

**WEST VIRGINIA
PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JEFFREY T. HUFFMAN,
Grievant,**

v.

DOCKET NO. 2016-1631-MU

**MARSHALL UNIVERSITY,
Respondent.**

DECISION

Jeffrey T. Huffman (“Grievant”) filed this grievance on May 10, 2016, against his employer, Marshall University (“Marshall” or “Respondent”). His statement of grievance reads:

Based on the joint interpretation of Policies AA-26 and AA-28, I should apply for tenure during the 2016-2017 cycle.

I do not hold a terminal degree in my field of Civil Engineering and based on Section 4.3.2 in AA-26 (shown below), I am not eligible to apply for promotion until the 2016-17 cycle, which will be my sixth year as an assistant professor. Furthermore, Section 3.2.7 in AA-28 (shown below), ties promotion and tenure together so that they must occur concurrently. My conviction that my tenure application date is the 2016-17 cycle is supported by the pre-tenure portfolio I submitted to the CITE Personnel Committee in April 2014 that stated this date. My interpretation of the policies were not corrected at that time.

AA-26 – Faculty Promotion

4.3 - Requirements for the Rank of Associate Professor

4.3.2 – A candidate without an appropriate terminal degree must have had at least seven complete academic years’ experience as a full-time faculty member of which at least five complete academic years must be at the assistant professor rank at a regionally accredited international college or university, or other experience deemed as equivalent by the Dean of the college/school/library. In other words, during the sixth year as an assistant professor, a candidate may apply for promotion in academic rank.

AA-28 – Faculty Tenure

3.2 – Requirements

3.2.7 Tenure may be granted only to faculty who hold the rank of assistant professor or above. Promotion and tenure shall be applied for concurrently.

As a result of my interpretation of these policies, I did not submit by (*sic.*) application for tenure during the 2015-2016 cycle. If my interpretation of the policies are insufficient grounds for this appeal, I would like to submit that the administrative processes currently in place could have presented this situation. Since I had no intention of submitting a portfolio during the 2015-2016 cycle, I did not submit an “intention to apply” for tenure by the October 9, 2015 deadline. The purpose of this step is unclear, but it seems reasonable that my Chair, Dean, CITE Personnel Committee or Academic Affairs would have verified eligibility of intention letters received and this mistake would have been caught at that point with time to rectify the situation.

I understand from Dr. Eldon Larson (*sic.*), former Chairperson of the CITE Personnel Committee, that he considered it the duty of the Personnel Committee (and the Dean’s Office) to verify that all applicants were submitting their application at the correct time. If caught in fall 2015, the resolution could have been to move my application date to 2016-2017 (per my interpretation of the policies) or for me to go ahead and submit during the 2015-2016 cycle.

If my interpretation of the policies and the subsequent lack of verification by the administration are not sufficient grounds for this appeal, I submit that my current situation is not addressed in any of the policies. Section 4.2.4 in AA-28 (shown below) states that faculty members “who chooses not to apply will not be considered for tenure.” While I do not know the author’s intention for including this statement in the policy, I feel that the term “choose” implies “knowing intent.” I have every intention to apply for tenure when I am supposed to apply, but my interpretation of the policies resulted in an application year different from the one in my offer letter. Therefore, I am hopeful that the series of events and missed opportunities can be interpreted as “demonstrated extraordinary circumstances” so that I can still have my portfolio reviewed as specified in the resolution sought in the grievance.

AA-28 – Faculty Tenure,

4.2 – The Tenure Process

4.2.5 – Unless demonstrated extraordinary circumstances prevent an application during the sixth year of a faculty appointment, the person

who chooses not to apply not be considered for tenure and will be offered a succeeding one-year terminal contract of appointment.

For his relief, Grievant is requesting to have his one-year terminal contract rescinded and an opportunity to apply for tenure/promotion.

