DEBRA BAKER,

Grievant,

v. **Docket No. 97-BOT-359**

BOARD OF TRUSTEES/WEST VIRGINIA

UNIVERSITY-PARKERSBURG,

Respondent.

D E C I S I O N

Grievant, Debra Baker, grieves West Virginia University - Parkersburg's ("WVU-P") decision to deny her a promotion to Associate Professor. Relief requested was to be promoted to Associate Professor and to receive a salary at the mid-point in that salary range. (See footnote 1) This grievance was denied at Level II, and further participation by WVU-P was waived at Level III. Grievant appealed to Level IV, and a Level IV hearing was held on September 23, 1997. (See footnote 2) Grievant was pro se, and Respondents were represented by Ms.Mary Roberta Brandt. This case became mature for decision on October 7, 1997, the deadline for the parties' proposed findings of fact and conclusions of law.

Issues

Grievant raised multiple issues at Levels II and IV. (See footnote 3) Her major argument was that the decision to deny promotion was capricious. She also argued the criteria for tenure and promotion were the same, and if she received tenure she should have been promoted. Grievant alleged the recommendations from her Chair and Division were not considered. She also argued there was a conflict of interest on the part of the College-Wide Promotion Committee ("CWPC"), since there is only so much money allocated to faculty salaries, and the fewer people the CWPC promoted the more money there would be available for eachof the members to receive as a raise. She also alleged the CWPC was hostile to the Business Division because the faculty in her division make higher salaries than the rest of the faculty. Grievant also raised a number of alleged procedural violations: (See footnote 4) 1) she was

denied promotion on the basis of inadequate documentation, and this is not allowed by § IV-7D page 5 of the Answer Book; (See footnote 5) 2) the recommendation of the Dean for Academic Affairs, Dean Duttaahmed, was due March 15, 1997, and the notice she received was dated March 24, 1997; 3) Dean Duttaahmed did not make the requisite independent review of her materials but instead relied on the CWPC's decision; 4) President Miller did not review the recommendations of her Chair and Division; 5) the CWPC failed to date its recommendation for denial; and 6) WVU-P failed to give Grievant notice of her appeal rights. (See footnote 6) The undersigned Administrative Law Judge makes the following findings of fact based on the record in its entirety.

Findings of Fact

1. Grievant was initially employed as an adjunct faculty member at WVU-P in 1987. In 1989, she became a temporary, full-time faculty member, and in 1992, she was hired into a tenure track position.
2. In 1993, Grievant was promoted from Instructor to Assistant Professor.
3. Grievant applied for tenure (See footnote 7) and promotion to Associate Professor in October 1996. Grievant was found to be excellent in the area of “Service to students”, adequate in “Service to the institution and educational community”, and unsatisfactory in “Professional growth and development.”
4. Promotion at WVU-P is a multi-step process. The candidate must prepare a promotion application outlining her accomplishments since the last promotion. The candidate's application is reviewed and recommendations are made by the following individuals or groups in the following order: 1) her Division Chair, 2) her Division's Promotion and Tenure Committee, 3) the CWPC, and 4) the Dean of Academic Affairs, Dr. A. Duttaahmed. The final decision is made by President Miller after he reviews all the information presented to him.
5. “At each level of the process . . . a written rationale for the recommendation both for and against promotion must be forwarded to the candidate and to those involved in the next level of the process. The 'Promotion Evaluation Form' must be used for thisrationale. The written rationale must address each of the three promotion categories, must state specific reasons for recommendations, and must be based solely on the criteria outlined in Section IV

of this policy." (Emphasis added.).

6. Section IV referred to in Finding of Fact 5, identifies the following criteria: "Service to students" (50%), "Professional growth and development" (30%), and "Service to the institution and educational community" (20%). The application for promotion is not "rated" to arrive at a passing percentile. A candidate to Associate Professor must be satisfactory in all areas.

