GLENN H. CARPENTER

v. Docket No. 93-BOT-220

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY

D E C I S I O N

Grievant Glenn H. Carpenter, at all times relevant to this grievance, had been employed by Respondent West Virginia Univer sity (WVU) as a probationary faculty member in its College of Agriculture and Forestry. He held the position of Extension Specialist and Assistant Professor from the time of his appoint ment in January 1986. After his denial for promotion and tenure in 1992, Grievant filed a level one grievance claiming, among other things, that WVU's decision was arbitrary and capricious. (See footnote 1)

Findings of Fact

1. Grievant earned his bachelors degree from Michigan State University in August 1974 with a major in Poultry Science. He completed a masters degree and a doctorate, a PhD, at that same institution in June 1980 and June 1983, respectively. From 1983 until December 1985, he held three positions, for about a year each, in state and federal government and higher education, focusing primarily on projects and research in poultry and egg production matters. Ex.26.

2. In January 1986, Grievant was employed by WVU as a tenure-track, probationary faculty member, specifically, as an Extension Specialist assigned to the College of Agriculture and Forestry's (AF College) Division of Animal and Veterinary Sciences (Division). Grievant's position had been fully funded by the WVU Cooperative Extension Service (Extension) during the course of his employment, and he worked for Extension on a full- time basis.

3. WVU's November 1985 offer letter to Grievant to serve as Extension Specialist and Assistant Professor with "100 percent extension duties" charged him with the mission and task of developing an outstanding poultry program and becoming the leading expert in West Virginia in poultry science public educa tion matters within three to five years. In addition, Grievant was required to reply and assent to the offer in signature form at the end of the second page of the letter. Ex.28.

4. Grievant's job description detailed his responsibili ties as an "Extension Specialist - Poultry." His positionreported directly to Edmund B. Collins, Extension's Division Leader of Agriculture, Forestry and Community Development. Basically, Grievant provided leadership to the educational

and organizational programs of West Virginia's poultry industry, coordinated educational programs for an annual poultry festival, assisted in planning state 4-H and Future Farmers of America youth programs for poultry, coordinated promotional activities for the State Fair, published quarterly poultry update newslet ters for commercial and small flock producers, served at various times as chairman for State and national level workshops and seminars and, most recently, served on the editorial review board of a national poultry research journal. Much of Grievant's work involved extensive travel throughout the State. However, his position had neither teaching nor research compo nents. Neither Extension nor the AF College allocated Grievant any funds or work time for formal research. In addition, Grievant had no curricular responsibilities within the AF College and Division, although he occasionally taught courses and presented lectures in classes in Division.

5. During at least the 1990-91 academic year and thereaf ter, Dr. Rachel Tompkins served in the administrative post of Associate Provost and Director of Extension. By letter dated June 10, 1991, she informed AF College's Dean, Robert Maxwell, that Extension "does not intend to support a tenure-track poultry position in the future. Conversations with the poultry industry convince us that those same resources spent in other ways can provide more assistance to the industry." Dr. Tompkinsnoted that although Extension would not support a tenure recom mendation for Grievant, the decision "was not to be interpreted as a reflection on [Grievant's] performance." She offered to collaborate with Dean Maxwell in finding Grievant an "alterna tive position." Ex.14.

6. In accordance with the regulations set forth in the University of West Virginia Board of Trustees' Policy Bulletin 36, Section 10 (PB 36), the 1991-92 academic year would be Grievant's critical year for tenure review. Grievant timely applied for tenure within AF College and promotion to Associate Professor.

7. WVU's "Policy and Procedures for Faculty Evaluations 1991-92" (PPFE) require that the granting of tenure be based on demonstrated excellence in at least two of the three areas of teaching, research and service. Ex.24. It further states, "the term 'excellence' in this context means performance which meets or exceeds that of peers recently achieving similar promotion and/or tenure who are respected for their contributions in research and instruction at [WVU] and peer research universi ties."

8. Basically, when formally applying for tenure, the candidate prepares, gathers and submits a "Faculty Productivity Report" and support documentation as proof of excellence in the targeted areas.

Notably, PPFE advises that such supporting documentation for teaching performance might include evidence drawn from such sources as the collective judgment of students, of student advisors, and of colleagues who have visited the faculty mem ber's classroom. . .[and/or] analyses of coursecontent, evaluation of products such as textbooks or videotapes, studies of success rates of students taught, or other evidence deemed appropriate and proper by the department and college.

