

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOHN FRANK RAKUS,
Grievant,

v.

Docket No. 2019-1637-MU

MARSHALL UNIVERSITY,
Respondent.

DECISION

Grievant, John Rakus, was employed by Respondent, Marshall University ("MU"), in the position of Assistant Professor. By form dated May 20, 2019, Dr. Rakus filed a level one grievance alleging the following:

I was denied promotion and tenure. This applies to Title 133 Procedural Rule West Virginia Higher Education Policy Commission Series 9 Academic Freedom, Professional Responsibility, Promotion and Tenure. In addition, Marshall University BOG policies AA-28 apply.¹

As relief, Grievant seeks: "to have the decision to deny him tenure reversed and to be promoted to Associate Professor."

A level one hearing was conducted on June 12, 2019, and decision denying the grievance was issued on June 16, 2019. That decision was adopted by MU Senior Vice President, F. Layton Cottrill, Jr. on June 9, 2019. Grievant appealed to level two by form dated June 25, 2019. A mediation was conducted on August 26, 2019 and Grievant made a timely appeal to level three.

¹ Grievant attached a more detailed description of his grievance to the level one form. That statement is part of the record and incorporated herein by reference.

A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board over the course of two days: January 15, 2020; and March 10, 2020. Grievant personally appeared and was represented by Hoyt Glazer, Esquire. Respondent appeared in the person of Michael Castellani and was represented by Dawn George, Assistant Attorney General. This matter became mature for decision on April 10, 2020, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant's application for tenure was denied because he had not published a paper resulting from his research in a peer-reviewed journal prior to his application for tenure. Grievant points out that he presented at national meetings and was successful in receiving significant grants to support his research. He argues that it is arbitrary and capricious to deny him tenure based upon one criterion, especially since he had submitted a paper to a journal that had not yet been accepted for publication.

Respondent demonstrated that the criteria used for granting tenure had been consistently applied by the department for decades and were academically sound. Respondent gave Grievant notice and reminders of the criteria during his probationary period. Grievant did not prove that the decision to deny him tenure was arbitrary and capricious.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Dr. John Rakus, is employed by Respondent, Marshall University, as an assistant professor of Biochemistry in MU's Chemistry Department.

2. Prior to employment at MU, Grievant obtained his B.S. in Chemistry and Molecular Biology in 2004 from the University of Richmond, and his Ph.D. in 2009 from the University of Illinois at Urbana-Champaign. He performed three years of post-doctoral work at New York University.

3. The Dean of the MU College of Science, Charles C. Somerville, provided Grievant with an appointment letter dated December 5, 2012, which serves as a contract of employment. Grievant was employed in a probationary (tenure-track) position as an assistant professor in the Department of Chemistry beginning in the 2013-2014 academic year. The appointment letter listed Grievant's salary, his general duties, prior experience credit and the dates for his pre-tenure review and tenure application. Grievant signed and accepted the appointment letter on December 14, 2012.² (Joint Exhibit 8)

4. An "Addendum to contract of John F. Rakus" was attached to the appointment letter and was also signed by Grievant on December 14, 2012. This addendum provided specific details concerning Grievant's duties and obligations as a probationary faculty member as well as resources which were to be provided by MU to facilitate his work including the following:

You will be assigned a reduced teaching load during your probationary years of appointment. Continued provision of a reduced instructional load is contingent upon satisfactory progress toward promotion and tenure. This will include development of an independent research program of high

² The appointment letter was signed as approved by Gayle L. Ormiston, MU Senior Vice President for Academic Affairs and Provost, on December 17, 2012.

quality as demonstrated by regular publication in peer-reviewed journals application for external support and other measures of excellence in scholarship as outlined below.