7. Grievant's application followed the usual steps as it went through the review process.

8. By letter dated November 4, 1996, the Chairperson of Grievant's Business and Economics Division, Henry Lowenstein, recommended Grievant for both promotion and tenure. Professor Lowenstein wrote at length about Grievant's teaching skills and creative and innovative teaching techniques. He also noted her high advisee load. In the area of service he noted her students engaged in research in the community, and Grievant had received grant monies for WVU-P, worked with the business honor society, and was on the library committee. In the area of professional growth and development Professor Lowenstein stated Grievant had engaged in a number of activities as noted in her application, and she was seriously exploring various options to pursue a Ph.D.

9. On November 21, 1996, the Division of Business and Economics Promotion Committee recommended Grievant for promotion and tenure. This recommendation did not speak to any specifics to support its recommendation as required by Section VI of the Answer Book. 10. By memorandum dated February 17, 1997, (See footnote 8) the CWPC committee informed Dean Duttaahmed and President Miller that it did not recommend Grievant for promotion because there was "[n]o evidence of any formal professional development occurring since [Grievant's] last promotion." (See footnote 9) This committee, made up of a member of each of WVU-P's Divisions, found Grievant's "Service to students" and "Service to the Institution and Community" to be acceptable. The CWPC noted the majority of the educational programs Grievant had attended were part of the in-service requirements for all faculty at WVU-P. (See footnote 10) The recommendation was unanimous, and the Business Division representative signed the form. This recommendation spoke to each of the three areas, as required. The CWPC recommended one of the three faculty members from the Business Division who went up for promotion.

11. On February 18, 1997, Grievant, as well as the two other Business faculty members who went up for promotion, received a memo from Mr. Sy Sarkarat, the Business Division's representative on the CWPC, stating he had "strongly supported each of [their] application[s] for promotion." Grievant believed this meant Professor Sarkarat did not support the CWPC's recommendation even though he signed it. 12. On February 28, 1997, Grievant responded to the CWPC's recommendation and sent a letter to Dean Duttaahmed and President Miller, indicating there may be possible conflicts of interests because "undistributed promotion monies will be used for across-the-board-raises. (See footnote 11) **Grievant stated she was "truly disappointed that [her] own colleagues ha[d] so little understanding and regard for the hard work and sincere effort [she'd] made to better this institution." She also noted the CWPC could have requested an interview with her if it had questions. She noted she should have been asked for the documentation of the workshop before the committee made its decision. In this Memo, Grievant reiterated and highlighted her achievements. She also noted that funding for professional growth and development was very limited at WVU-P.**

13. On March 21, 1997, Dean Duttaahmed wrote President Miller and spoke to each of three areas as required. He noted that although he commended Grievant on her "Service to students", he could not recommend Grievant for promotion to Associate Professor because of the weakness of her professional growth and development. He noted some things were in the planning stages, but very little had been accomplished since the last promotion. Dean Duttaahmed noted her professional development activities were not related to her teaching and professional responsibilities. He also noted there were some funding sources available. He suggested Grievant "concentrate on her professional development activities and apply again next year."

14. On May 15,1997, President Miller notified Grievant he had reviewed all the recommendations from all the entities involved in her application. He gave greater weightto the recommendations of the CWPC and Dean Duttaahmed than to the recommendations from the people in Grievant's division, because the CWPC and Dean Duttaahmed had a greater overall view of the university and its faculty. He explained he concurred with the reasons for denial given by the CWPC and Dean Duttaahmed. He directed Grievant to "BOT Policy Bulletin

36 (Answer Book #IV-7)" for appeal procedures.

15. At the same time President Miller agreed with the CWPC about the denial of Grievant's application for promotion, he promoted two other faculty members the CWPC recommended for denial, one of whom was from the Business Division.

16. The appeal procedures outlined in Policy Bulletin 36 describe both the internal procedure and the grievance procedure.

17. On May 22, 1997, President Miller's secretary sent, at Grievant's request, a more detailed account of the appeal procedures available to Grievant.