Eventually, all of the submitted data is reviewed and evaluated by various persons and/or committees at the departmen tal/division and college/school levels who, in turn, make written recommendations. Next, WVU's Provost/Vice President for Academic Affairs and Research consults with WVU's Promotion and Tenure Advisory Panel (P&TA Panel). At that level the various data and collected recommendations are assessed in order to ascertain that review procedures have been followed and to determine whether all of the recommendations are supported by objective evidence, consistent with WVU's policies and objec tives and in conformance with the appropriate criteria for promotion and tenure. The P&TA Panel then prepares a written statement with respect to these issues. Finally, the Provost, as WVU's President's designee, is authorized to render the final decision whether to grant or deny promotion and/or tenure.

9. Five "external" faculty members at higher education institutions in other states reviewed Grievant's credentials and submitted their opinions to Dean Maxwell in December 1991. Three persons rendered unequivocally positive recommendations for tenure; one of these noted that the increasing difficulty for extension personnel to obtain tenure was "unfortunate" in light of the current great need for their services. Of the two remaining evaluators, one opined that Grievant's situation as the sole poultry specialist in the State made it especially difficult, if not impossible, to meet all of the needs of theposition, but that, since one must be measured in terms of productivity, Grievant's "program" was "marginal" for tenure considerations compared with other programs at that stage of development. The other evaluator basically commended much of Grievant's work. However, he expressed the belief that, while the level of Grievant's accomplishments would receive positive evaluation for tenure within WVU's "Extension system at an area poultry responsibility level," that level might not support a positive tenure recommendation within the "Poultry Science Department" of another college. Ex.21.

10. On January 22, 1992, the Division's five-member Departmental Committee (DDC) submitted a lengthy, four-page memorandum in which it rated Grievant excellent in all three areas of

consideration and strongly recommended tenure, effec tive July 1, 1992. The DDC's Chair was Dr. Donald J. Horvath, Professor Emeritus. Ex.20; T.315.

11. The Division Director (or Chairman), Dr. Paul Lewis, concurred with the DDC on February 6, 1992. Dr. Lewis noted and praised Grievant's Extension contributions and teaching work and additionally lauded Grievant for his "grantsmanship." According to Dr. Lewis, Grievant's "creative ideas" and other contribu tions helped to secure various awards of research monies for poultry science projects. Dr. Lewis also stated that Grievant was an "effective participant" in Division's graduate program and noted that he served on several student committees. In the last paragraph of his three-page letter, Dr. Lewis stated that he "must question the facts used" by Dr. Tompkins to concludethat Grievant could not "address the complex future needs of a growing poultry industry as justification for [Grievant's] termination." He concluded with the belief that tenure deci sions for extension specialists were properly the AF College's responsibility, not Extension's. Ex.18.

12. On February 19, 1992, AF College's six member Promo tion and Tenure Committee (AFP&T Committee) rated Grievant's service and teaching excellent and his research satisfactory; it recommended that promotion and tenure be granted. Dr. Edward C. Prigge, a professor in Division, was a member of the AFP&T Committee. Ex.16; T.337.

13. In a February 24, 1992 memorandum, Dr. Collins out lined what he believed to be five positive elements of Grievant's performance with respect to Extension. He stated in the letter that, in consideration of those factors, Grievant met the minimal requirements for promotion and tenure considera tions. Ex.15.

14. By letter dated March 9, 1992, Dr. Tompkins submitted her recommendations to Dean Maxwell. Initially, she referred to an attached copy of her June 10, 1991 letter and reiterated that she would not continue to fund the poultry specialist position past June 30, 1993, the end of the next academic year. She also told Dean Maxwell that if he recommended Grievant for tenure, in light of the loss of Extension funding, it would amount to a declaration that he intended to fund the position from his own budget, not Extension's. Her further discussion was in marked contrast to her June 1991 letter, which voiced no concerns atall about Grievant's performance. She stated in the current letter, among other things, that Grievant's performance was "adequate in teaching, research and service," but did not meet the "standards of excellence" set forth in the 1985 offer letter when he was hired, i.e., that he become West Virginia's "leading expert in poultry science public education

matters." She said Grievant's record was not "distinguished by excellence in any particular area," and that she would not recommend him for tenure, even if she retained the poultry specialist position. Ex.14.