In exchange for reduced teaching, criteria for your promotion and tenure will be modified to place emphasis on your research productivity. To help you establish a productive research laboratory, the University will provide \$100,000 in startup funds. . . This can be used to purchase equipment and supplies, travel to professional meetings, to support undergraduate students, and other research related expenditures approved by your Chair and Dean. *Id.*

5. The addendum also stated that “research must be an area of exemplary performance for promotion to both associate in full professor when a faculty member is given a reduced instructional load, and resources, to facilitate development of a sustained program of independent research.” Credible evidence of performance in several of the following categories may establish exemplary performance:

- Publication in peer-reviewed journals of quality and visibility;
- Regular application for external research support; peer-reviewed and/or invited presentations at national meetings;
- Achievement of national or international stature in your field of research such as editorship;
- Chairing proposal review panels;
- Election as an officer in major national or international professional societies;
- Offers to write critical reviews of major scientific advances. *Id.*

6. In addition to exemplary performance in the area of research, the addendum required Grievant to demonstrate professional performance in the areas of teaching and service to the University and community. *Id.*

7. As required by the Pre-Tenure Review Policy set out in the MU Faculty Handbook,³ the appointment letter established the 2015-2016 academic year as the time for Grievant's pre-tenure review. The 2018-2019 academic year was set as the time Grievant was to submit his tenure application.

8. MU Board of Governors ("BOG") Policy No. AA-28 governs the process for granting faculty tenure. The policy requires that to be granted tenure the faculty member must demonstrate professional performance and achievement in his or her major areas of responsibility and demonstrate exemplary performance in either teaching and advising or in scholarly and creative activity. Pursuant to the appointment letter Grievant was required to demonstrate exemplary performance in scholarly research. Joint Exhibit 4.

9. Each College in the University has discretion to procedures and performance criteria for receiving tenure. MUBOG Policy No. AA-28. The Chemistry Department in the College of Science has required for decades that a faculty member must have published at least one paper in a peer-reviewed journal to qualify for tenure. Grievant was aware of this requirement when he accepted his position and throughout his probationary period.⁴

10. All tenured members of the Chemistry Department faculty had published a paper prior to being granted tenure except one. The faculty member who had not written a paper had obtained a patent through his research at MU which was considered the equivalent of a published paper or better.

³ Joint Exhibit 3.

⁴ Testimony of nearly all witnesses including Grievant.

11. Grievant received an evaluation of his performance and progress each year from the Chair of the Department of Chemistry, Michael Castellani. The summary of the first year noted that Grievant had made a “good to excellent start” in the three areas for which he would be evaluated for tenure; Teaching, Service, and Research. A suggestion was made to help improve Grievant’s teaching and for research it was suggested that “a summary of projects or accomplishments would be helpful in demonstrating research progress prior to publication.”⁵

12. In the second-year evaluation it was again expressed that Grievant has made a good to excellent start both in terms of quantity of activities and in their quality. Regarding research, Grievant was cautioned that “While it is early to expect publication to originate from your laboratory, you want to be sure to consider your research through that lens.” (Joint Exhibit 1 p. 126)

13. Grievant received a mid-tenure review from Dr. Castellani in February 2016. Among other things it was noted that Grievant had been invited to participate in a proposed redesign of the undergrad biochemistry laboratory curriculum by two well-known biochemists at the Universities of Richmond and San Diego. Grievant had also submitted four proposals for funding totaling at least \$30,000. None of the proposals were funded and it was suggested that Grievant address the comments and suggestions in future applications. *Id.* p. 128.

14. The mid-tenure evaluation summary addressed the three areas for which Grievant was accountable. For teaching it was noted that Grievant was “becoming an effective teacher and his students clearly think highly of him.” It was noted that Grievant

⁵ Joint Exhibit 1, Grievant’s application for tenure.

was performing above expectations in service by participating in important activities which require a significant expenditure of time and effort. Since this was not the main area of focus, Grievant was cautioned to “resist additional service work.” *Id.* p. 129

15. There was no information regarding research progress included in the mid-tenure package submitted by Grievant. Dr. Castellani noted that Grievant invested a great deal of time into proposal writing and he had attended professional conferences to stay current in his field. But he cautioned that: What is needed at that point was “tangible evidence of progress toward at least a couple of principal authorship publications.” *Id.* p. 128.

16. The Department of Chemistry Promotion and Tenure (“P&T”) Committee also performed a mid-tenure review. The chair of the committee, Michael Norton informed Dr. Castellani of the P&T Committee’s findings in a memorandum dated February 8, 2016. The committee agreed that Grievant was strong in the areas of teaching and service but had some concerns regarding research. The committee noted that Grievant had successfully competed for a NASA starter grant. The committee expressed significant concern regarding Grievant’s progress toward publication of a journal article. The committee suggested that Grievant would “benefit from constructing a publication timeline, with targeted journals and titles in order to assure productivity” so he could remain on track to receive tenure. The committee also stated that “greater emphasis on research productivity, even if this requires some retraction in Teaching and Service activities, is clearly called for.” *Id.* p. 133.