18. Professional growth and development includes " such items as acquiring additional credit in courses which broaden or strengthen the faculty member's area of expertise, participation in non-credit workshops, seminars or special lectures, attendance at professional meetings or conferences, membership in professional organizations, publications of original work, independent study, and/or other areas as determined within each division." WVU-P Answer Book IV-7D at 2.

19. A review of all the materials submitted by Grievant in the area of professional growth and development indicate the following: 1) Grievant had taken no graduate course work since she received her graduate degree in 1987; 2) Grievant had published no articles and had given no presentations since her last promotion; 3) Grievant had completed no independent research since her last promotion; 4) the majority of the in-services attended by Grievant were not related to her areas of expertise, business or marketing; 5) the majority of the in-services and seminars were related to teaching techniques and leadership training; and 7) Grievant is a member of various organizations, but her level of participation in these organizations was not noted .

20. When assessing the criteria for promotion "candidates must demonstrate a consistent level of special merit since the time of their last promotion." Id. At V. In Grievant's case this would be a review of the professional growth and development since 1993.

21. The guidelines to be met for the first promotion from Instructor to Assistant Professor "may be based on somewhat less stringent evidence of merit than is the case for further promotions to the ranks of Associate Professor or Professor." Id. Thus, a candidate is expected to demonstrate increasing ability as he or she travels up the academic ladder.

Standard of Review

This Grievance Board's review of an institution of higher learning promotion decision is "generally limited to an inquiry into whether the process by which such decisions are made conform to applicable college policy or was otherwise arbitrary and capricious." Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 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); See also Carpenter v. Bd. of Trustees/W. Va. Univ., Docket No. 93-BOD-220 (Mar. 18, 1994). "Deference is grantedto the subjective determination made by the official[s] administering the process." Harrison, supra; Gardener v. Bd. of Trustees/Marshall Univ., Docket No. 93-BOT-391 (Aug. 26, 1994). Thus, a grievant attempting to prove wrongful denial of promotion must demonstrate the action was arbitrary and capricious, clearly wrong, or a violation of college policy. See Kilburn v. Bd. of Directors/W. Va. State College, Docket No. 94-BOD-104 (Dec. 29, 1995).

The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the decision-maker. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). Generally, an action by an institution of higher learning is considered arbitrary and capricious if the decision-maker did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem or situation, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible 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). See Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-255 (Mar. 19, 1998). See generally Cutright v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 95-BOT-090 (Nov. 3, 1995).

Discussion

In this case involving the denial of promotion, Grievant bears the burden of proving by a

preponderance of the evidence that WVU-P erred when it did not promote her to Associate Professor. See Baroni v. Bd. of Directors/Fairmont State College, Docket No.92-BOD-271 (Feb. 11, 1993); Harrison, supra. For the reasons discussed below, the undersigned concludes Grievant has failed to meet that burden.

In higher education, promotions are not a statutory right nor a reward for a faculty member's years of service. Rather, in accordance with the West Virginia Board of Trustee's Policy Bulletin 36, a promotion is based upon excellence in teaching, service to the institution and/or community, ongoing professional development and other relevant factors.

It is not necessary to set forth or analyze in any detail the evidence presented by Grievant. The only testimony presented by Grievant was her own beliefs and allegations. Certainly she believed what she was saying, but mere allegations alone without substantiating facts are insufficient to prove a grievance. Harrison, supra. The issues raised by Grievant will be addressed individually.

I. Whether Grievant's denial of promotion was arbitrary and capricious

The WVU-P Faculty Handbook, “The Answer Book”, uses language identical to that found in the West Virginia Board of Trustees Policy Bulletin 36 (Series 36), and with regard to promotion of faculty, sets forth the following criteria:

Section 6. Promotion in Rank

6.1

> Within the following framework, each President shall establish, in cooperation with the faculty or duly elected representatives of the faculty, guidelines and criteria for promotion in rank:

6.1.1

> There shall be demonstrated evidence that promotion is based upon a wide range of criteria, established by the institution in conformance with this document and appropriate to the mission of the institution. Examples appropriate to some institutions might be: Excellence in teaching; accessibility to students; professional and scholarly activities and recognition; significant service to the institution community; experience in higher education, and at the institution; possession ofthe doctorate, special competence, or the highest earned degree appropriate to the teaching field; publications and research; potential for continued professional growth; and service to the people of the State of West Virginia. Ultimate authority regarding the application of guidelines and criteria relating to promotion shall rest with the institution.