Following a Level One grievance hearing on May 19, 2016, Marshall denied the grievance on May 20, 2016. Grievant appealed to Level Two of the grievance procedure on June 2, 2016. On July 5, 2016, Grievant, with Respondent's concurrence, filed a "Motion to Proceed to Level Three Hearing," requesting to move to the final step in the statutory grievance procedure without holding a mediation session. That motion was denied by Chief Administrative Law Judge Billie Thacker Catlett on July 26, 2016. After mediation was completed at Level Two on September 15, 2016, Grievant appealed to Level Three on September 23, 2016. Following a telephone conference on November 18, 2016, addressing Grievant's Motion to Compel Discovery and Respondent's Motion *in Limine*, a Level Three hearing was held before the undersigned Administrative Law Judge on December 16, 2016, at the Grievance Board's offices in Charleston, West Virginia. Grievant was represented by Mark A. Toor, Esquire. Marshall was represented by Candace Kraus, Deputy General Counsel for the West Virginia Higher Education Policy Commission, and Jendonnae L. Houdyschell, Associate General Counsel for Marshall University. This matter became mature for decision on January 17, 2017, following receipt of the parties' post-hearing briefs.

Synopsis

Grievant is employed by Respondent Marshall as an Assistant Professor in its College of Information Technology and Engineering. Grievant was hired without a

terminal degree in Engineering, and his letter of appointment stated that his tenure application date was to occur during the 2015-2016 school year. In 2014, Marshall adopted new policies governing tenure and promotion which Grievant reasonably interpreted to require that he apply for tenure and promotion concurrently and, as a probationary faculty member without a terminal degree in his teaching field, allowed him to compete for promotion and tenure at the same time during the 2016-2017 academic year. During the 2013-2014 academic year, Grievant submitted a pre-tenure review portfolio to the Personnel Committee of his college in which he affirmatively stated his intention to apply for tenure in January 2017. In these particular circumstances, Marshall is equitably estopped from denying Grievant an opportunity to compete for tenure based upon his failure to submit an application for tenure during the 2015-2016 academic year. Accordingly, this grievance will be granted.

The undersigned Administrative Law Judge makes the following Findings of Fact based upon the record developed at the hearings held at Levels One and Three.

Findings of Fact

1. Jeffrey Huffman (“Grievant”) is an Assistant Professor in the Marshall University Weisberg Division of Engineering and Computer Science in the College of Information Technology and Engineering (“CITE”).
2. In accordance with his original letter of appointment, Grievant began his full-time, tenure-track employment as an Assistant Professor at Marshall University during the 2010-2011 academic year on January 2, 2011. See G Ex A at L III.

3. Grievant pursued a private sector career for nearly 20 years before accepting a teaching position at Marshall.

4. In accordance with his letter of appointment, Grievant was scheduled to stand for tenure during the 2015-2016 academic year. See G Ex A at L III.

5. When Grievant was hired, the Marshall policy on promotion was contained in Policy AA-26, Faculty Promotion, which had been in effect since March 8, 2006. See G Ex 1 at L I at § 1.3 & 4.

6. Ordinarily, the probationary faculty member has primary responsibility for timely initiating his or her application for tenure. See G Ex 2 at L I, MU Policy AA-28 (2014), at § 4.2.4.

7. Dr. Asad Salem is Chair of the Division of Engineering in Marshall's College of Information Technology and Engineering.

8. Dr. Salem is Grievant's immediate supervisor.

9. Dr. Wael Zatar is Dean of Marshall's College of Information Technology and Engineering.

10. Dr. Gayle Ormiston is Marshall's Provost and Senior Vice President for Academic Affairs.

11. When Grievant was hired as an Assistant Professor at Marshall, faculty tenure was governed by Marshall University Policy No. AA-28, Faculty Tenure, which had been effective since March 8, 2006. See G Ex 1 at L I at § 1.3 & 4.