17. By letter dated May 11, 2016, Dean of the College of Science, Sommerville provided Grievant with a review and comments concerning his mid-tenure review

material. Dr. Sommerville found Grievant's progress in the areas of Teaching and Service to meet or exceed expectations. In the area of Research Dr. Sommerville wrote:

Both the departmental committee and the Chair provided supportive evaluations of your progress in this area, though both evaluations note that Scholarly and Creative Activities must be an area of exemplary performance for successful tenure and promotion application, and that exemplary performance is not been demonstrated to date. Although your efforts to garner external funding have been extensive, and you have had some success, my advice would be to focus your efforts on the preparation and submission of manuscripts to peer-reviewed journals. **Peer-reviewed publications will be necessary for positive tenure and promotion recommendation** and will also be an important factor in securing funding from federal agencies. (Emphasis added).

18. In the summary for Grievant's fourth yearly evaluation, Dr. Castellani wrote:

You are meeting the department's expectations with respect to service. There are issues with teaching, but all are resolvable with what we believe will be relatively small amount of effort. While your research is clearly not made the desired level of progress, we believe it is still possible for you to generate the necessary results to achieve tenure.

19. In his fifth-year, Grievant was again told that he was meeting expectations in the areas of Service and Teaching. It was noted that Grievant's teaching had improved. In the area of Research, it was noted that Grievant had received two significant grants. One was a WV EPSCoR Research Initiative grant and the other was a national Track 4 EPSCoR Research Fellows award for over \$160,000. It was noted that the second grant was a "truly significant accomplishment."

20. However, Dr. Castellani expressed his concern with the lack of progress toward a published paper in a peer-reviewed journal. He wrote:

This is your area of exemplary performance and, despite your great success, continues to concern us because of the lack of

either. Reviewed research papers or submitted manuscripts. As we suggested last year, you have significantly pared down your group and that should help focus your research this summer as we discussed in the past, you must begin submitting manuscripts for publication soon to allow for correction so that the paper can at least be accepted prior to the committee meeting.⁶

21. Grievant was informed when he signed his appointment letter and during the evaluation process that publishing a paper in an appropriate journal was required for him to receive tenure in the Department of Chemistry.⁷

22. On January 7, 2019, Grievant submitted his application for tenure to the Department of Chemistry P&T Committee. In the same month, Grievant submitted a paper for publication to the Journal for Protein Research. The paper went through peer review and was returned to Grievant as “inadequate for publication.” Grievant resubmitted the article in May 2019. The journal editor said there were not enough conclusions and suggested that Grievant transfer his submission to the ECS Omega Journal for publication.

23. Grievant received an editorial response from that journal in December 2019. The editor asked Grievant to resubmit the article which he did in January 2020. At the date of the hearing, the paper had not been accepted for publication.

24. The Chemistry Department requires at least three artifacts to demonstrate exemplary performance on research: grants, invited talks at conferences including presentations of posters, and a published paper. Grievant had two artifacts but did not

⁶ *Id.* p. 141.

⁷ Grievant agrees that he knew about this requirement and was striving to meet it during his probationary period.

have a published paper when he submitted his tenure application. His hope was that the paper would be accepted for publication during the tenure consideration process.

25. After considerable discussion the P&T Committee took an anonymous vote on paper ballots regarding Grievant's tenure application. The committee voted to deny tenure with one exception. The sole reason for denying tenure to Grievant was that he had not demonstrated exemplary performance in research because he did not have a published paper in a peer-reviewed journal. The dissenting voter felt they should grant tenure conditioned upon the submitted paper being accepted for publication.

26. Department Chair Castellani agreed with the P&T Committee's conclusion and it was approved by the Dean of the College and the MU President. Grievant's contract of employment with MU terminates at the end of the 2019-2020 academic year.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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, the party bearing the burden has not met its burden. *Id.*

Grievant asserts that the decision to deny him tenure was arbitrary and capricious. He notes that it is undisputed that Grievant put significant effort into teaching and service as well as research. Grievant was successful in obtaining a significant grant and additional small ones. He argues that he has participated in conferences and collaborated

with national colleagues and should not be denied tenure solely upon not having an article published. He asserts that there is not a policy which specifically requires publication for tenure and not all departments have that requirement.