6.1.2

There shall be demonstrated evidence that, in the process of making evaluations for promotions, there is participation of persons from several different groups, such as: peers from within and without the particular unit of the institution, supervisory administrative personnel such as the department/division chair and the dean, and students.

6.1.3

There shall be no practice of granting promotion routinely or because of length of service or of denying promotion capriciously.

6.1.4

The institution shall provide copies of its general guidelines and criteria for promotion to the Board of Trustees and shall make available such guidelines and criteria to its faculty.

6.2

Promotion shall not be granted automatically, but shall result from action by the President of the institution following consultation with the appropriate academic units.

Grievant's first issue, whether the denial of promotion was arbitrary and capricious must be answered in the negative. Although all the parties confirmed Grievant was an excellent teacher, and her service was adequate, it is clear WVU-P's decision was not arbitrary and capricious, and Grievant's professional growth and development did not demonstrate the required quality to be promoted to Associate Professor. Respondent's main concern was that Grievant had not returned to school to pursue a further degree and, indeed, had taken no graduate courses since her original hire date in 1987. Although it is clear it would be difficult and costly for Grievant to attend graduate school, that is the expectation for all individuals who pursue a career in academia.

Of course, it appears by the guidelines, that Grievant could be promoted to Associate Professor if she demonstrated substantial professional growth and developmentin the other

identified criteria. However, the guidelines require that the evidence for promotion to Associate Professor must be stringently reviewed.

Grievant's endeavors in the area of professional growth and development will not withstand this type of scrutiny. Grievant has not attended even one graduate course since 1987, when she received her MBA. Additionally, although Grievant indicated she had been involved in extensive independent research, a review of the record and Grievant's testimony reveals that this research is performed by Grievant's students to fulfill a course requirement. Obviously, this course assignment requires Grievant to research her students' research and is time consuming, but it does not fulfill the requirement for independent research.

Grievant has presented no papers on independent work to professional groups, and has published no papers. The majority of the in-services and seminars Grievant attended were not in her areas of professional expertise, business or marketing, as is expected. The in-services Grievant did attend were mainly two hour, general presentations relating to such issues as: “Internet training”, “Multiculturalism”, “Grant Writing” and “Curriculum and Technology.” Grievant did attend a day long seminar in Charleston in May 1996 on “Leadership and Technology” and also attended a workshop of unknown length in Fairmont on “Training and Creativity.” Additionally, Grievant is a member of several business honoraries , but her level of participation in these groups was not indicated by Grievant in her materials or her testimony. (See footnote 12) A review of the materials presented by Grievant to thedecision-maker by the undersigned Administrative Law Judge does not demonstrate that the decision of WVU-P to deny promotion was arbitrary and capricious.

II. Whether similarities in the tenure and promotion processes require an institution to grant promotion, if tenure has been granted

Grievant's statement that the criteria for promotion and tenure are the same misstates the point of, and the difference between, these two academic events. Series 36 identifies the same examples of possible criteria that can be used by an institution during the tenure and promotion processes. These criteria may vary from institution to institution and the weight given to each may vary according to the needs of the institution. Additionally, tenure is based on the applicant's entire academic career, while promotion is reviewed from the last promotion. Further, promotion is a continuing process, and the standards for advancement to

the higher levels are more stringent. By contrast, tenure is a one time event. The process for tenure is different and many additional factors are considered in that decision that do not come into play with promotion, as demonstrated by the guidelines stated below.

Section 8 of Policy Bulletin 36 states the requirements and guidelines for tenure. The pertinent sections from the Board of Trustee's Policy are reproduced below.