12. When Grievant was hired as an Assistant Professor at Marshall, faculty promotion was governed by Marshall University Policy AA-26, Faculty Promotion, which had been effective since March 8, 2006. See G Ex 4 at L I at § 1.3 & 4.

13. Subsequent to Grievant's hiring date, Marshall's President sought to revise the school's policies on promotion and tenure in an effort to slow down the pace of faculty promotions, which he perceived as unduly accelerated.

14. A revised Marshall University Policy No. AA-28, Faculty Tenure, was passed on April 23, 2014, and became effective on July 1, 2014. See G Ex 2 at L I at § 1.3 & 4.

15. A revised Marshall University Policy No. AA-26, Faculty Promotion, was also passed on April 23, 2014, and became effective on July 1, 2014. See G Ex 3 at L I at § 1.3 & 4. In addition, the revised Marshall University Policy AA-28 (2014) provided: "Faculty members hired prior to the adoption of this policy may choose to use either the guidelines dated March 8, 2006, or the guidelines set forth in this policy." G Ex 2 at L I at § 1.4.

16. Under Marshall University Policy No. AA 26, Faculty Promotion (2006), to be eligible for promotion to Associate Professor, an Assistant Professor without a terminal degree in his or her teaching field was required to serve seven (7) years as a full-time faculty member with at least four (4) of those years at the rank of Assistant Professor. See G Ex 4 at L I at § 2.7.2.

17. Marshall University Policy No. AA-26, Faculty Promotion (2006), further provided: "Promotion and tenure may be awarded concurrently." G Ex 4 at L I at § 2.7.2.

18. Under revised Marshall University Policy No. AA-28, Faculty Promotion (2014), to be eligible for promotion to Associate Professor, an Assistant Professor without a terminal degree in his or her teaching field is required to seven (7) years as a full-time faculty member, with at least five (5) of those years at the rank of Assistant Professor. See G Ex 3 at L I at § 4.3.2.

19. Under revised Marshall University Policy No. AA-26, Faculty Tenure (2014), "[p]romotion and tenure **shall be applied for concurrently.**" G Ex 2 at L I at § 3.2.7 (emphasis added). Marshall previously allowed probationary faculty members to apply for promotion before they applied for tenure, resulting in the promotion of some probationary faculty members before they were awarded tenured status.

20. After Grievant reviewed these revised policies on tenure and promotion (AA-28 (2014) and AA-26 (2014)), he determined that it would be advantageous to follow the new policies, and defer his application for tenure and promotion until 2017, when he could properly apply for tenure and promotion concurrently.

21. Provost Ormiston approved a chart containing timelines for faculty applying for tenure pursuant to Marshall University Policy AA-28, Faculty Tenure, (2014). This chart was updated in November 2014 and disseminated to deans and department chairs. See G Ex E at L III.

22. This chart, entitled “Tenure and Promotion Policies Implementation Timeline,” was not further disseminated to Grievant, apparently based upon a determination that Grievant was not included in the pool of faculty members who had a legitimate option to seek tenure and promotion under either the 2014 or 2006 promotion and tenure policies. The chart was not part of the policy approved by the Faculty Senate, and Grievant did not see this chart prior to his original 2015-2016 deadline for applying for tenure.

23. Based upon the clarification contained in the chart (G Ex E at L III), Grievant was not eligible to defer his application for tenure to the 2016-2017 academic year.

24. Marshall encourages probationary faculty members to submit a package for pre-tenure review at or about the half-way point in the time for seeking tenured status. This process is intended to help verify that potential tenure applicants are on the right track to achieve tenure and promotion.

25. In accordance with Marshall’s pre-tenure process, Grievant presented a pre-tenure portfolio to the Personnel Committee of Marshall’s College of Information Technology and Engineering in which he explicitly stated: “My application for tenure will occur in January 2017.” G Ex D at L III. This package was timely submitted to the Personnel Committee during the 2013-2014 academic year, as required by Grievant’s letter of appointment. See G Ex A at L III; G Ex D.

