SHELDON FINVER, PH.D.,

Grievant,

v.

DOCKET NO. 97-BOT-271

WEST VIRGINIA BOARD OF TRUSTEES/

MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Dr. Sheldon Finver, an Assistant Professor at Marshall University ("Marshall"), filed this grievance on or about May 5, 1997:

> Grievant has been wrongfully denied promotion and tenure in that his application was processed in a manner contrary to law and the lawfully adopted rule, regulation and written policy of the Marshall University School of Medicine. As a result, the denial of his application was arbitrary and capricious. Grievant seeks relief in the form of an additional terminal year of employment and the opportunity to submit his application for promotion and tenure for processing in a lawful manner.

The grievance was denied at level one, and a level two hearing was held on May 22, 1997. Following a decision by Linda P. Rowe, Director of Judicial Programs, denying the grievance on May 27, 1997, Grievant by-passed level three and appealed to level four June 5, 1997. The parties agreed to submit the grievance on the record developed at the level two hearing, and this case became mature for decision on August 15, 1997, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

Faculty Activities Plan and Report 1992-93.

Ex. 2 -

Faculty Activities Plan and Report 1993-94.

Ex. 3 -

Faculty Activities Plan and Report 1995-96.

Ex. 4 -

Faculty Promotion and Tenure Regulations, Timetable Provisions

Ex. 5 -

Recommendation for Promotion and Tenure, dated Nov. 5, 1996.

Ex. 6 -

Letter dated April 17, 1997, from Terry W. Fenger, Ph.D. to Grievant.

Ex. 7 -

Letter dated November 1, 1996, from Terry W. Fenger, Ph.D. to Charles R. McKown, M.D.

Ex. 8 -

Letter dated May 5, 1997, from Terry W. Fenger, Ph.D. to Jane Moran, Esq.

Marshall's Exhibits

Ex. 1 -

Policy for Evaluation of Faculty Activities

Ex. 2 -

Letter dated October 26, 1996, from Grievant to Dr. T. Fenger, Chairman.

Ex. 3 -

January 10, 1997 MUSOM Personnel Advisory Committee Meeting Minutes.

Ex. 4 -

Faculty Promotion and Tenure Regulations

Ex. 5 -

Memorandum dated March 7, 1997, from Carl A. Gruetter, Ph.D. to Grievant.

Testimony

Grievant testified in his own behalf, and presented the testimony of Dr. Terry Fenger. Marshall presented the testimony of Dr. Carl Gruetter.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant is an Assistant Professor in the Department of Microbiology at Marshall University School of Medicine.

2. Grievant was initially employed by Marshall in December 1991, under a special grant from the National Science Foundation which created the EPSCOR (Experimental Program to Stimulate Competitive Research) program. The original goals set by Marshall for Grievant anticipated a schedule which would allow him to focus onresearch, but the changing needs of his Department and the limitations on available research funds kept Grievant's job description in constant flux.

3. Marshall conducts yearly evaluations of faculty, and Grievant received evaluations for school years 1992-93, 1993-94, and 1995-96. G Exs. 1, 2, 3.

4. Grievant received an overall rating of excellent for the 1992-93 year; good for the 1993-94 year; and good for the 1995-96 year.

5. In the fall of 1996, Grievant met the minimal qualifications for promotion and tenure as set forth in the Marshall University Green Book and the Faculty Promotion and Tenure Regulations of the Marshall University School of Medicine. G. Ex. 4.

6. The Faculty Promotion and Tenure Regulations of the Marshall University School of Medicine were adopted by a sixty percent (60%) majority vote of the full-time faculty present at a regularly scheduled School of Medicine faculty meeting.

7. The Faculty Promotion and Tenure Regulations of Marshall's School of Medicine (G. Ex. 4) provide, in part:

November 1

> Departmental Chairperson must submit a recommendation for promotion/tenure, and all other required exhibits to the Dean on or before this date.