15. Notwithstanding Dr. Tompkins' pronouncements, Dean Maxwell highly recommended Grievant's promotion and tenure. He informed Grievant of this in a March 13, 1992 letter in which he also stated that he did not support Dr. Tompkins' withdrawal of funding for the poultry specialist position, but that that matter was a separate issue from the promotion and tenure issue, one that "requires resolution in the President's Office as to its propriety and legality." Ex.12. By memorandum dated the same day, Dean Maxwell advised WVU's then-Interim Provost and Vice President for Academic Affairs and Research, Dr. William Vehse (the Provost or Dr. Vehse), that he supported Grievant's request for promotion and tenure. He stated that Dr. Tompkins' "threat" of withdrawal of funding for Grievant's position was "arbitrary and capricious behavior on the part of WVU, in view of the letter of offer" given to Grievant in 1985. He argued that Grievant had "earned" tenure. Finally, he offered to discuss his recommendations "in more detail," at the Provost'sconvenience. Ex.13.

16. WVU's P&TA Panel reported in its May 4, 1992 memoran dum that it had completed its review of Grievant's materials forwarded by the AF College. The memorandum noted that, while reviewers within the AF College had all recommended Grievant for promotion and tenure, not all of the reviewers reported a finding that Grievant had demonstrated excellence in research. Ex.11.

17. By letter dated May 15, 1992, Dr. Vehse notified Grievant that, based upon his review of all relevant data, promotion and tenure would not be granted and that, instead, a terminal contract for the 1992-93 academic year would be issued. Dr. Vehse thereafter set forth a lengthy (twelve pages) and de tailed rationale for his decision to deny tenure, primarily on the basis that "insufficient evidence" existed for which to conclude that Grievant met required standards of excellence. Dr. Vehse summarized that, in essence, current institutional programmatic needs and circumstances alone supported denial of tenure. Ex.9.

18. By letter dated June 8, 1992, Grievant filed a formal eleven-page "rebuttal" to the pronouncements contained in Dr. Vehse's letter. In a covering letter, Grievant basically maintained that he had met all of the requirements in his 1985 offer letter and more, that all pertinent reviewers except Dr. Tompkins had submitted positive recommendations in support of promotion and tenure, and that the decision not to grant promo tion and tenure appeared to be exclusively based upon

Dr.Tompkins' "unfair, untruthful, tremendously self-serving" negative opinions and comments.

19. Notwithstanding the fact that Grievant's position did not include ongoing teaching responsibilities within AF College or Division and despite the **documented** opinions of Division faculty members who attended Grievant's classes and presenta tions and praised Grievant's teaching abilities, the Provost concluded there was **no** evidence of teaching excellence, simply because the Provost did not find student or other individualized evaluations of Grievant's teaching in his file, even though PPFE did not **require** student evaluations as proof of excellence. (See footnote 2) In the same vein, irrespective of the fact that Grievant's position had neither time nor funds allocated for formal research purpos es, and despite praise from other reviewers with respect to Grievant's research abilities, the Provost found that Grievant's supporting role in three research projects which led to jointly written, refereed articles as lacking of excellence.

20. Respected and high-ranking Extension, AF College and Division personnel who recommended Grievant for promotion and tenure clarified and justified their opinions via testimony and other means. For example, Dr. Horvath testified extensivelyabout criteria and evidence at his disposal to assess Grievant's abilities, especially in teaching given Grievant's unique and "non-traditional" position, to support his favorable recom mendations. T.314-336. He also submitted a written statement to the effect that in his long career at WVU, he had recommended for and against promotion and tenure many times, but had never "rubber-stamped" anyone's application. Ex.31. Dr. Prigge, who served as a P&T reviewer in the past on at least five other occasions, explained that his use of the word "satisfactory" to describe Grievant's research abilities meant that Grievant's work was in the excellent range, above average with respect to the work of others, and definitely within expectations for promotion and tenure considerations. T.336-346.

21. Neither the AF College nor Extension would commit to fund Grievant's position as poultry extension specialist, in whole or part, beyond the 1992-93 academic year; therefore, Grievant's position was effectively terminated. Moreover, Extension's programmatic needs and circumstances had altered with respect the poultry industry.

Grievant argues that WVU failed to identify a proper peer group for which to measure and evaluate his performance in his unique position. He also charges that the Provost's review of his application for promotion and tenure was unduly based upon assumptions so as to deny him a meaningful and fair evaluation, and was arbitrary and capricious.