26. Consistent with Grievant’s stated intent to apply for tenure in January 2017, Grievant’s pre-tenure portfolio contained blank spaces to add his annual report

ratings for 2014, 2015 and 2016, as well as summaries of his student course evaluation scores for spring and fall of 2014, 2015, and 2016, the last of which ratings and scores would not have been rendered until the middle of the 2016-2017 academic year. See G Ex D at L III.

27. Dean Zatar attended the Personnel Committee meeting where Grievant's pre-tenure package was reviewed. There was no discussion regarding the timing of Grievant's tenure application, and Dean Zatar did not personally review Grievant's written submission, leaving that part of the process to the members of the Personnel Committee.

28. Pre-tenure packages may also be reviewed by the Department Chair and the College Dean, in addition to the Personnel Committee, as part of the pre-tenure review process. Dr. Salem did not take note of Grievant's statement indicating he was planning to apply for tenure in 2017.

29. At no time during Grievant's meeting with the Personnel Committee, or thereafter, did anyone question, challenge, or seek clarification of the tenure application date which Grievant had stated in his pre-tenure package.

30. Grievant did not submit a notice of intention to apply for tenure in the 2015-2016 academic year.

31. In or about October 2015, upon learning that Grievant had not submitted a timely application for tenure, Dean Zatar went to Grievant's Department Chair, Dr. Salem, and both of them went to Grievant's office to meet with Grievant personally,

indicating that they were shocked and surprised that Grievant had not submitted a tenure application.

32. Dean Zatar recalled that Grievant was likewise shocked by their arrival, indicating that Grievant thought he could apply for tenure during the 2016-2017 academic year. After further discussion of the pertinent policies, and Grievant's original letter of appointment, Dean Zatar recalled Grievant acknowledging that his understanding was mistaken.

33. Marshall University Policy AA-28, Faculty Tenure, (2006), provides: "Unless demonstrated extraordinary circumstances prevent an application during the sixth year of a faculty appointment, the person who chooses not to apply for tenure and (*sic.*) will be offered a one-year terminal contract of employment." G Ex 1 at L I at § 3.2.3.

34. Marshall University Policy AA-28, Faculty Tenure (2014) contains an almost identical provision: "Unless demonstrated extraordinary circumstances prevent an application during the sixth year of a faculty appointment, the person who chooses not to apply will not be considered for tenure and will be offered a succeeding one-year terminal contract of appointment." G Ex 2 at L I at § 4.2.5.

35. Marshall's policies on tenure and promotion are required to be consistent with the policies of the West Virginia Higher Education Policy Commission. See 133 C.S.R. 9 §1.1 (2007).

36. In view of Grievant's explicit declaration that he intended to apply for tenure during the 2016-2017 school year, and Grievant's explanation to Dr. Zatar, in the

presence of Dr. Salem, that he was intending to apply for tenure in the following academic year, because he did not have a terminal degree, and thought the policy allowed him to do this, Dr. Ormiston's testimony that Grievant's only response, when confronted by his failure to timely file for tenure during the 2015-2016 school year, was that Grievant had "forgotten" to apply for tenure, is not credible. Further, the credible testimony of Dr. Salem and Dr. Zatar that tenure is the most important event in an academician's career and, Grievant otherwise appeared on track to effectively compete for tenure, makes any assertion that Grievant "simply forgot" to apply for tenure patently incredible. Provost Ormiston's assertion is likewise inconsistent with Grievant's credible testimony at Level Three.

37. On April 22, 2016, Provost Ormiston issued notice to Grievant stating that he would be offered a terminal one-year employment contract, based upon his failure to timely apply for tenure in the 2015-2016 academic year. See R Ex 2 at L I.

38. At the time Provost Ormiston issued his decision in April 2016 that Grievant should receive a one-year terminal contract for the 2016-2017 academic year, Provost Ormiston was not aware that Grievant had submitted a pre-tenure review package during the 2013-14 academic year in which he stated that he intended to apply for tenure in 2017.