November 15

> The Dean will forward all documentation concerning candidates for promotion/tenure to the Chairperson of Personnel Advisory Committee on or before this date.

February 1

> Final recommendations of the Personnel Advisory Committee regarding promotion/tenure of all candidates will be forwarded to the Dean on or before this date.

February 15

> The Dean will have met with Departmental Chairpersons and indicated to them in writing the final decision concerning the promotion/tenure recommendation for each candidate within the Department on or before this date. Subsequently, theDean will present his/her final recommendation to the President and send an information copy to the Chairperson of the Personnel Advisory Committee.

8. Grievant prepared his application for promotion and tenure in October 1996. He submitted his application to Dr. Terry Fenger, Chairman, Microbiology, Immunology, and Molecular Genetics, on October 26, 1996. He requested that Dr. Fenger submit his letter of recommendation to Dean Charles McKown by November 1, 1996 (R. Ex. 2), in keeping with the School of Medicine's regulations. G. Ex. 4.

9. By letter dated November 1, 1997, Dr. Fenger recommended to Dean McKown that Grievant be awarded tenure and that he be promoted to the rank of Associate Professor. G. Ex. 7. Dr. Fenger also submitted a form recommendation for Grievant's promotion and award of tenure. G. Ex. 5. The recommendation provides an “overall evaluation based on departmental evaluations” reporting that Grievant's teaching and research were satisfactory, and his service to the community was good.

10. Dr. Fenger delivered Grievant's application packet to the office of Dean McKown on November 7, 1996, after receiving prior authorization from the Dean's office to delay submission from the time deadline date of November 1, 1996 to November 7, 1996. Tr., p. 57.

11. Grievant's complete application packet was delivered to Dr. Carl Gruetter, Chairperson of the Personnel Advisory Committee by Dean McKown on November 15, 1996, in compliance with the regulations. G. Ex. 5.

12. The Personnel Advisory Committee met, reviewed Grievant's application, and voted to deny him tenure and promotion, on January 10, 1997. R. Ex. 3. 13. The Personnel Advisory Committee delayed from January 10, 1997 until March 7, 1997, before giving notice of their decision to deny promotion and tenure to the Grievant. G. Ex. 5. The notice failed to comply with the regulation deadline of February 1, 1997 by 35 days.

14. Chairperson Gruetter was responsible for the delay because he was busy with other things at the time. Tr., p. 89.

15. The next level of evaluation, as set forth in the regulations, was to have occurred by February 15, and it required the Dean to meet with Chairperson Fenger and to indicate to the Chairperson ". . . the final decision concerning the promotion/tenure recommendation for each candidate within the Department." G. Ex. 4. The regulation provides that only after the required meeting between the Chair and the Dean and a notice in writing from the Dean to the Chair of the final decision, is the Dean authorized to send a final recommendation to the President for his approval. G. Ex. 4.

16. No contact between the Chairperson and the Dean regarding Grievant's application occurred between the denial notice of March 7, 1996, from the Personnel Advisory Committee, and the date on which a final denial of Grievant's application was issued from the President's office. G. Ex. 5.

17. Grievant received a registered letter on March 14, 1997, from the President advising him that his application for promotion and tenure had been denied. Tr., p. 49. The President's letter of denial was issued four (4) days after the Grievant, Chairperson Fenger, and Dean McKown received notice from the Personnel Advisory Committee that it recommended against awarding Grievant tenure and promotion. 18. Had he been allowed to consult with the Dean, per the regulations, Chairperson Fenger would have enthusiastically supported his original recommendation that Grievant

be awarded tenure and promotion. Tr., p. 23.

19. The intent behind the regulation requiring a meeting between the Dean and the Chairperson prior to the Dean's final recommendation to the President was ". . . so that the Chair has some additional input into the Dean's decision." Tr., p. 73.