Section 128-36-8

TENURE

8.1

Tenure is designed to ensure academic freedom and to provide professional stability for the experienced faculty member. It is a means of protection against the capriciousdismissal of an individual who has served faithfully and well in the academic community. Continuous self-evaluation, as well as regular evaluation by peer and administrative personnel, is essential to the viability of the tenure system. Tenure should never be permitted to mask irresponsibility, mediocrity, or deliberate refusal to meet academic requirements or professional responsibilities. Tenure applies to those faculty members who qualify for it and is a means of making the teaching and research profession attractive to persons of ability. There shall be demonstrated evidence that tenure is based upon a wide range of criteria such as: excellence in teaching; accessibility to students; professional and scholarly activity and recognition; significant service to the college community; experience in higher education and at the institution; possession of the earned doctorate or the highest earned degree appropriate to the teaching field, granted by a regionally accredited institution, or special competence that is deemed to be equivalent to such academic credentials; publications and research; potential for continued professional growth; and service to the people of the State of West Virginia. Ultimate authority regarding the application of guidelines and criteria relating to tenure shall rest with the institution.

8.2

In making tenure decisions, careful consideration shall be given to the tenure profile of the institution, projected enrollment patterns, staffing needs of the institution, current and projected mission of each department/division, specific academic competence of the faculty member, and preservation of opportunities for infusion of new talent. The institution, while not maintaining "Tenure Quotas," shall be mindful of the dangers of losing internal flexibility and institutional accountability to the citizens of the state as the result of an overly tenured faculty. Tenure may be granted only to people in positions funded by monies under the control of the State College System Board.

8.3

Tenure shall not be granted automatically, or for years of service, but shall result from action by the president of the institution following consultation with appropriate academic units.

8.4

Tenure may be granted at he time of the appointment by the President or designee, following consultation with appropriate academic units.

8.5

Tenure may be attained only by faculty who hold the rank of Assistant Professor or above.

The above policy demonstrates that tenure, a one time event, involves multiple considerations and regulations that promotions do not. The fact Grievant received tenure does not mandate promotion, and Grievant's second argument must fail.

III. Failure to consider the recommendations of Grievant's Division Chair and Promotion Committee

Grievant also alleges the recommendations of her Division Promotion Committee and her Chair were not considered during the promotion process. It is the practice of the CWPC, and Dean Duttaahmed and President Miller to review all materials presented to them as part of the promotion process. No evidence was presented to demonstrate that the standard process was not followed in this case. Grievant did not call any members of the CWPC as witnesses. Dean Duttaahmed and President Miller did testify and stated they reviewed all the submitted Promotion and Tenure material, including all recommendations. The evidence demonstrates that Grievant's allegation is false and all materials were reviewed by all the appropriate parties.

IV. Conflicts of interests

A. Salary conflict

Grievant alleges the CWPC had a conflict of interest, and thus, violated W. Va. Code § 6B-2-5(b)(1). This Code Section states "a public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another employee." Grievant's argument in this regard is that the CWPC

knew there was a set amount of money for pay increases, and that every promotion would decrease the amount of money available for their raises, andraises of their peers. Grievant alleges this is why only three of the nine faculty who went up were recommended by the CWPC. Although there is some logic in Grievant 's allegation, no evidence was submitted to support this belief. As stated previously, Grievant did not call any members of the CWPC to testify. Further, the CWPC may only make recommendations to Dean Duttaahmed and President Miller, and President Miller is the individual who makes the final decision. Additionally, President Miller indicated that he saw no evidence to support this allegation, and if he had, he would have taken corrective action immediately.

B. Hostility to the Business Department

Grievant also indicated she thought the CWPC was hostile to the Business Division because their faculty made more money than the other divisions; and thus, the CWPC did not look favorably on promotions for that division. No evidence was submitted to support this allegation. Three Business faculty went up for promotion, the CWPC recommended one for promotion. Another Business faculty member was promoted by President Miller over the recommendation of this committee.