Respondent counters that Grievant agreed by accepting his appointment letter that he would be required to receive an exemplary performance rating in research to be granted tenure. The addendum to the appointment letter lists that a publication of an article in a valued journal is one of the examples of exemplary performance research. The letter states that evidence of performance in several of the categories is necessary for tenure. Respondent is not required to place equal weight on any of the categories and it is within the department's discretion to put more weight on the publication category than any of the others. Finally, Respondent notes that Grievant was informed when he was employed that publication was required for tenured and he was reminded and cautioned about that requirement in his annual evaluations and specifically by Dr. Sommerville in his mid-tenure review. Respondent argues that the decision to deny tenure was based upon reasonable, predetermined, valid criteria and was not arbitrary and capricious.

"In higher education, promotions are not a statutory right nor a reward for a faculty member's years of service." *Baker, supra; Hart v. Bd. of Directors*, Docket No. 95-BOD-198 (Mar.6, 1996). However, "[p]romotion and tenure are paramount professional and economic goals of a teacher." *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); *McCoy v. W. Va. State Univ.*, Docket No. 2017-2137-WVSU (Jan. 10, 2020).

The review of an institution of higher learning's promotion decision is "generally limited to an inquiry into whether the process by which such decisions are made conforms

to applicable college policy or was otherwise arbitrary and capricious.” *Harrison v. W. Va. Bd. of Directors*, Docket No. 93-BOD-400 (April 11, 1995). “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.” *Sui v. Johnson*, 784 F.2d 238 (4th Cir. 1984). The “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

Generally, an agency’s action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). 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)). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his or her judgment for that of [the employer].” *Blake v. Kanawha County Bd. of Educ.*, Docket No.

01-20-470 (Oct. 29, 2001); *Butler v. Dep't of Health & Human Res.*, Docket No. 2014-0539-DHHR (Mar. 16, 2015).

In this matter, the Department of Chemistry has determined that for a faculty member to demonstrate exemplary performance in the area of Research, they must have at least one paper published in a recognized peer-review journal prior to their application for tenure. Publication was viewed as important by Dr. Castellani because it creates a permanent record of the research and creates a base upon which further research can be conducted. Dr. Leslie Frost described it as a realization of potential. She noted that researchers have potential when they start their work, but that potential is not fully realized until their results are published. Grievant admits that this requirement was made clear to him and he agreed with his mid-tenure review conclusion that his progress toward that goal was lacking.

Publication is listed as an area for proving exemplary performance in research and there is nothing which prohibits the department from emphasizing that specific requirement. Especially since that standard has been applied to all tenure applicants for decades and Grievant was given repeated notice of the requirement. All of the reviewer agreed that Grievant is talented and hard-working, but they could not look past this long-standing requirement.

Grievant has failed to demonstrate Respondent relied upon criteria that was not intended to be considered, arrived at a decision in a manner contrary to the evidence, or reached a decision that was so implausible that it could not be ascribed to a difference of opinion. The decision to deny Grievant was not arbitrary and capricious. *See, Elfenbein*

v. Higher Education Interim Governing Board/WVU., Docket No. 00-HE-393 (Jan. 31, 2003).

Accordingly, the grievance is **DENIED**.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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, the party bearing the burden has not met its burden. *Id.*

2. "In higher education, promotions are not a statutory right nor a reward for a faculty member's years of service." *Baker, supra; Hart v. Bd. of Directors*, Docket No. 95-BOD-198 (Mar.6, 1996). However, "[p]romotion and tenure are paramount professional and economic goals of a teacher." *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); *McCoy v. W. Va. State Univ.*, Docket No. 2017-2137-WVSU (Jan. 10, 2020).

3. The review of an institution of higher learning's promotion decision is "generally limited to an inquiry into whether the process by which such decisions are made conforms to applicable college policy or was otherwise arbitrary and capricious." *Harrison v. W. Va. Bd. of Directors*, Docket No. 93-BOD-400 (April 11, 1995).

4. "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." *Sui v. Johnson*, 784 F.2d 238 (4th Cir. 1984).

5. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

6. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). 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)).

7. Grievant did not prove by a preponderance of the evidence that Respondent's decision to deny him tenure was arbitrary and capricious.

Accordingly, the grievance is **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 (2018).

DATE: June 10, 2020

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE