason. In a memorandum dated July 30, 1979 then Academic Dean George Condon noted that the grievant had been offered and accepted the position of Assistant Professor at a salary of \$15,939. Apparently this salary was considered quite high as the Dean stated that "...there might be equity problems in the next year or so, when we might have to hold her back somewhat on merit increases." Dean Carper further indicated that the grievant may have been "held back" when during the level two hearing he stated that several years of improved performance may be needed for her to demonstrate the worthiness deserved for promotion and "...that she would have ample opportunity to arise to higher academic ranks." (T. 199) The memorandum together with Dean Carper's statements creates the appearance that promotion would not be granted to the grievant so soon after she had been awarded tenure not because of her lack of ability but based upon the institution's financial and/or personnel concerns.

The decision to grant or deny a promotion may be based on numerous factors, including financial and personnel considerations, however the reason for the denial as stated by Dean Carper is without support and therefore improper.

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

Findings of Fact

1. The grievant was first employed by Shepherd College in 1979 as an Assistant Professor of Speech Communications.

2. The grievant was granted tenure at Shepherd College in June 1985.

3. The grievant's application for promotion to Associate Professor filed in November 1985 was denied.

4. The grievant submitted a second application for promotion in November 1986. The promotion was recommended by her department chairman and was unanimously approved by the divisional and campus Promotion, Retention and Tenure Committees.

5. Howard Carper, Academic Dean, recommended denial of the promotion based upon his identification of ongoing negative elements regarding the grievant's teaching skills. He also

did not consider the recommendation of the department chairman to indicate that she had exhibited outstanding teaching skills.

6. Dean Carper presented no corroborative documentation or other evidence in support of his stated determination that negative elements were part of the grievant's overall positive evaluations.

7. In July 1987 the grievant was notified by Dr. James Butcher, President, that the promotion had been denied but no reasons were given for the denial.

8. A memorandum of July 30, 1979 and the testimony of Dean Carper strongly indicates that the grievant may have been "held back" as a method of maintaining her salary at a level comparable to that of her peers.

9. Evaluation for both tenure and promotion is based upon the same four areas of performance, therefore the granting of tenure and denial of promotion for essentially the same period of time is arbitrary and capricious.

Conclusions of Law

1. W.Va. Board of Regents Policy Bulletin 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. Cohen v. West Virginia University, Docket No. BOR1-86-247-2.

2. "Guidelines and Criteria for Promotion in Rank and Tenure at Shepherd College" provide that requests for promotion and/or tenure will be evaluated on the basis of the possession of a terminal degree, excellence in teaching, professional growth and professional service.

3. The 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, Kauffman v. Shepherd College, Docket No. BOR1-86-216-2.

4. The decision to deny the grievant's requested promotion was unsupported by any evidence and therefore must be determined to have been arbitrary and capricious.

Accordingly, the grievance is **GRANTED** and Shepherd College is Ordered to process the promotion of the grievant to the level of Associate Professor effective July 1, 1987.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jefferson 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

September 30, 1988

Sue Keller

SUE KELLER
HEARING EXAMINER