IV. Procedural allegations

Grievant also alleges other procedural difficulties. Each of these issues will be dealt with briefly.

A. CWPC did not request documentation of a seminar before it made its final decision. CWPC noted Grievant did not document this workshop, but did not indicate this was the reason it found her professional growth and development inadequate, or that it did not believe Grievant had attended this seminar. Further, Grievant was allowed to submit documentation of this seminar to Dean Duttaahmed and President Miller. B. Dean Duttaahmed's notice to Grievant was approximately one week late. This argument is without merit as Grievant did not demonstrate how this action harmed her, or that she was treated any differently than any other faculty member who applied for promotion.

C. Dean Duttaahmed did not independently evaluate her materials and make his own decision on the merits of her promotion. This allegation is false. Dean Duttaahmed testified he had indeed talked to the CWPC, but that he had made his decision before he discussed

anything with them. Additionally, there is nothing in the promotion guidelines which indicates Dean Duttaahmed cannot discuss promotion issues with the CWPC.

D. Grievant noted she did not receive a dated notice of the CWPC's recommendation. She did not indicate how this action harmed her. It is clear she received this notice in a timely manner, either on the day it was dated or the day after, and she was able to respond to this recommendation before Dean Duttaahmed assessed her materials. This allegation is without merit.

E. Grievant alleges her denial of promotion did not notify her completely enough of her appeal rights. This allegation is without merit. The letter referred Grievant to the Answer Book, and the Answer Book delineated the two methods of appeal open to Grievant. Further, on May 22, 1997, as the result of Grievant's request for further information, a letter detailing additional information about Grievant's appeal rights was sent to Grievant. After a complete review of all of Grievant's arguments, the undersigned Administrative Law Judge finds Grievant has failed to meet her burden of proof and makes the following Conclusions of Law.

Conclusions of Law

1. A grievant must prove all her allegations constituting the grievance by a preponderance of the evidence. Baroni v. The Bd. of Directors/Fairmont State College, Docket No. 92-BOD-271 (Feb. 11, 1993).

2. "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); see also Carpenter v. Bd. of Trustees/W. Va. Univ., Docket No. 93-BOD-220 (Mar. 18, 1994). "Deference is granted to the subjective determination made by the official administering the process." Harrison, supra; Gardener v. Bd. of Trustees/Marshall Univ., Docket No. 93-BOT-391 (Aug. 26, 1994).

3. This Grievance Board's review of an institution of higher learning promotion decision is "generally limited to an inquiry into whether the process by which such decisions are made conform[s] to applicable college policy or was otherwise arbitrary and capricious." Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93- BOD-400 (Apr. 11, 1995).

4. The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and an Administrative Law Judge may not substitute her judgment for that of the decision-maker. See generally,Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). Generally, an action by an institution of higher learning is considered arbitrary and capricious if the decision-maker did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem or situation, 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). See Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-255 (Mar. 19, 1998). See generally Cutright v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 95-BOT-090 (Nov. 3, 1995).

5. Grievant did not meet her burden of proving a violation of a valid policy or regulation or demonstrate that denial of promotion to Associate Professor was arbitrary and capricious or clearly wrong.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood 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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: April 30, 1998

Footnote: 1

This salary is higher than the one Grievant would receive through promotion.