39. Dr. Eldon Larsen served as Chair of Marshall's Faculty Senate at the time Marshall University Policies AA-26 and AA-28 were revised.

40. Dr. Larsen was Chair of the Personnel Committee that reviewed Grievant's pre-tenure review portfolio during the 2013-2014 academic year. Dr. Larsen

failed to note that Grievant was intending to apply for tenure in 2017 and, consequently, did not contemporaneously discuss this with Grievant, or bring this to the attention of Grievant's Department Chair, College Dean or University Provost.

41. Grievant understood that the date he was ordinarily expected to apply for tenure was the date set forth in his original letter of appointment. However, Grievant reasonably believed that the promotion and tenure policy adopted by the Marshall University Board of Governors in 2014 superseded the terms of his appointment letter.

Discussion

Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). "The 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). Where the evidence equally supports both sides, Grievant has not met his burden. *Id.*

It is well recognized that promotions are not a statutory right nor a reward for a higher education faculty member's years of service. *Hart v. Bd. of Directors*, Docket No. 95-BOD-198 (Mar. 6, 1996); *Baker v. Bd. of Trustees*, Docket No. 97-BOT-359 (Apr. 30, 1998). Nonetheless, "[p]romotion and tenure are paramount professional and economic goals of a teacher. Grievant has a valuable property interest in this expectation of

tenure.” *State ex rel. McLendon v. Morton*, 162 W. Va. 431, 249 S.E.2d 919 (1978).”
Finver v. Bd. of Trustees, Docket No. 97-BOT-271 (Oct. 15, 1997).

This grievance does not involve an issue relating to whether Grievant has earned tenure based on his performance and accomplishments, a subjective determination in academia which this Grievance Board is reluctant to second guess, unless the school’s actions are patently arbitrary and capricious. See *Scarpaci v. West Liberty Univ.*, Docket No. 2013-2229-CONS (Dec. 23, 2013). See generally, *Siu v. Johnson*, 748 F.2d 238 (4th Cir. 1984). Instead, this grievance involves an interpretation of Grievant’s contract with Marshall, as reflected in his letter of appointment, and Marshall’s written policies pertaining to attaining promotion and tenure. Grievant is asserting that he reasonably concluded that a change in Marshall’s tenure and promotion policy had superseded his letter of appointment, either requiring that he wait an additional year before applying for tenure and promotion at the same time, or giving him that option, based upon the timing of his hiring. Marshall simply asserts that his application was untimely, and it therefore had no choice except to issue Grievant a terminal contract for the 2016-2017 school year.

Generally, an administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977). In this particular situation, Grievant’s mistaken belief that he was required to apply for promotion and tenure at the same time constituted an honest and objectively reasonable interpretation of an ambiguity created in Marshall’s tenure and promotion policy which was revised and reissued after Grievant was hired and

accepted his letter of appointment. In these circumstances, the “escape clause” in Marshall’s tenure policy permitting a faculty member to receive an additional year of contracted service before applying for tenure, based upon “demonstrated extraordinary circumstances,” does not apply, because Grievant did make a decision not to apply for tenure within the meaning of that provision. Instead, Grievant attempted to make an election to apply for tenure and promotion concurrently, one year later than the deadline set forth in his letter of appointment, an option which Marshall’s revised policies appeared to sanction. Further, despite Marshall’s protestations, the University’s policies are silent as to any particular procedure a probationary faculty member is required to follow, when making an election to apply for tenure and promotion under the 2014 revised policies, rather than under the timeline contained in his letter of appointment, nor is there any explicit language stating that the revised 2014 policy is not permitted to supersede the terms contained in a letter of appointment.