WVU's thrust in this case is that Grievant failed to produce sufficient documentation in his application file fromwhich a determination could be made that he had attained excel lence in the areas of teaching and research. WVU also alleges that Division and AF College reviewers who recommended promotion and tenure had no evidence upon which to rate Grievant's perfor mance as excellent, especially in the teaching area, and accuses those reviewers of arbitrary and capricious behavior.

Based on all matters of record, it is determined that this grievance must be granted in part and denied in part. Essen tially, Grievant has established that the various and overwhelm ing recommendations that he be awarded the rank of Associate Professor, effective July 1, 1992, were based on sufficient documentation and appropriate evidence of excellence in at least teaching and service and satisfactory (above-average to excel lent) performance in research. However, Grievant has not established that the denial of tenure was arbitrary and capri cious or unreasonable, under the circumstances. WVU established that, due to budgetary considerations and current programmatic needs and circumstances, the denial of tenure was justified.

Conclusions of Law

1. Regulations promulgated by WVU's governing board, the University of West Virginia Board of Trustees, require that WVU establish guidelines and criteria for promotion in rank and for the award of tenure.

2. The promotion and tenure review process in this case was governed by WVU's "Policies and Procedures for Faculty Evaluations 1991-92." Requests for promotion and/or tenure were to be evaluated on the basis of demonstrated evidence of excellence in teaching, research and service, or excellence in two of these three areas. Consideration was also to be given to budgetary matters and program needs and circumstances.

3. "The decisional subjective process by which promotion and tenure are awarded or denied is best left to the profession al 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); Kauffman v. Shepherd College, Docket No. BOR1-86- 216-2 (Nov. 5, 1986)." Cohen v. West Virginia University, Docket No. BOR1-86-247-2 (July 7, 1987).

4. The various recommendations that Grievant be awarded the rank of Associate Professor, effective July 1, 1992, are supported by evidence of excellent performance in at least two targeted

areas, teaching and service, and evidence of satisfac tory performance in the area of research; therefore, denial of promotion at the Provost's level was arbitrary and capricious and an abuse of discretion on WVU's part. See Webb v. Shepherd College, Docket No. 87-207-2 (Sept. 30, 1988).

5. "Under the provisions of W.Va. Code §18-29-6(b) this Grievance Board is authorized to 'provide such relief as is deemed fair and equitable....' Standifur/Weese v. University of W.Va. Bd. of Trustees, Docket No. 92-BOT-017 (Oct. 30, 1992); Rexroat v. Boone Co. Bd. of Educ., Docket No. 91-03-233 (June 15, 1992)." Meredith v. Monongalia County Bd. of Educ., Docket No. 93-30-264 (Dec. 28, 1993).

6. Grievant is entitled to the retroactive award ofpromotion to the rank of Associate Professor and all benefits thereto, effective July 1, 1992, for the 1992-93 academic year.

7. WVU established that, due to budgetary considerations and what were deemed to be prevailing programmatic needs and circumstances, the denial of tenure to Grievant was justified. See Kauffman, supra.

Based on the foregoing, this grievance is **GRANTED** in part, to the extent that Grievant is due relief on the promotion issue, and **DENIED** in part, to the extent that the denial of tenure by WVU is upheld. Accordingly, WVU is **Ordered** to pay Grievant the difference between his salary as Assistant Profes sor and that which it would have been upon promotion to Associ ate Professor, effective July 1, 1992, and to confer upon Grievant all of the benefits of said rank, including the altera tion and correction of all references to his rank as found in any and all personnel files for the 1992-93 academic year, his terminal year of employment at WVU.

Any 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. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

Administrative Law Judge

Date: March 18, 1994

Footnote: 1 While the record indicates that the grievance was initiated in Spring 1992, the three- day level two hearing was held January 6, February 25, and March 11, 1993. An adverse decision was issued at that level on May 18, 1993. Grievant then submitted his appeal to level four for a decision based upon the extensive evidence adduced at level two. Briefs were received on July 19 and August 9, 1993. Thereafter, the case was transferred to the undersigned for administrative reasons. Both parties filed rebuttals in late August 1993.

Footnote: 2 Grievant's explanation as to why his file did not contain or even need individual "evaluations" of his various Extension seminars and workshops is reasonable and convincing. For example, he asserted that working farmers and other seminar participants would not bother to fill out evaluations at the end of the presentations; rather, these folks simply would not return for other events if they felt Grievant's programs were not useful. According to Grievant, his success in these ongoing teaching endeavors must be measured in terms of the continuing and increasing volume of new and returning participants.