Footnote: 2

At the Level IV hearing, Grievant requested that the case be remanded to Level II. She based this request on the fact that the Level II decision was not signed by the President of WVU-P, Dr. Eldon Miller. At the Level II hearing, the Grievance Evaluator, Dr. C.B. Wilson, informed Grievant that President Miller would receive the recommended decision from him, and the final decision would be Dr. Miller's. Although this is the normal course of events in most grievances, Respondent decided to change that process for this grievance. This change was instituted because the original decision to deny promotion came from President Miller, and Respondent believed the Level II decision should be reviewed by an independent party, who was not originally included in the prior decision. Thus, the Level II Decision was reviewed and authorized by the President of West Virginia University, David Hardesty prior to it being sent under Dr. Wilson's signature. After much discussion on this issue, Grievant asked to withdraw her Motion to Remand, and this request was granted. At Level II, Grievant had agreed to hold the issue of gender discrimination in abeyance or withdraw it until some other time. The parties agreed that the time lines could be waived on this issue, and there was some discussion that it could be handled in a different forum. At the start of the Level IV hearing, Grievant attempted to raise this issue again, and Respondents objected stating they were unaware that Grievant wished to pursue this issue at Level IV. A review of the detailed grievance statement filed at Level IV does not speak to the issue of sexual discrimination. Given that this issue was held in abeyance at the Level II hearing, the Statement of Grievance filed at Level IV does not indicate that Grievant wished to pursue this issue at Level IV, and Grievant could still address this issue later pursuant to the prior agreement, Grievant's request to raise this issue at Level IV was denied prior to the start of the Level IV hearing. Grievant still continued to argue sexual discrimination in her post hearing submissions. This part of Grievant's proposals was disregarded

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Footnote: 3

Some of the issues Grievant raised at Level II were not raised at Level IV. Issues not raised at Level IV were that the promotion guidelines were outdated, and the College- Wide Promotion Committee ("CWPC") did not reach a consensus. A review of the record reveals that these issues were without merit as the guidelines had been in place for some time, and Grievant made no effort to address this issue before her denial. See Harrison v. Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995). As for a consensus of the CWPC, consensus was not required, only a majority vote. Additionally, it was clear the vote in the CWPC was unanimous as demonstrated by the signed recommendation Grievant received from this committee.

Footnote: 4

There is some confusion about whether Grievant wished to pursue all the procedural issues she raised at each level of the hearing process. In her Level IV testimony, she stated she was "not interested in being promoted by default because of some procedural mistake." However, since she did address each of these issues in her testimony, it is assumed she still considered them to be valid arguments, and they will be addressed.

Footnote: 5

The Answer Book is the handbook used by the college to guide faculty and staff in their interaction with WVU-P.

Footnote: 6

Grievant also asked at Level IV, that the Level II Grievance Evaluator be removed due to a conflict of interest. This issue was not addressed at the Level IV hearing and is considered abandoned.

Grievant also argued at Level IV that the Level II decision was late, but then went on to say that with her grievance, " WVU-P made a conscientious effort to have the hearing transcribed in a speedy fashion", "C. B. Wilson endeavored to reach his decision quickly", that she was "willing to agree to a ten-day extension," and that her concern was that this process had the potential for misuse. Given the statements of Grievant, it is clear she did not believe she was harmed, and this issue will not be addressed further.

Footnote: 7

Grievant was granted tenure. The process by which tenure is granted at WVU-P is different from the process by which promotion is granted.

Footnote: 8

The copy that Grievant received was undated because the dated front sheet was not attached to her copy. Grievant received this memo either on or shortly after February 17, 1997.

Footnote: 9

This form also indicated Grievant had not documented the one off-campus seminar she had attended. There was no indication the CWPC did not believe Grievant had attended this seminar.

Footnote: 10

Testimony revealed these in-services were not required of the faculty, but there was an expectation for faculty to attend, and they were held during paid faculty time the week before a semester started.

Footnote: 11

The bulk of these monies was used for equity raises.

Footnote: 12

An Administrative Law Judge reviewing the evidence for promotion and tenure is limited to the record before the decision-maker at the time of the decision. An applicant is responsible for informing the decision-maker of her qualifications for promotion. If she does not do so at the appropriate time, such data cannot be considered later by anAdministrative Law Judge, as the purpose of a promotion grievance is to assess the institution's decision at the time it was made, utilizing the data it had before it. See Blankenship v. Mingo County Bd. of Educ., Docket No. 96-29-365 (June 18, 1996); Green v. Mason County Bd. of Educ., Docket No. 91-26-176 (July 26, 1991);

Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26,1989).