DISCUSSION

Grievant alleges Marshall failed to adhere to its own regulations in processing his application for promotion and tenure, and therefore, the decision to deny his application was arbitrary and capricious. Marshall argues that although the Personnel Advisory Committee was late in making a final recommendation to the Dean, making it impossible for the required meeting between the Dean and the Chairperson to take place by the regulation's deadline, "it acted in a manner consistent with prior practice." Marshall Brief, at 2. Further, Marshall contends that Grievant did not meet the standards for tenure and promotion. Marshall contends that the "sole issue in this matter is whether the President's decision, to deny Dr. Finver's application for promotion and tenure, was arbitrary, capricious, or without factual basis." Marshall Brief, at 2. Marshall is wrong. The sole issue in this matter is whether Marshall violated its own regulations for processing Grievant's application for promotion and tenure. If it did, it is unnecessary to address whether Grievant met the standards for promotion and tenure.

Marshall blithely ignores its own regulations, and fails to explain the reason for the 3-month delay in processing Grievant's application, other than Dr. Gruetter's admission that he was busy and did not submit the application on time. Marshall merely argues that,because Grievant did not meet the standards for promotion and tenure, any procedural irregularity is harmless. I disagree. Dr. Gruetter testified that the intent behind the regulation requiring a meeting between the Dean and Chairperson prior to the Dean making a final recommendation to the President, is to allow the Chairperson additional input into the Dean's decision. In this case, Chairperson Fenger strongly supported Grievant's application and recommended he be awarded promotion and tenure. The Committee did not. Thus, any additional input Chairperson Fenger could make to the Dean could have resulted in a change in the Dean's final recommendation.

Marshall argues that the Dean has rarely, if ever, reversed the recommendation from the Personnel Advisory Committee. If that is the case, and the meeting between the Chairperson and the

Dean is a futile gesture, then Marshall should amend its regulations. As it stands, the meeting is required by the regulations, and the failure to conduct such a meeting, especially in this instance, cannot be found to be harmless error. Marshall also contends that the deadlines in the regulations are not meant to be “hard and fast”, and it acted in conformance with “past practice.” However, no evidence was presented to substantiate Marshall's argument that it routinely ignores the regulations.

CONCLUSIONS OF LAW

1. 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).

2. A teacher who has satisfied the objective eligibility standards for tenure that have been adopted by a State College has sufficient entitlement to prevent him from beingdenied promotion and tenure without procedural due process. Bd. of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); McLendon, supra at 438.

3. The Marshall University School of Medicine has adopted Faculty Promotion and Tenure Regulations, in accordance with the Tenure Policies of Marshall University as outlined in its Green Book.

4. The regulations provide that subsequent to the time the Dean of the School of Medicine receives the recommendation of the Personnel Advisory Committee regarding a candidate for promotion and tenure and prior to the time the Dean makes his recommendation to the President of the University, the Dean shall meet with the Chairperson of the candidate's department and indicate to the Chair, in writing, his final decision regarding the applicant. The rule further allows that the Dean's recommendation be sent to the President only after the meeting between the Dean and the Chairperson has occurred. G. Ex. 4.

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

6. Marshall failed to comply with the requirements of its own policy and procedure by omitting a step which, in the Grievant's case, might have been critical in the evaluation of his application for promotion and tenure.

7. “Upon finding by the Hearing Examiner . . . that probationary faculty member had been

denied tenure on basis of actions of President of employer institution which were arbitrary, capricious or unsupported by the evidence, proper remedy was award ofadditional non-terminal year of employment, during which faculty member was to be afforded proper evaluation." Norton v. Stone, Syl. Pt. 2, 313 S.E.2d 456 (W. Va. 1984).

Accordingly, this grievance is **GRANTED**, and Grievant is awarded an additional non-terminal year of employment and an opportunity to submit his application for promotion and tenure in compliance with the provisions of the Faculty Promotion and Tenure Regulations of the School of Medicine of Marshall University.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: October 15, 1997