In the context of an employment relationship, a revised term of employment may be implied from an employer’s policies if there is clear and convincing evidence to establish the employer’s actions. See Syl. Pt. 3, *Adkins v. Inco Alloys Int’l, Inc.*, 187 W. Va. 219, 417 S.E.2d 910 (1992). Grievant here has clearly established facts and circumstances which merit application of the doctrine of equitable estoppel. More specifically, the language contained in Marshall’s revised tenure and promotion policies provided a proper basis for Grievant to conclude that he could properly apply for promotion and tenure concurrently, based upon his election to have his tenure and promotion status governed by the revised 2014 policies, rather than the 2006 policies in

effect at the time of his appointment, and Grievant made a good faith effort to place Marshall on notice of this election in the pre-tenure review portfolio which he timely submitted to the appropriate Personnel Committee, to be further reviewed by his Department Chair and Dean.

Grievant may have been an experienced and accomplished engineer, but he was a novice as a faculty member. Further, the testimony of Professor Larsen, a long-time member of Marshall's Faculty Senate who served as President of the Faculty Senate at the time these revised promotion and tenure policies were adopted, supported Grievant's interpretation of these policies as a reasonable response, given the recognized need to clarify the language upon which Grievant relied to his detriment. In addition, Marshall's failure to disseminate the timeline chart developed by Academic Affairs to clarify which faculty members were eligible to elect to follow the 2014 policy instead of the 2006 policy, to all faculty, including Grievant, further contributed to Grievant's mistaken determination that he could make a timely tenure application during the 2016-2017 academic year. Therefore, this grievance must be granted because Grievant demonstrated that Marshall is equitably estopped from penalizing him for this mistake. *See Adkins, supra.*

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Because this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3

(2008); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). "The 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). Where the evidence equally supports both sides, Grievant has not met his burden. *Id.*

2. Promotion and tenure are paramount professional and economic goals of a teacher. Grievant has a valuable property interest in this expectation of tenure. *State ex rel. McLendon v. Morton*, 162 W. Va. 431, 249 S.E.2d 919 (1978); *Finver v. Bd. of Trustees*, Docket No. 97-BOT-271 (Oct. 15, 1997).

3. An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977).

4. "Where an employee seeks to establish a . . . substantial employment right, either through an express promise by the employer or by implication from the employer's personnel manual, policies, or custom and practice, such claim must be established by clear and convincing evidence." Syl. Pt. 3, *Adkins v. Inco Alloys Int'l, Inc.*, 187 W. Va. 219, 417 S.E.2d 910 (1992).

5. Grievant established by clear and convincing evidence that his failure to apply for tenure during the 2015-2016 academic year resulted from his honest and reasonable, albeit mistaken, interpretation of a substantive change in Marshall University's written promotion and tenure policies, and not from either forgetting that

2015-2016 was the year in which he was required to apply for tenure under the terms of his letter of appointment, and the policies on tenure and promotion in place at the time he was hired, nor from any affirmative decision not to apply for tenure at Marshall. In these particular facts and circumstances, Marshall is equitably estopped from denying Grievant the opportunity to apply for tenure.

6. The proper remedy where a probationary faculty member has been wrongly denied the opportunity to compete for tenure is to award an additional non-terminal year of employment, during which the faculty member may be afforded proper evaluation and an opportunity to apply for promotion. See *State ex rel. Norton v. Stone*, 173 W. Va. 179, 313 S.E. 2d 456 (1984); *Finver, supra*.

Accordingly, this grievance is **GRANTED**. Respondent Marshall University is hereby **ORDERED** to award Grievant an additional non-terminal year of employment and submit his application for tenure and/or promotion in compliance with the provisions of Marshall University's established policies on faculty tenure and promotion.

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 appealing party must also provide the Board with the civil action number so that the certified record can be

prepared and properly transmitted to the Circuit Court of Kanawha County. See also 156 C.S.R. 1 § 6.20 (2008).

DATE: February 10, 2017

LEWIS G. BREWER
Administrative Law Judge